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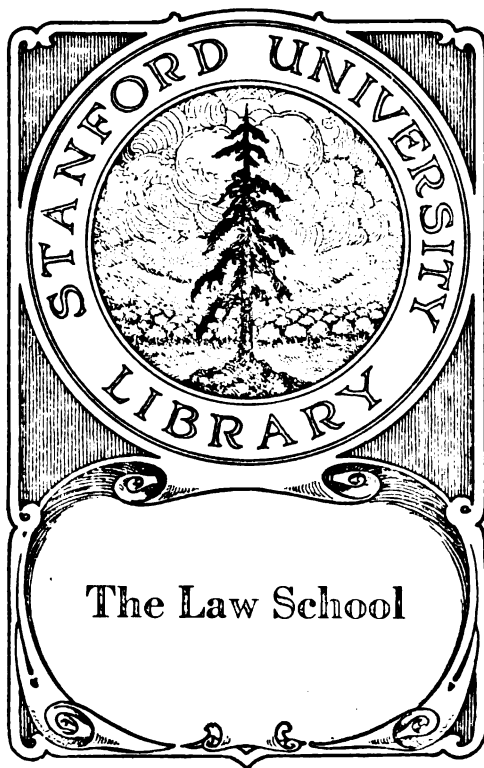
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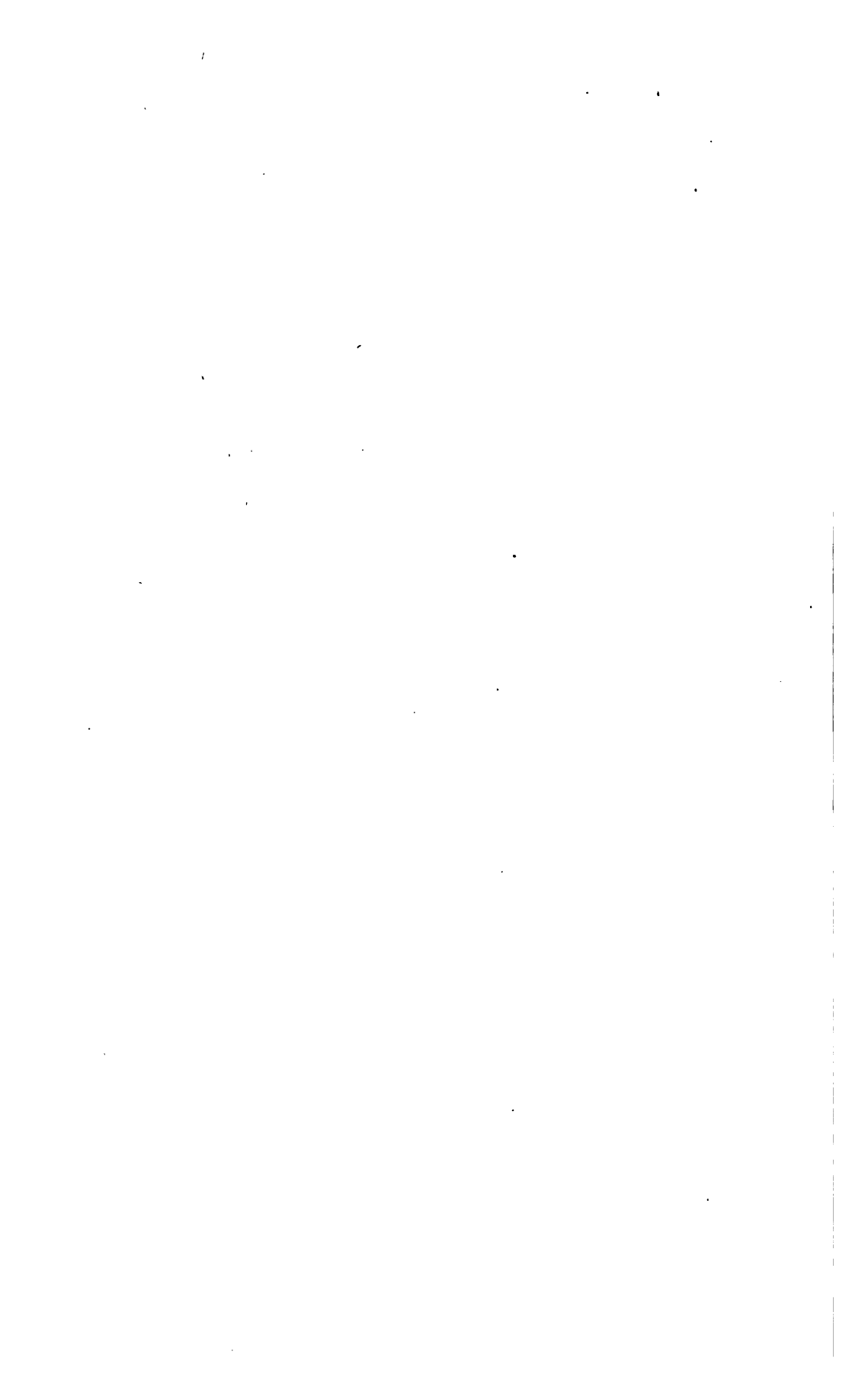
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THE LAW OF CONTRACTS

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IN FOUR VOLUMES

VOLUME III

WILLISTON'S LAW

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§ 1288. A breach of contract involves a broken promise.

As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract. It is immaterial for this purpose whether the failure in performance is great or small, or whether any damage has been caused.¹ Any breach of contract gives rise to a right of action; and at common law no judicial expression of the rights of the parties could be obtained until there had been a breach.²

When the time for performance of a promise has so far passed that substantial fulfilment of the promise is no longer possible, the obligation of the promisor changes its character. Even though the law could and did grant specific performance, so called, of all contracts, the performance enforced by the court would differ from that contracted for at least in being given at a later time than was agreed. The Civil law makes a distinction in terms between *mora* or delay in performance, and a breach in other respects than in time, of the duty to perform. The difference is not so sharply defined in English and American law, but is, nevertheless, implicitly observed in some distinctions which the law makes. The obligation to perform and the obligation to do so at a fixed time are regarded as two duties,

¹ See *infra*, 1340, *ad fin.*

² See 42 N. J. L. Jl. 102, as to statutory powers given English courts,

to make anticipatory declaration of the rights of parties.

rather than as one indivisible duty. Thus a promise to convey property which is enforced by equity is regarded as specifically enforced even though considerable time has elapsed after the date at which it was agreed that the conveyance should be made. Damages may be given for the delay as a separate matter. At law a promise to pay money is almost the only kind of promise which can be specifically enforced, and the common law in enforcing an obligation to pay an agreed sum of money³ conceived that the promise itself continued in effect after the time fixed for its performance had elapsed. On the other hand, when a promise to deliver goods or do anything other than pay money is broken, the law substitutes for the obligation a right of action for damages.⁴

It should be observed, however, that this distinction between an obligation to pay money and an obligation to do other things is only applicable where the money is absolutely due. When money is promised in exchange for something else which has not been given, and where, therefore, no debt has arisen, a breach of the promise to pay the money for the performance to be exchanged for it is ground for the payment of damages, not for the recovery of the full sum promised. In such a case the same considerations are applicable as in the case of obligations to deliver goods or render services.

§ 1289. Promises payable on demand.

Generally there can be no breach of a promise until all the conditions qualifying it have happened or been performed.⁵ But a peculiar rule prevails in regard to promises to pay on demand. "When a party agrees to pay his own debt on request,

³ A few other promises may in effect be specifically enforced at law, *e. g.*, a promise of perpetual forbearance, a promise to keep an offer open.

⁴ An illustration of this distinction is found in the rule of the common law that an accord and satisfaction could not discharge liability on a sealed instrument for the payment of money even after breach, but an accord and satisfaction after breach of a covenant of any other character

could be made, for the covenant had merged in a right of action for damages. See *infra*, § 1849.

⁵ *Blackburn v. Irvine*, 225 Fed. 217, 123 C. C. A. 405; *Allen v. Stephens*, 102 Ga. 596, 29 S. E. 443; *Atcherley v. Lewers*, 18 Hawaii, 625; *In re Squire*, 168 Ia. 507, 150 N. W. 706; *McDermott v. Alger*, 186 Mich. 278, 152 N. W. 991; *Essex v. Smith*, 97 Neb. 649, 150 N. W. 1022; *Gilbert v. Taylor*, 148 N. Y. 298, 42 N. E. 713.

it is regarded as an undertaking to pay generally, and no special request need be alleged.⁶ But it is otherwise when he undertakes for a collateral matter, or as a surety for a third person. There if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alleged and proved."⁷

The explanation of the anomaly that a debtor whose promise is expressly conditional upon a demand should be liable without a demand (for the suggestion that bringing an action itself is a demand which satisfies a condition precedent to the plaintiff's right to bring the action, is absurd) is found in the common form of early declarations, which always alleged, even though the defendant's promise was in terms unconditional, that the defendant promised to pay on request, and that though often requested he failed to do so. It was therefore impossible to tell from the pleadings whether or not there was in fact a condition requiring a request or demand; and the decision

⁶ See *supra*, § 1175.

⁷ Bronson, J., speaking for the court in *Nelson v. Bostwick*, 5 Hill, 37, 40 Am. Dec. 310, an action against Shumway as principal and Nelson as surety upon a bond, "conditioned to be void if Shumway should pay on demand all costs that might be awarded to the defendants" in a certain action. Judge Bronson cited—*Devenly v. Welbore*, Cro. Elis. 85; *Hill v. Wade*, Cro. Jac. 523; *Waters v. Bridge*, Cro. Jac. 639; *Birks v. Trippet*, 1 Saund. 32, and note (2); *Harwood v. Turberville*, 6 Mod. 200; Com. Dig. Pleader (c. 69); *Sicklemore v. Thistleton*, 6 M. & S. 9; *Carter v. Ring*, 3 Camp. 459; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. Ed 626, 2 Saund. 106, note (3); *Lawes' Pl.* 232, 251; 1 Chit. Pl. 363, ed. of '37. Cowen, J., in a concurring opinion, (cited as additional authorities for the necessity of an actual demand in the one case and the needlessness of it in the other; *Selman v. King* (Cro. Jac. 183); *The Case of an Hostler* (Yelv. 66); and continued

"A promise to save harmless on request is an instance. (*Harrison v. Mitford*, 2 Bulstr. 229.)

"This and various other cases to the same effect are cited, 1 Saund. 33, note (2), 'for,' adds the editor, 'a request is parcel of the contract, and must be proved; and no action arises until a request be made.' (*Vid. Douglass v. Howland*, 24 Wend. 51, and several books there cited to the same point.) In *Harwood v. Turberville* (6 Mod. 200) the defendant became surety by bond to pay a previous debt of his mother, on demand; and a special request was held necessary to charge him." These authorities were quoted and relied upon in *First Nat. Bank v. Story*, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154, where it was held that one who guaranteed payment at maturity "upon demand" was not liable until demand had been made. To the same effect is *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. See also *supra*, § 1175; *infra*, § 2040.

that a demand was unnecessary, and that the allegations in the declarations were purely formal in cases where there was no express condition led the courts mistakenly to hold the allegations equally formal where there was such a condition.

§ 1290. Partial and total breach.

Though breach to any extent of any promise in a contract⁸ gives rise to a cause of action, it has already appeared⁹ that a slight breach will not necessarily end further duties of the injured person for the performance of the contract. In spite of a slight breach a promisor may be able so nearly to fulfil the terms of his promise that the just way to deal with the situation is to hold the promisor liable merely for the defect in the performance and not to regard the contract as terminated and as being transformed into a right of action entitling the injured party to recover damages equal in value to the whole performance of the contract.¹⁰

In a unilateral contract for the performance of several disconnected acts, or for the payment of several sums in instalments, a breach as to one or any number less than the whole of the instalments is generally partial.¹¹ In a unilateral contract for one continuing performance or in a bilateral contract not yet wholly performed on either side, whether a breach is total or partial is necessarily a question of degree. Until the breach is of sufficient importance it is impossible that it should operate as a transformation of the whole contract into a right of action for damages. Moreover, even after the breach has become of great importance, the injured party may consent to accept further performance from the wrongdoer and thereby restrict his right of action to a right to recover compensation for defective partial performance rather than for total performance.

⁸ See, e. g., *Taylor v. Laird*, 1 H. & N. 273; *Milke v. Steiner Mantel Co.*, 103 Md. 235, 249, 68 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354.

⁹ See §§ 812 et seq.

¹⁰ In the early law it seems that any breach of contract justified an action for the value of the whole

performance to be rendered. *Rudder v. Price*, 1 H. Bl. 547; *Bush v. Stowell*, 71 Pa. 208. This was on the theory that the plaintiff was entitled to everything promised him, and a failure in any respect made performance altogether impossible.

¹¹ *Green v. Petersen*, 218 N. Y. 280, 112 N. E. 746. See *infra*, § 2024.

§ 1291. One action only is allowed for a single breach of contract.

Certain rules of procedure qualify the right of an injured party to sue for breach of promise. In laying down these rules the law seems to have had two objects in view: first, the restriction of suits to such a number as is absolutely necessary for purposes of justice and, second, the minimizing of damages to the defendant so far as is possible, without denying to the injured party compensation for the wrong which he has suffered. Accordingly there can be but one action for a single breach.¹² Non-performance by one party will give rise to a cause of action as soon as there is a day's delay in performance beyond the period stipulated for in the contract, for it is fundamental that for any actual failure to do as agreed the injured party has a remedy. But if the breach is not such as will involve the non-performance of the contract altogether, the damages recovered will be calculated on the assumption that the contract will be carried out in the future; that is they will be limited to the damage caused by breaches which had taken place at the date of the writ;¹³ whereas, if the breach at the time of suit has already been so serious as to involve the failure of the whole contract, damages based on the loss of the defendant's whole performance may be awarded to the plaintiff.¹⁴

Unless the contract is totally broken it is not desirable that a money equivalent should be given instead of what the parties bargained for. It is often better that the contract should be carried out a little late or defectively rather than that the parties should be deprived of the opportunity of performance altogether and that a money equivalent should be substituted which, in the nature of the case, is more or less imperfect relief.

¹² *Rudder v. Price*, 1 H. Bl. 547; *South & North R. Co. v. Henlein*, 56 Ala. 368; *Leggett v. Lippincott*, 50 N. J. L. 462, 14 Atl. 577; *Bender-nagle v. Cocks*, 19 Wend. 207, 209, 32 Am. Dec. 448; *Goldberg v. Eastern Brewing Co.*, 136 N. Y. App. D. 692, 121 N. Y. S. 465.

¹³ *Kansas &c. R. Co. v. Curry*, 6

Kan. App. 561, 51 Pac. 576; *Fay v. Guynon*, 131 Mass. 31; *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824; *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589; *Erie &c. R. v. Johnson*, 101 Pa. 555. Cf. *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

¹⁴ See *infra*, § 1317.

In case of a breach of an indivisible contract where there is not a total breach of contract, the damages of the plaintiff will be such an amount as will compensate the plaintiff for the late or defective performance of the defendant.¹⁵ It may, however, appear subsequently that the defendant will never perform, either because of his own permanent unwillingness to do so, or because his delay is so great before he becomes willing to perform that the plaintiff is justifiably unwilling to allow him to perform thereafter. If, however, the plaintiff has already recovered, in an action on the same breach of promise, damages based on the assumption that the contract is to be carried out in the future he can bring no further action. He has already sued upon this cause of action and but one action is allowed him, although the damages he received in that action have proved inadequate compensation. Had he deferred bringing action until it appeared that a consequence of the breach of contract was that the contract would never be performed at all, not simply that its performance would be delayed, he might have recovered damages sufficient to compensate him for the total loss of the defendant's performance.

§ 1292. Sometimes one action only allowed for several breaches of contract.

Sometimes, however, a contract may provide for more than one performance by a promisor. In such a case it seems the non-performance of each thing promised is a separate breach of contract rendering the promisor liable; and an action upon a breach of one promise will not necessarily involve an inability to sue subsequently on later breaches of the same contract, for the causes of action are different.¹⁶ And a promise in form

¹⁵ If the breach consists of non-payment of a sum of money absolutely due, the statement in the text must be qualified. In such a case judgment will be given for the money due, not merely damages for delay.

¹⁶ *Fay v. Guynon*, 131 Mass. 31, 35; *Barrie v. Earle*, 143 Mass. 1, 5, 8 N. E. 639, 58 Am. Rep. 126. The common law took a distinction between debt and assumpsit in regard

to the recovery of instalments. In debt on a bond or covenant to pay several sums of money at different dates, the action could not be brought until all the sums were due (though on a bond on condition to secure payment of several sums there was a breach of condition of the whole bond if the first sum was not paid). See *Rudder v. Price*, 1 H. Bl. 547, and cases cited. *Bush v. Stowell*,

single may involve several performances, and thus be in effect several promises. Such is a covenant to repair in a lease, on which repeated actions may be brought,¹⁷ or a covenant by a carrier to give free transportation for life.¹⁸

After more than one breach of the same contract has occurred, however, the injured party must join in any action brought all breaches which have theretofore taken place; since to bring separate actions for each breach is unnecessarily vexatious to the defendant without giving the plaintiff any advantage.¹⁹

This rule is based on reasons of policy and has even been applied to entirely distinct bargains where they constitute a running account between the parties. Though each item of such an account must in law be regarded as a separate transaction, it is frequently held that the plaintiff must bring a single action for whatever is due on the account at the time action is

71 Pa. 208; *Lyll v. London*, 8 U. C. C. P. 365. On the other hand, in *assumpsit* an action lay on breach of the first instalment, *ibid.*, and it was said "that where a man brings such an action for breach of an *assumpsit* upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action." Reporter's note to *Beckwith v. Nott*, Cro. Jac. 504. These distinctions, however, have doubtless wholly disappeared, and the plaintiff now may bring a separate action for breach of each instalment, as soon as the breach takes place and recover damages for that instalment. *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Seed v. Johnston*, 63 N. Y. App. Div. 340, 71 N. Y. S. 579. The qualification stated in the text, however, requiring joinder of all breaches which have occurred, must be observed.

¹⁷ *Kingdon v. Nottle*, 1 M. & G. 355, 365; *Phelps v. New Haven &c. Co.*, 43 Conn. 453; *Shaffer v. Lee*,

8 Barb. 420; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

¹⁸ *Kansas &c. R. v. Curry*, 6 Kan. App. 561, 51 Pac. 576; *Pittsburgh & R. v. Peterson*, 58 Pa. Super. 44.

¹⁹ *Bagot v. Williams*, 3 B. & C. 235; *Pinney v. Barnes*, 17 Conn. 420; *Casselberry v. Forquer*, 27 Ill. 170; *Indiana & R. v. Koons*, 105 Ind. 507, 5 N. E. 549; *Manton v. Gammon*, 7 Ill. App. 201; *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *Wilson v. Mechanical OrguINETTE Co.*, 170 N. Y. 542, 553, 63 N. E. 550. In *Seed v. Johnston*, 63 N. Y. App. Div. 340, 343, 71 N. Y. S. 579, the court said: "It is a well-established proposition of law that if a contract provides for payment by instalments, due at different times, the instalments may, of course, be successively sued on as they become payable (*Wells, Res Adj.* 203), but each action should include every instalment due when it is commenced, unless a suit is, at the time, pending for the recovery thereof or other special circumstances exist. *Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470."

brought unless some good reason for a contrary course exists, on pain of forfeiting all right to items not included in the action.²⁰ For separate contracts not constituting a running account several actions may be maintained, though all had been broken before the first action was brought, and all might have been enforced in one action.²¹

Wherever the defendant's breach of contract is substantial and material the plaintiff may sue in one action and recover damages based on the entire value of performance,²² for a consequence of the breach already committed is that the whole contract will not be performed. It may happen, however, that the injured party will prefer not to exercise his right to refuse to continue performance but rather to hold himself ready to perform the remainder of the contract and demand performance from the other party, from time to time, as it may become due. This course though it seems allowed in England is not generally allowed in this country.²³ If the breach is such that the injured party may treat it as an entire breach of the contract, it seems that he must do so or, rather, that if he fails to do so he can bring no new action after the first in which he claimed and recovered damages for the partial breach only. The reason of this is that it sufficiently protects the plaintiff in that he is allowed to recover full damages, and, at the same time, it minimizes the damage of the defendant by not allowing him to be vexed with a number of separate suits.²⁴

²⁰ *Lee v. Tannenbaum*, 62 Ala. 501; *Avery v. Fitch*, 4 Conn. 362; *Atlanta Elevator Co. v. Fulton & Co. Mills*, 106 Ga. 427, 32 S. E. 541; *Robbins v. Conley*, 47 Mo. App. 502 (compare *Alkire Grocer Co. v. Tagert*, 60 Mo. App. 389); *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60; *Bender-nagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448. But see *contra*, *Seddon v. Tutop*, 6 T. R. 607; *Williams v. Abbott Elec. Co.*, 134 Ia. 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Phelps v. Abbott*, 116 Mich. 624, 74 N. W. 1010; *Beck v. Devereaux*, 9 Neb. 109, 2 N. W. 365; *McLaughlin v. Hill*, 6 Vt. 20.

²¹ *King v. Sheriff*, 1 B. & Ad. 672.

²² See *infra*, § 1317. It is not intended to intimate that a repudiation before the time for performance will give rise to an immediate cause of action. As to this, see *infra*, § 1305.

²³ This seems necessarily to follow from the statements in cases where the defendant repudiated. See *infra*, § 1322.

²⁴ Where there has been repudiation the question is covered by the discussion *infra*, §§ 1305 *et seq.* In regard to a case where there has been a material breach but no repudiation, the case is not so clear either on principle or on authority, but in such a case, also, it seems that the plaintiff,

§ 1293. Implied promises.

It is not only for breach of express promises that a contractor is liable but of implied promises as well ; and the most serious difficulty in this matter is to determine what promises are fairly to be implied in a given contract. The principle to be adopted, however, is plain; the difficulty lies in its application. Since the governing principle in the formation of contracts is the justifiable assumption by one party of a certain intention on the part of the other, the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included.²⁵

unless the circumstances show that the defendant intends to continue performance, not only may but must recover all damages in his action which he can ever recover. *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601. In this case the defendants agreed to sell and deliver to the plaintiff 50,000 pairs of bicycle pedals in instalments. Two thousand six hundred and eight pairs were delivered, but the defendant wrongfully failed to make further delivery. After a time, when about 19,000 pairs of pedals should have been delivered, the plaintiff brought action, seeking damages for the failure of the seller to deliver that number. The plaintiff recovered judgment in this action. Subsequently after the time within which the remainder of the pedals should have been delivered, according to the terms of the contract, the plaintiff brought action for the failure of the defendant to deliver them. The Appellate Division of the Supreme Court held that the plaintiff was debarred by his former action from further recovery, and this decision was confirmed by the Court of Appeals. Compare *Gall v. Gall*, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. (N. S.) 603.

²⁵ See *supra*, §§ 90, 670, and *infra*, § 1318. In *Brodie v. Cardiff Corp.*, [1919] A. C. 337, 358, Lord Atkinson said: "The introduction of an implied term into the contract of the parties . . . can only be justified when the implied term is not inconsistent with some express term of the contract and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties. *Hanalyn v. Wood*, [1891] 2 Q. B. 488." In *C. M. Cecil Co. v. C. D. Wood Electric Co.*, 103 N. Y. Misc. 687, 170 N. Y. S. 962, 963, the court said:

"In expressed consideration of defendant's purchase of a considerable stock of manufactured articles from plaintiff, the plaintiff agreed, not only not to sell or manufacture this article for any one else for a period of one year, but also to furnish further articles of the same kind during that period to defendant at a fixed price. Although the parties manifestly thought it unnecessary that the plaintiff should at the same time expressly agree that it would not voluntarily facilitate the making of the same articles by any other per-

Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied.²⁸

When a seller promises to sell a horse, and the buyer promises to pay the price on receiving the horse, he does not in terms agree to accept the horse, but he must be understood to make that promise by implication; the buyer's promise is here subject to a condition (receiving the horse) which cannot be fulfilled without his coöperation. So though a contract of employment contains no other express promise on the part of

son, through a transfer to that person of the means of manufacture possessed by the plaintiff, or that it would maintain its ability to supply the defendant's further possible demands therefor, it is quite evident that that was the intention of the parties. It seems to me, therefore, that 'equity and justice' require that such promise be implied from the agreement. The applications of this well established principle have been so numerous, and have covered so wide a range of implications, as to make it practically impossible to cite all of them. Notable examples, however, will be found in *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Creamer v. Metropolitan Securities Co.*, 120 N. Y. App. Div. 422, 105 N. Y. S. 28. See also *Stirling v. Maitland*, 5 B. & S. 841; *Ogdens, Ltd., v. Nelson*, [1904] 2 K. B. 410. The rule was also recognized in *Jugla v. Trouttet*, 120 N. Y. 21, 23 N. E. 1066, but the court in that case declined to imply a promise on the part of the plaintiff to continue in business for the defendant's benefit because, as it said (120 N. Y. at pages 26 and 27, 23 N. E. at page 1067) among other reasons: 'They

[plaintiffs] did not, in express terms, undertake to sell him [defendant] gloves for any specified time.' In the case at bar it will be observed that, in addition to plaintiff's promise not to supply any competitors during a specified time, it expressly agreed to supply the defendant during that period." See also *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12, L. R. A. 1917 A. 171.

* "The rule of law is that when the obligation of performance by one party to a contract presupposes the doing of another act by the other party prior thereto, there arises an implied obligation of the second party to do the act which the performance of the contract necessarily involves." *Weeks v. Rector, etc., of Trinity Church*, 56 N. Y. App. Div. 195, 197, 67 N. Y. S. 670. See also *Churchward v. The Queen*, 6 B. & S. 807; *DuPont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 C. C. A. 161; *Milake v. Steiner Mantel Co.*, 103 Md. 235, 249, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354; *Wheelock v. Zevitas*, 229 Mass. 167, 118 N. E. 279; *Thomas v. Hartshorne*, 45 N. J. Eq. 215, 16 Atl. 916; *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N. Y. 272, 118 N. E. 618.

the employer than to pay a stipulated compensation, there is an implied promise to employ which is violated by a refusal to allow the employee to perform his duties as such, though there is no refusal to pay the compensation.²⁷ The damages may or may not be nominal in such a case; but there is in any event a breach of contract. Generally on a fair construction of a contract where the liability of one party to a contract is subject to a condition, express or implied in fact, which cannot happen without his coöperation, he will be held to have given impliedly a promise of such coöperation,²⁸ but this is not always the case. A contract by which P promises that A shall be his exclusive agent in Liverpool may contain no implication that P will continue business in Liverpool.²⁹ Of such questions it has been said: "Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations; each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, context, and extrinsic circumstances, including prior negotiations and relations, may be considered to enable the court to view that matter from the standpoint of the parties at the time of making the contract."³⁰

²⁷ *Rubel Bronse &c. Co. v. Vos*, [1918] 1 K. B. 315, rightly criticising *Turner v. Sawdon*, [1901] 2 K. B. 653.

²⁸ See *infra*, § 1318.

²⁹ *Rhodes v. Forwood*, 1 App. Cas. 256. See also *In re English Marine Ins. Co.*, 5 Ch. App. 737; *Pellet v. Manufacturers' Ins. Co.*, 104 Fed. 502, 43 C. C. A. 669; *Brougham v. Paul*, 138 Ill. App. 455; *Bradlee v. Southern Coast Lumber Co.*, 193 Mass. 378, 79 N. E. 777; *cf. Ogdens, Ltd., v. Nelson*, [1905] A. C. 139, [1904] 2 K. B. 410; *Macgregor v. Union Life Ins. Co.*, 121 Fed. 493, 57 C. C. A. 613; *Lewis v. Atlas Mut.*

L. Ins. Co., 61 Mo. 534; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Horton v. Hall & Clark Mfg. Co.*, 94 N. Y. App. D. 404.

³⁰ *Great Lakes, etc., Co. v. Scranton Coal Co.*, 239 Fed. 603, 152 C. C. A. 437. In speaking of a contract in which a carrier undertook to carry coal on the Great Lakes on all its steamers going westward from Oswego the court in this case said:—

"There is no express provision that the steamers, or any of them, shall make any trips whatsoever, eastward or westward; there is no express provision that the trips, if and when

§ 1294. Performance of a promise must be made as such.

Even though a promisor is prepared to keep and does keep his promise according to its express terms, he will, nevertheless, violate his contract unless his performance is rendered as a performance of his promise. In a leading case the parties having contracted to buy and sell a cargo of tea on certain terms, afterwards had negotiations which amounted to a rescission of the first contract and the substitution of a new one for the purchase of the cargo on different terms. When the time for performance came the buyer wrongly contended that the first contract was still in force and the seller on learning of this contention refused to deliver the cargo. The court held that he was entitled not only to do so but to sue the buyer for

made, shall extend as far east as Oswego. And therefore defendant contends that the obligation to carry coal westward is conditional solely upon the Transportation Company's uncontrollable willingness to run the boats on Lake Ontario. If this be the sound construction of the agreement, the bill must be dismissed, for, under such circumstances, the court would not tie defendant's hands.

"But we cannot accede to these contentions or adopt this construction. The obligation to carry defendant's coal on all west-bound trips, fairly interpreted in the light of the context and of the relations of the parties out of which the written agreement grew, carries with it the further implied obligation to run the boats in a reasonable manner continuously during the period of navigation on the Great Lakes east-bound to or beyond Oswego and west-bound calling at this port.

"Looking at the agreement in its entirety, we find the circumstances that will suspend the obligation, in whole or in part, of each party, clearly specified, such as strikes, accidents, or the loss of a vessel. It is not the obligation to continue a

west-bound voyage from Oswego once begun, but the obligation to continue in the conduct of its business, that is expressly remitted or suspended. Clearly this has reference to the entire future of the three-year period of the contract; it would be unnecessary to abate the obligation to carry in the event that a vessel be destroyed, if the duty to carry from Oswego were subject to the owner's arbitrary right to keep the vessel on Lake Erie. Furthermore, such a construction would place this part of the plaintiff's business completely at the mercy of the shipowner, inasmuch as plaintiff's obligation is absolute except for the specified excuses, to give defendant its cargo on call at the port. A bilateral contract of the nature here in question will not lightly be construed, so as to give one of the parties a virtual option, instead of imposing upon each of them obligations conditioned solely as they may have expressly agreed."

See also *M'Intyre v. Belcher*, 14 C. B. (N. S.) 654; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; *Genet v. Delaware & Hudson Canal Co.*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; *Jacquin v. Boutard*, 89 Hun, 437, 35 N. Y. S. 496, and *supra*, § 90

damages although the latter had expressed his willingness to take the cargo of tea at the time agreed upon, it being clear that the buyer's intention if he took the tea was to treat it as a performance under the first contract and not to comply with the terms of the contract which actually bound the parties.³¹ The only possible breach that could be stated in a declaration against the defendant in the case would be not that he refused to take the tea but that he refused to take it under his promise in the original contract.

§ 1295. Renewed offers of performance.

Frequently by the terms of a contract a promisor is given a period of time at any moment of which he may make the agreed performance. Such a contract will not be broken until the agreed period has elapsed.³² This is true even though the promisor may have made a defective attempt to perform at an earlier day.³³ If, however, the conduct of the promisor justifies the promisee in believing that no further performance will be rendered, the promisee is justified in changing his position and thereafter a tender of full performance will be ineffectual.³⁴ Also, a contract to marry is an exception to the general rule. One who has agreed to marry at a future day, and who repudiates his engagement, cannot by retracting the refusal before the day originally agreed upon for the marriage prevent a breach.³⁵ The second offer may be admissible in

³¹ *Ripley v. M'Clure*, 4 Ex. 345.

³² *Levant American Commercial Co. v. Wells*, 186 N. Y. App. D. 467, 174 N. Y. S. 303. Thus tender of performance due under an obligation may be made effectively until the close of the day when performance was due. *Supra*, § 857.

³³ In *Borrowman v. Free*, 4 Q. B. Div. 500, the plaintiff agreed on May 7th to sell a cargo of maize to be shipped between the fifteenth of May and the thirtieth of June. A cargo was offered which the defendant refused to take on account of its inferiority. The quality was submitted to arbitration, and the

defendant was held justified in his refusal. The plaintiff, however, subsequently, but still within the time fixed by the contract, offered the defendant another cargo of proper quality, and the defendant was held liable for refusing to accept it.

³⁴ *Hallwood Cash Register Co. v. Lufkin*, 179 Mass. 143, 60 N. E. 473; *Traver v. Halsted*, 23 Wend. 66.

³⁵ *Kurts v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Corduan v. M'Cloud*, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915 D. 1190; *Stacey v. Dolan*, 88 Vt. 369, 92 Atl. 453, Ann. Cas. 1917 A. 650.

mitigation of damage,³⁶ though even this is denied when the repudiation of the engagement was made under such circumstances as to make acceptance of a subsequent offer virtually impossible.³⁷ The explanation of these marriage cases may be either that there is a subsidiary obligation between engaged persons which is immediately broken by the first refusal,³⁸ or that the nature of a contract to marry is such that even though there is no immediate breach, the situation is so changed by the first refusal that the case comes within the principle that a justifiable change of position by the promisee precludes a *locus penitentiae*.

When there has been an actual breach of contract the plaintiff's right of action accrues and cannot be defeated by a subsequent offer to perform.³⁹

§ 1296. Anticipatory or prospective breach.

Logically, there can be no breach of a promise until the terms or conditions qualifying the promise have been fulfilled. One who contracts to do a certain thing on a certain contingency or at a certain time does not and indeed cannot break that promise unless the contingency happens or the time arrives. Clear as this statement is on principle and though it probably expresses the law in regard to unilateral contracts, the prevalent doctrine in regard to bilateral contracts asserts an exception to it where there is a repudiation of the obligations of a contract by a party to it.⁴⁰ If the contract was originally bilateral, but the injured party has already performed all that the contract required of him, the situation becomes the same as if the contract were originally unilateral.⁴¹

³⁶ *McCarty v. Heryford*, 125 Fed. 46; *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556.

³⁷ *Holloway v. Griffith*, 32 Ia. 409, 7 Am. Rep. 208; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 346, 36 Am. Rep. 442.

³⁸ See *infra*, § 1320.

³⁹ *Colby v. Reed*, 99 U. S. 560, 25

L. Ed. 484; *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Emack v. Hughes*, 74 Vt. 382, 392, 52 Atl. 1061.

⁴⁰ It is no exception that in a bilateral contract there may be an entire breach of the contract though the time for all of the defendant's obligation or even of the most important part of it has not yet arrived. See *infra*, § 1317.

⁴¹ See *infra*, § 106.

§ 1297. Lord Cockburn's rule in regard to repudiation.

But if the injured party to a bilateral contract has not fully performed and there has been no actual violation of promise by the other party (unless words expressing the speaker's intention concerning what he will do in the future can be so considered) yet because of repudiation thus expressed there is reason to believe that the latter will not fulfil his contractual obligation, the situation presents greater difficulty. In *Frost v. Knight*,⁴² Cockburn, C. J., thus stated the law: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."⁴³

§ 1298. First half of Cockburn's rule approved in England but inconsistent with American decisions.

This language was quoted with approval in a later decision⁴⁴ and may be regarded as expressing the present understanding of English lawyers on the matter in question.⁴⁵ The alterna-

⁴² L. R. 7 Ex. 111.

⁴³ L. R. 7 Ex. 111, 112.

⁴⁴ Per Cotton, L. J., in *Johnstone v. Milling*, 16 Q. B. D. 460. See also *Michael v. Hart*, [1902] 1 K. 482.

⁴⁵ See, e. g., Leake, *Contracts* (4th ed.), 618; Mayne, *Damages* (7th ed.), 184. It is also quoted and acted on in *Dalrymple v. Scott*, 19 Ont. App. 477; *Cromwell v. Morris*, 34 Dom. L. R. 305.

tive stated as permissible in the first paragraph of Lord Cockburn's statement is not allowed generally in this country. There is a line of cases running back to 1845⁴⁶ which holds that after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a

⁴⁶ *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670, is the earliest decision. In this case the plaintiff was employed to clean and repair a number of pictures, for which the defendant agreed to pay. After the plaintiff had begun work on them, the defendant countermanded the order. The plaintiff nevertheless completed the work and sued for the full price. The court held he could recover only for what he had done before the order was countermanded, with such further sum as would compensate him for interruption of the contract at that point.

To similar effect are *Kingman v. Western Mfg. Co.*, 92 Fed. Rep. 486, 34 C. C. A. 489; *King v. Rhodes*, 47 D. C. App. 316 (cert. denied, 248 U. S. 560 39 S. Ct. 7); *Faulk v. Richardson*, 63 Fla. 608, 57 So. 666, 39 L. R. A. (N. S.) 1171, Ann. Cas. 1914 A. 277; *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030; *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354; *Black v. Woodrow*, 39 Md. 194, 216; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803; *Collins v. Delaporte*, 115 Mass. 159 (*semble*); *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423; *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N. W. 343, 112 N. W. 708; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *American Publishing Co. v.*

Walker, 87 Mo. App. 503; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710; *Backes v. Schlick*, 82 Neb. 289, 117 N. W. 707; *Dillon v. Anderson*, 43 N. Y. 231; *Lord v. Thomas*, 64 N. Y. 107; *Johnson v. Meeker*, 96 N. Y. 93, 48 Am. Rep. 609; *People v. Aldridge*, 83 Hun, 279, 31 N. Y. S. 920; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117; *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981; *Chicago, etc., Co. v. Barry (Tenn.)*, 52 S. W. 451; *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 239, 40 Vt. 257; *Cameron v. White*, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388; *Badger State Lumber Co. v. G. W. Jones Lumber Co.*, 140 Wis. 73, 121 N. W. 933. But see *contra*, *Roebbling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *McAlister v. Safley*, 65 Iowa, 719, 23 N. W. 139 (compare *Moline Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272); *Martin v. Meles*, 179 Mass. 114, 118, 60 N. E. 397. And see *Southern Cotton Oil Co. v. Heflin*, 99 Fed. 339, 39 C. C. A. 546; *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19; *Lake Shore, etc., Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.

plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise.

American decisions not infrequently quote either in terms or in substance Lord Cockburn's rule in its entirety, but it is probable that very few would actually decide that after repudiation the injured party might continue performance where such continuance would cause an enhancement of damages. The inconsistency of Lord Cockburn's rule with the rule of damages in question is often not observed. When it is apparently observed, sometimes in order to meet the difficulty the alternative of the plaintiff is expressed as merely the right after repudiation either to sue immediately or to wait until the time fixed for performance, omitting the statement that in the latter event the plaintiff must continue to treat the contract as binding upon him.⁴⁷

§ 1299. Rule of damages not applicable in every case.

The English courts have recognized that a plaintiff who fails to use reasonable means to mitigate or at least not to enhance the damages which a defendant is to be called upon to pay, cannot recover such avoidable damages as he may suffer; ⁴⁸

⁴⁷ See *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19; *Brady v. Oliver*, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.). 60, Ann. Cas. 1913 C. 376; *Palestine, etc., Co. v. Connally* (Tex. Civ. App.), 148 S. W. 1109.

⁴⁸ *Mayne, Damages* (7th ed.), 185; *Harries v. Edmonds*, 1 C. & K. 686, 687; *Roper v. Johnson*, L. R. 8 C. P. 167; *Roth v. Taysen* (C. A.), 12 T. L. R.; 211. *Brace v. Calder* (C. A.), [1895] 2 Q. B. 253. Cf. *Brown v. Muller*, L. R. 7 Ex. 319; *Re South*

and it is quite possible that Lord Cockburn, in stating as he did the first alternative of a party aggrieved by repudiation of a contract, did not appreciate that his statement justified a violation of that duty.⁴⁹

It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages, and it is a question of fact in every case whether such enhancement of damage will be caused.⁵⁰ But one distinction is to be observed, so far as the question here under consideration is concerned, between cases where repudiation or countermand takes place before manufacture or work under the contract has been begun and those where notice is given after work has been done, or manufacture begun by him. Where nothing has been done it will almost always be the proper course for the seller to refrain from doing anything, and the measure of his damages will be simply the profit he would have derived had the contract been carried out.⁵¹

Where manufacture has been begun, however, another element must be considered. If work or manufacture is stopped it

African Trust Co. (C. A.), 74 L.T. 769.

* Lord Cockburn's statement is also sometimes repeated by American courts, which would not be likely to enforce it to its logical conclusion. See *Foss, etc., Co. v. Bullock*, 59 Fed. 83, 87, 8 C. C. A. 14; *Smith v. Georgia Loan Co.*, 113 Ga. 975, 39 S. E. 410; *Strauss v. Meertief*, 64 Ala. 299, 307, 38 Am. Rep. 8; *Claes, etc., Mfg. Co. v. McCord*, 65 Mo. App. 507; *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250.

* A possible situation is well illustrated by *Southern Cotton Oil Co. v. Heflin*, 99 Fed. Rep. 339, 39 C. C. A. 546. The plaintiff had agreed to sell all the cotton-seed cake and meal its mill produced during a specified year. In the course of the year the defendant repudiated the contract. The cake and meal was but one prod-

uct made from perishable raw material by the plaintiff's mill. To stop making the cake and meal would have involved abandoning the manufacture of other products, and would also have involved a violation by the plaintiff of contracts for the sale of oil and other materials. Accordingly the plaintiff was held entitled to recover the difference between the contract price and the market price of the cake and meal manufactured after the notice of repudiation. See also *Feick v. Stephens*, 250 Fed. 185, 162 C. C. A. 321; *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397.

* To refrain from manufacturing the goods might involve in some cases closing a factory at a large loss. In such a case it seems the manufacturer may proceed with the contract.

may cause the waste of what he has done, and it is in such cases particularly that it may prove less expensive to continue manufacture and complete the goods for the repudiating buyer rather than to stop performance. But it may be the least expensive course to stop performance even though a waste is thereby caused. Such waste, however, must be included as part of the damages for which the buyer is liable.⁵² Also, where a seller or manufacturer is under a duty to more than one person to perform the contract, a countermand by one, as it will not justify breach of contract with the others, should be inoperative.⁵³ If in spite of the buyer's countermand the seller tenders the goods, an acceptance of them, or even a recognition of the contract by taking the goods into his possession, will be an assent to the disregard of the countermand.⁵⁴

§ 1300. American decisions sound.

Judged in the light of every consideration of mercantile convenience the American decisions are correct. The facts of one of the few cases⁵⁵ which are directly opposed to them need only be stated to illustrate this. The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire. After 120 tons had been delivered the defendant requested the plaintiff to stop further shipments, and on the refusal of the latter, telegraphed, "Will not take wire if shipped." Nevertheless, the plaintiff went through the

⁵² In *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769, the defendant contracted to buy ten-inch leather hose to be manufactured by the plaintiff. After the leather had already been cut the buyer repudiated the contract. There was no general market for hose of such large size, and the seller, therefore, cut the leather down to the size necessary for making nine-inch hose. This involved waste. The seller was held entitled not only to the profit that would have been made on the contract but also the waste due to cutting the leather down. See also *Feick v. Stephens*, 250 Fed. 185, 162 C. C. A. 321.

⁵³ *Martin v. Meles*, 179 Mass. 114 60 N. E. 397. This point seems to have been overlooked in *King v. Rhodes*, 47 D. C. App. 316, cert. denied 248 U. S. 560, 39 S. Ct. 7.

⁵⁴ *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710.

⁵⁵ *Roebeling's Son's Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518. See also *Lake Shore, etc., Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623, 116 N. E. 115. Cf. *Rounsaville & Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030.

futile and expensive steps of preparing and sending the rest of the wire, and was held entitled to recover damages for so doing.⁵⁶

§ 1301. Inconsistency of Cockburn's language—True rule.

Lord Cockburn's statement of the plaintiff's second alternative is that "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." The two clauses of this sentence logically contradict each other. If the contract is put an end to, no action can be brought upon it.⁵⁷ If an action may be brought at once or at any time in the future, it is not put an end to.⁵⁸ The question of the time when the action should be brought is not immediately essential here, and that question being left for subsequent discussion, it may be laid down as a more logically coherent and more practically useful statement that the promisee may, if he thinks proper, treat the repudiation of the other party as a ground for putting an end to the contract by rescission.⁵⁹ If this course is adopted no rights under the contract can remain, though a quasi-contractual right to recover the value of anything which has been done will survive. Or the promisee may decline to continue to perform and sue the promisor for his breach of contract.⁶⁰ Ordinarily, of course, a plaintiff in an ac-

⁵⁶ The Uniform Sales Act adopts in Sec. 64 (4), the prevailing American doctrine:

"(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the

sale had been fully performed shall be considered in estimating such damages."

⁵⁷ *Heagney v. J. I. Case Machinery Co.*, 4 Neb. (Unof.) 745 96 N. W. Rep. 175; *McCormick Machine Co. v. Brown*, 5 Neb. (Unof.) 356, 98 N. W. Rep. 697; *Ward v. Warren*, 44 Oreg. 102, 74 Pac. 482. "Rescission" means that both parties to a contract shall be wholly released as though it had not been made. *Jones v. McGinn*, 70 Or. 236, 140 Pac. 904.

⁵⁸ *Speirs v. Union Forge Co.*, 180 Mass. 87, 92, 61 N. E. 825.

⁵⁹ See *infra*, §§ 1455 *et seq.*

⁶⁰ *Supra*, § 1303.

tion upon a contract cannot succeed if he has himself failed to perform at the proper time; but if that failure to perform was excused by the defendant's own conduct this principle does not apply. The authorities furnish abundant illustration of this when the excuse for the plaintiff's failure to perform consisted of a prior serious breach of the contract by the defendant.

The same principle covers the case of repudiation without an actual breach of contract. The reason why the plaintiff must ordinarily have performed in order that he may recover is the same reason which underlies the doctrine of failure of consideration. The mutual performances in a bilateral contract are, barring exceptional cases, intended to be given in exchange for each other, and if the exchange fails on one side owing to defective performance, the other party may likewise decline to perform. This reason was pretty well hidden during the early development of the doctrine under the terminology of implied conditions, but it is sufficiently apparent at the present day.⁶¹

Now, if it be an excuse which will justify a promisor in breaking his promise that his co-contractor has failed to give the performance agreed upon as an exchange, it should likewise be an excuse that the co-contractor has made it plain, as by repudiation, that he will not give such performance when it becomes due in the future. A promisor can no more be expected to perform his promise when he is not going to receive counter-performance than when he actually has not received it. Baron Parke—a judge not likely to stretch too far the rules of the common law in order to work out justice—so held in *Ripley v. M'Clure*,⁶² and the law is clearly to that effect.⁶³

§ 1302. Contract not terminated.

Neither where the plaintiff's excuse for his own non-performance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse. The contract still exists, but one party to it has a defence and an excuse for non-performance.⁶⁴

⁶¹ See *supra*, §§ 813 *et seq.*, and *e. g.*, *Hull Coal Co. v. Empire Coal Co.*, 113 Fed. 256, 258, 51 C. C.A. 213.

⁶² 4 Ex. 345.

⁶³ See *supra*, §§ 875 *et seq.*

⁶⁴ *Hasler v. West India S. S. Co.*,

It may be thought that this statement differs from that of Lord Cockburn's second alternative only in words. Even so, words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as "rescinded" or "put an end to," when in truth one party to the contract has merely exercised his right to refuse to perform because of the wrongful conduct of the other party.⁶⁵

212 Fed. 862, 129 C. C. A. 382; *Bullard v. Eames*, 219 Mass. 49, 106 N. E. 584. In *Michael v. Hart*, [1902] 1 K. B. 482, 490, the Master of the Rolls said: "Where there has been what has been called an anticipatory breach of contract, going to the whole consideration, it has not of itself the effect of rescinding the contract for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. . . . On the other hand, he may refrain to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time fixed for performance arrives."

See also *Hayes v. Nashville*, 80 Fed. 641, 645, 26 C. C. A. 59; *Earnshaw v. Whittmore*, 194 Mass. 187, 192, 80 N. E. 520; *R. H. White Co. v. Remick*, 198 Mass. 41, 47, 84 N. E. 113; *Bixler v. Finkle*, 85 N. J. 77, 88 Atl. 846; *Elterman v. Hyman*, 192 N. Y. 113, 126, 84 N. E. 937, 127 Am. St. Rep. 862; *Interboro Brewing Co. v. Independent Ice Co.*, 83 N. Y. Misc. 119, 144 N. Y. S. 820, 822; and *infra*, § 1661.

*This error is adverted to in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, 14 Sup. Ct. 876, 38

L. Ed. 814. The plaintiff in that case had ceased to perform because of a breach of contract by the defendant and sought to recover damages. *Brewer, J.*, delivering the opinion of the court, said (p. 551): "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his [its?] non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. So *Holmes, J.*, in *Daley v. People's Building Assoc.*, 178 Mass. 13, 18, 59 N. E. 452, "conduct going no further than the defendant's might not justify even a refusal of further performance of the other side, . . . a right which must not be confounded with rescission, and which in some cases is more easily made out." See

§ 1303. Practical importance of distinction.

To be sure it frequently makes little practical difference whether this is the case or whether the contract is in fact rescinded. Where the only question that arises is in regard to the liability of a defendant for his refusal to perform the result is the same whether the whole contract is rescinded or whether it still subsists subject to a defence on the part of the defendant. But if the defendant seeks by counter-claim or cross-action to establish a right on his part to damages, his success depends on the existence of the contract. And more than one court has been led into the error of holding that no such right of action existed—that a voluntary exercise of the right to refuse to continue performance necessarily involved a total termination of the contract.⁶⁶ Citations need not be multiplied to prove the error of the foregoing statement and the right of the plaintiff to cease performance upon the defendant's repudiation and yet sue upon the contract.⁶⁷ In this respect an ordinary bilateral

also the remarks of Bowen, L. J., in *Boston &c. Co. v. Ansell*, 39 Ch. D. 339, 365.

⁶⁶ *Cox v. McLaughlin*, 54 Cal. 605; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 502, 35 Pac. 146; *Palm v. Ohio, etc., R. Co.*, 18 Ill. 217; *Howe v. Hutchison*, 105 Ill. 501; *Lake Shore, etc., Ry. Co. v. Richards*, 32 N. E. Rep. 402 (Ill. Sup. Ct. 1892. But see *s. c.* reversed on rehearing 152 Ill. 59, 80, 82); *Chicago Title & Trust Co. v. Sagola Lumber Co.*, 242 Ill. 468, 90 N. E. 282; *Jones v. Mial*, 79 N. C. 164. These cases hold that though a serious breach of contract will justify the other party in treating the contract as rescinded and so refusing to continue to perform, yet at least unless the breach amounts to actual prevention the party aggrieved cannot, if he ceases to perform, sue on the contract. The first California decision was chiefly based on the early Illinois case. So in *Hochster v. De La Tour*, 2 E. & B. 678, counsel for the defendant, though their case did not require it, based their whole argument on the assumption

that repudiation was equivalent to an offer to rescind, and that if the aggrieved party did not continue to hold himself ready and willing to perform he could not sue upon the contract.

In *Bethel v. Salem Improvement Co.*, 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808, also, the plaintiff was not allowed to recover for loss of profits, after having ceased to perform owing to the defendant's breach of contract. See also *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N. W. 1013.

⁶⁷ *Mayne's Case*, 5 Coke, 206 (3d Resolution); *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B. 127; *Ripley v. McClure*, 4 Ex. 345; *Marshall v. Macintosh*, 78 L. T. 750; *Leeson v. North British Oil, &c. Co., Ir. R.* 8 C. L. 309; *Anvil Mining Co. v. Humble* 153 U. S. 540, 38 L. Ed. 814; *McElwee v. Bridgeport Land, &c. Co.*, 54 Fed. 627, 4 C. C. A. 525; *Cherry Valley Works v. Florence &c. Co.*, 64 Fed. 569, 12 C. C. A. 306; *Martin v. Chapman*, 6 Port. 344; *Baldwin v. Marquese*, 91 Ga. 404, 18 S. E. 309; *Weil v. American*

contract differs from a lease. A landlord who rightfully ejects a tenant⁶⁸ or a tenant who for just cause surrenders the leased premises,⁶⁹ though entitled to recover damages suffered by breach of the other party's covenant before the termination of the lease cannot recover damages for the failure to continue the agreed relation till the end of the term unless there is an express covenant in the lease to pay such damages.⁷⁰

§ 1304. No manifestation of election necessary.

Further, in order to exercise his right to rescind a contract, an injured party must indicate his election so to do by positive action,⁷¹ but if he only wishes to refrain from performing his part of the contract, he is not seeking to assert an affirmative

Metal Co., 182 Ill. 128, 54 N. E. 1050; *Riley v. Walker*, 6 Ind. App. 622, 34 N. E. 100; *Morris v. Globe Refining Co.*, 22 Ky. L. Rep. 911, 59 S. W. Rep. 12; *Lowe v. Harwood*, 139 Mass. 133, 22 N. E. 538; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477; *Armstrong v. St. Paul &c. Co.*, 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029; *Berthold v. St. Louis Construction Co.*, 165 Mo. 280, 65 S. W. 784; *Brasell v. Cohn*, 32 Mont. 556, 81 Pac. 339; *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 665, 52 Atl. 467; *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589; *Reynolds v. Reynolds*, 48 Hun, 142; *Davis v. Tubbs*, 7 S. Dak. 488, 64 N. W. 534; *El Paso &c. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922; *Young v. Watson* (Tex. Civ. App.), 140 S. W. 840.

Another instance of the confusion of ideas due to the improper use of words here criticised may be found in *Fox v. Kitton*, 19 Ill. 519, where the court says that there is no conflict between the views of Parke, B. and the decision of *Hochster v. De La Tour*, 2 E. & B. 678, since Parke, B., said in *Phillpotts v. Evans*, 5 M. & W. 475, 477: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to

receive the goods, unless the seller acts on it in the meantime and rescinds the contract." This, the Illinois court adds, "is in strict accordance with the principles recognized in . . . *Hochster v. De La Tour*." Now Parke was using the word "rescinds" in its true sense. What he meant and what he said was that the seller might at his option terminate the contract. The Illinois court thought he was using the word in the improper way in which Lord Cockburn did, and that his meaning was that the seller might, without himself performing, so act as to entitle himself to sue the buyer immediately for breach of the contract—a doctrine Parke expressly denied both in *Phillpotts v. Evans*, and *Ripley v. M'Clure*, 4 Ex. 345, 359. The mistake made in *Fox v. Kitton* is repeated in *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

⁶⁸ *Wender &c. Co. v. Louisville &c. Co.*, 137 Ky. 339, 125 S. W. 732; *Spetton v. Goodman*, 194 Mass. 389, 80 N. E. 608; *R. H. White Co. v. Remick*, 198 Mass. 41, 84 N. E. 113.

⁶⁹ *Leavitt v. Fletcher*, 10 Allen, 119.

⁷⁰ See further in regard to leases, *supra*, §§ 890-892.

⁷¹ See *infra*, § 1469.

right, but standing on the defensive. He need do nothing except refrain from performing or receiving performance until he sues or is sued, when he should plead the cause which justifies his non-performance.⁷² Of course he may by manifesting an election to continue the contract deprive himself of this justification, but positive action on his part is necessary to bring this about.⁷³

§ 1305. Prospective inability to perform should excuse.

If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a wilful intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *vis major* this should be true.⁷⁴

§ 1306 Time when right of action accrues.

The final question remains, after a repudiation before the time for performance, when may the injured party bring his action upon the contract? If a technical declaration were as much thought of to-day as it was once, the question could hardly have become troublesome. From a technical point of view, it seems obvious that in an action on a contract the plaintiff must state the defendant broke some promise which he had made. If he promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he is not going to employ the plaintiff

⁷² Where the ground of non-performance is an actual breach of contract by the other party, it is an obvious consequence of the rule of common-law pleading which required the plaintiff to allege and prove his own performance, that he would fail if he had not duly performed, though the defendant had not manifested any election. Changes in modern pleading cannot have

affected the substantive law on this point. Where the ground of non-performance is repudiation or a prospective breach, there should be no difference for the essential nature of the defense is the same.

⁷³ See *supra*, §§ 683-688; Langdell, Summary of Contracts § 177.

⁷⁴ See *supra*, §§ 877 *et seq.*

upon June 1 can be a breach only of a contract not to make such statements. It is perhaps not wholly by chance that the doctrine of anticipatory breach has arisen as the exactness of common-law pleading has become largely a thing of the past; for the science of special pleading, in spite of the grave defects attending it, had the great merit of making clear the exact questions of law and fact to be decided.⁷⁵

§ 1307. Arguments from principle and precedent.

The matter is so plain on principle that theoretical discussion is hardly possible,⁷⁶ but certain distinctions may be made which have not always been observed, and which, if observed, are a sufficient answer to the claims of practical convenience that furnish the only support for the advocates of the doctrine of anticipatory breach. It seems desirable, also, to explain certain early cases which have led to some confusion, and thereby show the lack of historical basis for the doctrine; and of this first.

§ 1308. Early decision.

In Y. B. 21 Edw. IV. 54, pl. 26, Choke, J., says : "If you are bound to enfeof me of the manor of D. before such a feast, if you make a feoffment of that manor to another before the said

⁷⁵ In *Equitable Trust Co. v. Western Pacific R.*, 244 Fed. 485, 501 (aff'd. 250 Fed. 327, 162 C. C. A. 397, 246 U. S. 672, 62 L. Ed. 932, 38 S. Ct. Rep. 423), L. Hand, J., in effect accepted this conclusion, but held that there is in every contract an implied obligation not to repudiate. As to this suggestion, see *infra*, § 1318.

⁷⁶ It need hardly be said that the doctrine of anticipatory breach is peculiar to our law.

In Mommsen's *Beiträge Zum Obligationenrecht*, Abtheilung, 3, § 4, it is said: "The obligation must be already due. So long as the time of maturity has not arrived, the obligor has always a defense in case the creditor should endeavor to enforce the obligation."

And in the typical case of one who regardless of his contract to sell and deliver in the future specific property to A sells and delivers it to B, Oesterlen, *Der Mehrfache Verkauf*, pp. 17, 18, says: "The temporary impossibility of performance due to the first delivery is wholly immaterial if it is removed at the proper time." . . . "When fulfilment is not made to the latter (i. e. A) at the proper time, then for the first time has a legal injury been done." On the other hand, prospective non-performance, though not giving a cause of action, is to some extent at least recognized as a defence in the Civil law. See *infra*, §§ 905, 919.

feast, notwithstanding that you repurchase the property before the said feast, still you have forfeited your obligation because you were once disabled from making the feoffment."⁷⁷ This and similar statements are repeated several times in the early books.⁷⁸

§ 1309. Explanation of the decision.

What Choke was talking about was a bond with a condition. This appears from the case itself where his remark was made as an illustration, and so it was understood.⁷⁹ At the present day a bond with a condition to convey before a certain day would be regarded as in substance the equivalent of a covenant to pay on or after the day the penal sum of the bond (for which the law would substitute appropriate damages) if a conveyance was not made before the day. That does not represent the early understanding of such an instrument. The words of a bond, which are still used, acknowledging an immediate indebtedness, and adding a proviso in which case the instrument is to become void, had a literal meaning for our ancestors. "A specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release."⁸⁰ It has been frequently pointed out that a debt was not regarded in our early law as a contractual right but a property right, and a deed creating debt was not looked upon, as it is to-day, as a promise to pay money, but as a grant or conveyance of a sum of the grantor's money to the grantee.⁸¹ Accordingly a bond was closely analogous to a mortgage,—a conveyance with a provision of defeasance attached. If the condition was or became impossible there remained an absolute debt created by the bond.⁸²

⁷⁷ In *Mayne's Case*, 5 Coke, 20 b, 21 a, this passage is literally translated from the Year Book, and it is to Coke, probably, that the later currency of the citation is due.

⁷⁸ In 1 Rolle's Ab. 447, 448, under the title "Condition," this and several other similar cases are put. See also 5 Viner's Ab. 224.

⁷⁹ This is evident, e. g., from Rolle's classification of the authority under

"Condition." See also, *infra*, § 1310, n. 84.

⁸⁰ 9 Harv. L. Rev. 56, by Professor Ames.

⁸¹ *Supra*, § 11, 1820. See also Parol Contracts prior to Assumpsit, by Professor Ames, 8 Harv. L. Rev. 252; Pollock & Maitland, *Hist. Eng. Law* (2d ed.), ii. 205; Langdell, *Summary of Contracts*, § 100.

⁸² 2 Vynior's Case, 8 Coke, 81 b,

Choke's idea seems to have been that when the obligor of the bond sold the property, the condition became at that moment impossible of performance. There was, therefore, at that moment, by virtue of the bond itself, an absolute indebtedness, and this indebtedness, having once become absolute, could not subsequently be qualified. The condition could not be temporarily in abeyance.

§ 1310. Explanation of case continued.

Whether this view of the law was that generally taken by the contemporary judges, and, if so, when it gave way to a more modern conception, is not very material to this discussion, but it may be mentioned that Choke's statement seems inconsistent with the opinions of writers of authority not long afterwards.³³ What is material to observe is that, whichever way the point is decided, these authorities have no bearing upon the question of the immediate right to sue upon the repudiation of a contract. It may safely be asserted that Choke and his contemporaries and successors would all have agreed that a covenant to convey land before a certain feast, or a covenant to pay damages if the covenantor failed to convey

33 a; Perkins, Profitable Book, §§ 736, 757; 1 Rolle's Ab. 419 (C) pl. 2; *Ib.* 420 (E) pl. 1, 2. The last passage reads: "If the condition of a bond or feoffment is impossible when it is made it is a void condition, but the obligation or feoffment is not void but single, because the condition is subsequent. But if a condition precedent be impossible when it is made the whole is void, for nothing passes before the condition is performed." Perkins (§ 757) gives a case of a condition originally possible, but subsequently becoming impossible.

* Perkins, Profitable Book, § 800: "And there is a diversity when the condition is to be performed on the part of the feoffor or grantor, etc., and when on the part of the feoffee or grantee, etc. For when it is to be per-

formed on the part of the feoffee or grantee, it behoveth him that he be not disabled at any time to do or perform the same."

§ 801. "But when the condition is to be performed on the part of the feoffor or grantor, although they are disabled to perform it at any time before the day on which it ought to be performed, yet if they are able to perform the same at the day, etc., it is sufficient, except in special cases." Illustrations are also given by the author.

This was written in the first half of the sixteenth century. Coke adopted the diversity (Co. Litt. 221 b); but neither author gives a satisfactory reason for it.

In the case put by Choke the condition was to be performed by the obligor, grantor of the bond.

land before a certain feast, could in no event have been sued upon before the feast.⁸⁴

§ 1311. Erroneous statement of Fuller, C. J.

When, therefore, Fuller, C. J., of the Supreme Court of the United States, in the leading American decision on the point asserted, "It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract,"⁸⁵ it must, with deference be said that the learned judge was mistaken. The mistake is perhaps more pardonable than it would otherwise be, had not an English court fallen into the same error. In *Ford v. Tiley*,⁸⁶ Bayley, J., in delivering the opinion of the court, draws the conclusion from some of the old authorities above referred to "that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives."⁸⁷ This was not, so far as appears, necessary to the decision of the case. The decision seems to have been correct, as will presently be

"This is neatly proved by an extract from the case of *Hoe v. Marshall*, Cro. Eliz. 579, 580, S. C. Goldsb. 167, 168. The reader should first be reminded that in our early law a release of a claim or debt was treated as a conveyance and that consequently a release could not be made of a possible future claim (see *infra*, § 1823), and further that the word "obligation" here as always in the early books means a bond with condition. "If one covenants to infeoff me before Michaelmas, a release of all actions before Michaelmas is no bar to an action of covenant brought after Michaelmas, for there was not any cause of action at the time of the release made. But if an obligation be for the performance of that covenant, a release of all actions is a discharge of that bond, for it was a

duty defeasible." That is, the bond created an immediate liability as soon as it was made, and the condition operated as a defeasance.

⁸⁴ *Roehm v. Horst*, 178 U. S. 1, 18 44 L. Ed. 953, 20 Sup. Ct. 780. It is also stated in the opinion (p. 8) that this was "not disputed." If so, the counsel for the defendant conceded more than they should.

⁸⁵ 6 B. & C. 325 (1827). But the error is pointed out, though perhaps not conclusively shown, in the able opinion of Wells, J., in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. It is also adverted to in the argument of counsel for the defendant in *Short v. Stone*, 8 Q. B. 358, 364, and in *Lovelock v. Franklyn*, 8 Q. B. 371, 376.

⁸⁶ 6 B. & C. 325, 327.

shown, but Bayley's remark is noteworthy as the first statement in the English books authorizing the idea that an action may be brought on a promise before it is broken. It is to be noticed that this remark is confined to the case of an estate, and is not made as laying down a general principle of the law of contracts.⁸⁸

Where the owner of specific property agrees to sell it at a future day, it is certainly much easier to imply a promise that he will not otherwise dispose of it in the meantime, than it is to imply a promise in every contract not only to do but to say nothing inconsistent with the principal promise. But would a court, it may be asked, grant specific performance on January 1, of a contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day?⁸⁹ If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.

§ 1312. Other English cases.

In 1846 there were decided two cases in which a defendant was held liable for the breach of a promise to marry. In one of these cases⁹⁰ the defendant's promise was alleged to be simply to marry the plaintiff; in the other case "to marry her within a reasonable time next after he should thereunto be requested."⁹¹ In both cases the defendant was held liable without any request by the plaintiff.

These cases did not profess to establish any general doctrine that a contract could be broken before the time for its performance. Moreover, Parke, B., twice expressly ruled the con-

⁸⁸ Bayley's remark was repeated as representing the law in *Heard v. Bowers*, 23 Pick. 455, 460; but in that case, as the impossibility was not due to the voluntary act of the promisor, the rule was held inapplicable. In *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, the dictum in *Heard v. Bowers*, was repudiated.

⁸⁹ See *Duval v. Duval*, 54 N. J. Eq. 581, 590, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440, and *infra*, § 1421, in regard to repudiated contracts to devise or bequeath property.

⁹⁰ *Caines v. Smith*, 15 M. & W. 189.

⁹¹ *Short v. Stone*, 8 Q. B. 358.

trary at about this time;⁹² and Lord Denman expressed a similar opinion.⁹³

§ 1313. *Hochster v. De La Tour.*

So the matter stood in 1852 when the case of *Hochster v. De La Tour*⁹⁴ was decided. In that case the plaintiff had entered into a contract with the defendant to serve him as a courier for three months beginning June 1, 1852. On May 11, the defendant wrote to the plaintiff declining his services. The action was begun May 22, and, after a verdict for the plaintiff, objection was taken that the action was prematurely brought. Counsel for the defendant, however, argued—unnecessarily so far as the immediate case was concerned—that the plaintiff, having taken other employment, had terminated the contract. Lord Campbell, in delivering the opinion of the court in favor of the plaintiff, showed that the situation would be unfortunate if the plaintiff, as a condition of getting a right of action, must

⁹² *Phillipotts v. Evans*, 5 M. & W. 475, 477 (1839): "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract, for all that he stipulates for is that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them, nevertheless; and, *vice versa*, the plaintiffs could not sue him before."

In *Ripley v. M'Clure*, 4 Ex. 345 (1849), Parke reiterated his statement that a notice before the time for performance could not be a breach of contract, but held that it might excuse the other party from continuing to perform.

⁹³ *Lovelock v. Franklyn*, 8 Q. B. 371, 378 (1846): "This distinction shows that the passage cited from Lord Coke is inapplicable. That proves no more on the point now before us than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the meantime." As Lord Denman had immediately before taken part in the decision of *Short v. Stone*, 8 Q. B. 358, it may be assumed he did not regard that decision as inconsistent with his later remarks.

In *Thomson v. Miles*, 1 Esp. 184, Lord Kenyon had said that it had been solemnly adjudged that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of Parliament, gets such an estate as will enable him to make a title, that is sufficient.

See also *Alexander v. Gardner*, 1 Bing. N. C. 671, 677, per Tindal, C. J.

⁹⁴ 2 E. & B. 678.

decline other employment and hold himself ready to perform until June 1. From this, apparently misled by the argument of counsel, Lord Campbell drew the conclusion that the plaintiff must have an immediate right of action; and also drew the conclusion from the earlier cases already referred to⁹⁵ that incapacity before the time for performance had already been settled by decision to be a breach, neglecting to notice the distinction, hereafter adverted to,⁹⁶ between a promise to perform on a fixed future day and on a day which the injured party has a right to fix at any time in the present or future.

§ 1314. Modern law.

These two misapprehensions of Lord Campbell, for as such they must be regarded, make the case an unsatisfactory one. It has, however, settled the law in England,⁹⁷ and the doctrine for which it stands has been adopted in Canada,⁹⁸ and in the United States, either by dictum or decision, both in the Federal courts⁹⁹

* He adds the case of *Bowdell v. Parsons*, 10 East, 359, as establishing the proposition that "if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them." In fact, the contract in that case was to deliver upon request.

* *Infra*, § 1319.

* *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. D. 460; *Synge v. Synge* (C. A.), [1894] 1 Q. B. 466; *Roth v. Taysen*, 73 L. T. 628. See also *Danube, etc., Co. v. Xenos*, 13 C. B. (N. S.) 825; *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 6 E. & B. 953; *Roper v. Johnson*, L. R. 8 C. P. 167; *Brown v. Muller*, L. R. 7 Ex. 319; *Re South African Trust Co.*, 74 L. T. 769.

* *Dalrymple v. Scott*, 19 Ont. App. 477, 483; *Ontario Lantern Co. v. Hamilton Mfg. Co.*, 27 Ont. App. 346;

Cromwell v. Morris, 34 Dom. L. R. 305; *Gilbert v. Campbell*, 1 Hannay (N. Brunswick), 474.

* *Rœhm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 780, affirming 84 Fed. 565; *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 60 L. Ed. 811, 36 Sup. Ct. 412; *Ex parte Pollard*, 2 Lowell, 411; *Grau v. McVicker*, 8 Bliss. 13; *Dingley v. Oler*, 11 Fed. 372; *Foss, etc., Co. v. Bullock*, 59 Fed. 83, 87, 8 C. C. A. 14; *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 206, *Equitable Trust Co. v. Western Pac. R.*, 244 Fed. 485.

Clark v. National Benefit Co., 67 Fed. 222, must be regarded as overruled. The Supreme Court long remained apparently undecided. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920, 7 Sup. Ct. Rep. 882; *Pierce v. Tennessee &c. R. Co.*, 173 U. S. 1, 12, 43 L. Ed. 591, 19 Sup. Ct. 335. See also *Edward Hines Lumber Co. v. Alley*, 73 Fed. 603, 19 C. C. A. 599.

and in the courts of a majority of the States in which the question has arisen.¹

¹ *Veitech v. V. B. Atkins Grocery Co.*, 5 Ala. App. 444, 59 So. 746; *Jebeles, etc., Confectionery Co. v. Stephenson*, 6 Ala. App. 103, 60 So. 437; *Wendt v. Ismert-Hincke Milling Co.*, 107 Ark. 106, 154 S. W. 194; *Wolf v. Marsh*, 54 Cal. 228; *Fresno etc., Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *Garberino v. Roberts*, 109 Cal. 125, 128, 41 Pac. 857; *Home Pattern Co. v. Mertz Co.*, 86 Conn. 494, 86 Atl. 19; *Churchill Grain, etc., Co. v. Newton*, 88 Conn. 130, 89 Atl. 1121; *Landvoight v. Paul*, 27 Dist. Col. App. 423; *Thompson v. Kyle*, 39 Fla. 582, 23 So. 12; *Ford v. Lawson*, 133 Ga. 237, 65 S. E. 444; *Robson v. Hale*, 139 Ga. 753, 78 S. E. 177; *Fox v. Kitton*, 19 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Balance v. Vanuxem*, 191 Ill. 319, 61 N. E. 85; *Engesette v. McGilvray*, 63 Ill. App. 461; *Kurts v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Adams v. Byerly*, 123 Ind. 368, 24 N. E. 130; *Indiana Life Endowment Co. v. Reed*, 54 Ind. App. 450, 103 N. E. 77; *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409; 7 Am. Rep. 208; *McCormick v. Basal*, 46 Iowa 235; *Quarton v. American Law Book Co.*, 143 Ia. 517, 529, 121 N. W. 1009, 32 L. R. A. (N. S.) 1; *Sprague v. Iowa Merc. Co.*, (Ia.) 172 N. W. 637; *Platt v. Brand*, 26 Mich. 173; *Sheahan v. Barry*, 27 Mich. 217; *Kalkhoff v. Nelson*, 60 Minn. 284, 287, 62 N. W. 332; *McGuire v. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130; *Bignall, etc., Mfg. Co. v. Pierce, etc., Co.*, 59 Mo. App. 673; *Claes, etc., Mfg. Co. v. McCord*, 65 Mo. App. 507; *Vickers v. Electrozone Co.*, 67 N. J. L. 665, 52 Atl. 467; *O'Neill*

v. Supreme Council A. L. of H. 70 N. J. L. 410, 57 Atl. 463; *Samuel Super*, 85 N. J. L. 101, 88 Atl. 954; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Ferris v. Spooner*, 102 N. Y. 16, 5 N. E. 773; *Nichols v. Scranton, etc., Co.*, 137 N. Y. 471, 33 N. E. 561; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 643, 52 N. E. 671, 44 L. R. A. 227; *Hicks v. British Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Langan v. Supreme Council A. L. of H.*, 174 N. Y. 266, 66 N. E. 932; *Seymour v. Warren*, 114 N. Y. App. D. 813, 100 N. Y. S. 267, affd. 190 N. Y. 512, 83 N. E. 1131; *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488; *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120, 116 N. E. 789; *Matthews v. Matthews*, 62 Hun, 110, 16 N. Y. S. 621 (cf. *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286, 293; *Benecke v. Häbler*, 38 N. Y. App. D. 344, 58 N. Y. S. 16, affd. without opinion 166 N. Y. 631, 60 N. E. 1107); *Schmitt v. Schnell*, 14 Ohio C. C. 153; *Diem v. Koblitiz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Stark v. Duvall*, 7 Okl. 213, 54 Pac. 453; *J. K. Armsby Co. v. Grays Harbor Comm. Co.*, 62 Oreg. 173, 123 Pac. 32; *Zuck v. McClure*, 98 Pa. 541; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Echard Coal & Coke Co. v. Mudge*, 234 Pa. 86, 82 Atl. 1110; *Mountjoy v. Metzger*, 9 Phil. 10; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981; *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; *Kilgore v. Northwest Texas, etc., Assn.*, 90 Tex. 139, 37 S. W. 598; *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Tex. Civ. App.), 187 S. W.

There are strong opinions to the contrary,² however, and in many States the question is still undecided.³

747; *Gibson v. Wheldon*, 82 Vt. 175, 72 Atl. 909; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Lee v. Mutual, etc., Assoc.*, 97 Va. 160, 33 S. E. 556; *Mutual etc., Life Assoc. v. Taylor*, 99 Va. 208, 37 S. E. 854; *Davis v. Grand Rapids, etc., Co.*, 41 W. Va. 717, 24 S. E. 630; *Chapman v. Belts Co.*, 48 W. Va. 1, 35 S. E. 1013; *Bare v. Victoria Coal Co.*, 73 W. Va. 632, 80 S. E. 941; *Lewis v. West Virginia Pulp etc., Co.*, 76 W. Va. 103, 84 S. E. 1063; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576. See also *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

²*Pittman v. Pittman*, 110 Ky. 306, 61 S. W. 461; *South Gardner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110 (but see *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354); *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397; *Porter v. American Legion*, 183 Mass. 326, 67 N. E. 238; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830; *Parker v. Pettit*, 43 N. J. L. 512, 517 (overruled); *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760; *Markowitz v. Greenwall Co. (Tex. Civ. App.)*, 75 S. W. 74, 317; *Turner Cummings Hardwood Co. v. Phillip A. Ryan Lumber Co. (Tex. Civ. App.)*, 201 S. W. 431. See also *Warden v. Hinds*, 163 Fed. 201, 90 C. C. A. 449; *Perkins v. Fraser*, 107 La. 390, 31 So. 773.

³The question is referred to but expressly left open in *Day v. Connecticut, etc., Co.*, 45 Conn. 480, 494, 29 Am. Rep. 693 (but see later Connecticut

decisions in n. 1); *Sullivan v. Mo-Millan*, 26 Fla. 543, 8 So. 450 (but see *Thompson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193); *Maltby v. Eisenhauer*, 17 Kans. 308, 311; *Dugan v. Anderson*, 36 Md. 567, 11 Amer. Rep. 509; *Pinckney v. Dambmann*, 72 Md. 173, 182, 19 Atl. 450 (but see *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385).

In *Collins v. Snow*, 218 Mass. 542, 106 N. E. 148, 149, the court adverted to a distinction between legal and equitable procedure.

"The defendant's last contention is that under the doctrine of *Daniels v. Newton*, 114 Mass. 530, 19 Am. Dec. 384, the decree was wrong in enforcing the plaintiff's half of the instalments which fell due after the date of the filing of the bill, to wit, September 28, 1908. But *Daniels v. Newton* was an action at law. In an action at law relief cannot be given founded on facts happening subsequent to the date of the writ. In equity the rule is otherwise. In equity rights accruing to the plaintiff after the filing of the bill which grow out of the matters on which the bill is founded may be made the subject of a supplemental bill. *Saunders v. Frost*, 5 Pick. 275, 276; *Jaques v. Hall*, 3 Gray, 194. See also, in this connection, *Bauer v. International Waste Co.*, 201 Mass. 197, 87 N. E. 637. Indeed unless the original bill is dismissed that is the only way in which they can be enforced. *Saunders v. Frost*, 5 Pick. 275. By force of Equity Rule 25 all facts which at common law were the subject of a supplemental bill now can be pleaded by way of an amendment to the original bill."

§ 1315. Distinction between defence and right of action.

The reasoning in *Hochster v. De La Tour*,⁴ already adverted to, illustrates the importance of a distinction, which should be observed—the distinction between a defence and a right of action. This seems obvious, but it is frequently lost sight of, as it was in that case. It seems to be assumed that a breach of contract by one party is the only basis for a defence on the other's part. But fraud, mistake, failure of consideration actual or prospective and all other affirmative defences to breach of contract are based simply on principles of equity and justice. Whether a breach of contract has been committed does not primarily depend on such principles, but on whether a binding promise has been broken. Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, or preparing to perform, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. Indeed even if it be assumed that repudiation before the time for performance should give rise to an immediate right of action, it is impossible to make identical requirements concerning the repudiation which will furnish a defence and that which will afford ground for an action.⁵ It is a consequence of allowing such a defence that the injured party not only is free from liability if he fails to perform, but that if he brings an action he shall not be defeated by reason of his own non-performance, since that failure to perform was caused by the defendant's fault.⁶ But though the defendant cannot defeat the action on this ground, any other defence is effectual, and there is no reason precluding him from asserting that the action is prematurely brought.

§ 1316. Distinction between action for restitution and action on the contract.

Another important and frequently neglected distinction is

⁴ 2 E. & B. 678.

⁵ See *infra*, § 1331.

⁶ Thus where an owner of a building refused to allow a contractor to go on with work upon it a condition of the contract requiring the con-

tractor to produce a certificate of an engineer showing full performance cannot be set up by the owner in answer to an action by the contractor. *Smith v. Wetmore*, 167 N. Y. 234, 60 N. E. 419. See *supra*, § 677.

that between an action for restitution and an action on the contract. Since repudiation affords immediate cause for rescission it also entitles the party aggrieved to bring an immediate suit for the restitution specifically or in money equivalent of whatever he has parted with.⁷ Cases allowing this do not involve the consequence that an action might be brought at that time on the contract.

§ 1317. No inconsistency in allowing full damages before all performance due.

Again, it is often thought to allow a plaintiff to sue and recover full damages before the time for the completion of all the defendant's performance is to allow the doctrine of anticipatory breach,⁸ yet this is not the case. As soon as a party to a contract breaks any promise he has made, he is liable to an action. In such an action the plaintiff will recover whatever damages the breach has caused. If the breach is a trifling one such damages cannot well be more than the direct injury caused by that trifling breach. But if the breach is serious or is accompanied by repudiation of the whole contract, it may and frequently will involve as a consequence that all the rest of the contract will not be carried out. This may be a necessary consequence of the situation of affairs or it may result simply from the plaintiff's right to decline to let the defendant continue performance, since even if all the remaining performances were properly rendered, the plaintiff would not get substantially what he bargained for. The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach, and therefore to damages for the loss of the entire contract. This is no different principle from

⁷See *infra*, § 1466. Similarly an employee unable to complete performance of his contract because of illness may recover on a *quantum meruit* before the day when his compensation was payable under the contract. *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560. The contrary decision of *Tebo v. Ballard*, 36 Vt. 612, is justly criticised in 28 L. R. A. (N. S.) 317.

⁸*Nichols v. Scranton, etc., Co.*, 137 N. Y. 471, 33 N. E. 561; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836, illustrate this. These cases are unquestionably right. They do not involve the question of anticipatory breach, though in each of them the court seems to have thought so.

allowing a plaintiff in an action of tort for personal injuries to recover the damages he will probably suffer in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation. This is law where the doctrine of *Hochster v. De la Tour* is denied, as well as where it is admitted.⁹ Indeed in the action of assumpsit the early law seems always to have allowed full damages as soon as any instalment of performance was due and not performed.¹⁰ In most of the cases cited in support of the doctrine of anticipatory breach there had been in fact an actual breach, and, therefore, no novel principle was needed to sustain recovery.¹¹

⁹ *Pierce v. Tennessee &c. Co.*, 173 U. S. 1, 43 L. Ed. 591, 19 Sup. Ct. 335; *Re Manhattan Ice Co.*, 114 Fed. 399; *Northrop v. Mercantile Trust Co.*, 119 Fed. 969; *Strauss v. Meertief*, 64 Ala. 290, 38 Am. Rep. 8; *Howard College v. Turner*, 71 Ala. 429; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Goldman v. Goldman*, 51 La. Ann. 761, 25 So. 555; *Sutherland v. Wyer*, 67 Me. 64; *Speirs v. Union Drop-Forge Co.*, 180 Mass. 87, 61 N. E. 825; *St. John v. St. John*, 223 Mass. 137, 111 N. E. 719; *Schell v. Plumb*, 55 N. Y. 592; *Girard v. Taggart*, 5 S. & R. 19, 9 Am. Dec. 327; *King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419; *Chamberlin v. Morgan*, 68 Pa. 168; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Zdan v. Hruden*, 22 Manitoba, 387. See also *Mayne on Damages* (6th ed.), 106 *et seq.*; *Sutherland on Damages*, §§ 108, 112, 113. The contrary decisions of *Lichenstein v. Brooks*, 75 Tex. 196, 198, 12 S. W. 975; *Gordon v. Brewster*, 7 Wis. 355 (*cf. Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896); *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250, are not to be supported. See also *Salyers v. Smith*, 67 Ark. 526, 55 S. W. 936.

¹⁰ See *supra*, § 1290, n. 10.

¹¹ In *Bridgeport v. Ætna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566, 568, the court said: "The breach was one of a dependent covenant going to the whole consideration, and therefore total. *Kauffman v. Raeder*, 108 Fed. 171, 179, 47 C. C. A. 278, 54 L. R. A. 247; *Leopold v. Salkey*, 89 Ill. 412, 418, 31 Am. Rep. 93. A cause of action in favor of the city thereupon arose for the recovery of the damages consequent upon such breach. It might have brought suit immediately, or waited such length of time as the statute of limitations permitted, but only one action could be brought, and in that action, whenever brought, full recovery, covering the future as well as the past, could be had. *Cohn v. Norton*, 57 Conn. 480, 490, 18 Atl. 595, 5 L. R. A. 572; *Stanton v. New York, etc., Ry. Co.*, 59 Conn. 272, 283, 22 Atl. 300, 21 Am. St. Rep. 110; *Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 13, 19 Sup. Ct. 335, 43 L. Ed. 591; *Parker v. Russell*, 133 Mass. 74, 75; *Schell v. Plumb*, 55 N. Y. 592, 597; *Sutherland v. Wyer*, 67 Me. 64, 68; *Remelee v. Hall*, 31 Vt. 582, 585, 76 Am. Dec. 140; 1 *Sedgwick on Damages*, § 90; *Sutherland on Damages*, § 108.

"It makes no difference that the liquidation of damages suffered by the

§ 1318. Action may be based on breach of subsidiary promise.

Under this principle a right of action may accrue by breach of a subsidiary promise, long before the defendant's main performance is due, and the subsidiary promise may be an implied one. In any case where the plaintiff's performance requires the coöperation of the defendant, as in a contract to serve or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this coöperation¹² and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day.¹³ So in a contract of life insurance a promise on the part of the company to accept the premiums is clearly implied in fact and a refusal to receive premiums is an immediate breach of contract.¹⁴ Indeed, it seems that there is generally in a conditional contract an implied promise not to prevent performance of the condition.¹⁵ Such prevention would

city from the breach, in so far as the future was concerned, would be beset with difficulties. Those difficulties are the same in kind and no greater in degree than are frequently encountered in actions for personal injuries. *Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 16, 19 Sup. Ct. 335, 43 L. Ed. 591; *la re Stern*, 116 Fed. 604, 607, 54 C. C. A. 60; *East Tenn., etc., R. Co. v. Staub*, 7 Lea (Tenn.), 397, 406. Uncertainties that may arise from an inability to forecast correctly what the future has in store for a plaintiff whose rights have been invaded by a breach of contract or a tort do not suffice to convert his right of action into a contingent one or to bar him from recovery as of a matured and accrued claim."

¹² See *supra*, § 1293.

¹³ *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423; *Edwards v. Slate*, 184 Mass. 317, 68 N. E. 342. See also *supra*, § 1293; *infra*, § 1361; *Inchbald v. Western, etc., Co.*, 17 C. B. (N. S.).

Ford v. Tiley, 6 B. & C. 325, was clearly correctly decided under this principle. The defendant promised to

make a lease to the plaintiff as soon as he should become possessed of the property, which was then under lease to a third party. The defendant before the expiration of the prior lease executed another to the same lessee, thereby preventing possession reverting to him at the expiration of the previous lease.

¹⁴ *O'Neill v. Supreme Council, A. L. of H.*, 70 N. J. L. 410, 57 Atl. 463; *Fischer v. Hope Ins. Co.*, 69 N. Y. 161. The contrary decisions of *Porter v. American Legion*, 183 Mass. 326, 67 N. E. 238, and *Langan v. Supreme Council*, 174 N. Y. 266, 66 N. E. 932, must be deemed erroneous.

¹⁵ *United States v. Peck*, 102 U. S. 64, 26 L. Ed. 46; *Peck v. United States*, *ibid.*; *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423; *Knotts v. Clark Const. Co.*, 249 Fed. 181, 161 C. C. A. 217; *Danforth v. Tennessee &c. R.*, 93 Ala. 614, 11 So. 60; *Gay v. Blanchard*, 32 La. Ann. 497; *McFarland v. Welch*, 48 Mont. 196, 136 Pac. 394; *Patterson v. Meyherhofer*, 204 N. Y. 96, 97 N. E. 472; *Cameron-Hawn Co. v. Albany*,

then be an immediate breach of contract, and if of sufficiently serious character damages for the loss of the entire contract might be recovered. As countermanding work may have the legal effect of prevention in this country,¹⁶ though it does not involve actual physical prevention, it would be a breach of contract on this theory at the time when a stoppage in the performance of the contract had been caused thereby.¹⁷ It may be argued that the principle of implied subsidiary promises explains satisfactorily the doctrine of anticipatory breach, and the argument has been stated by courts of the highest authority.¹⁸ In spite of the somewhat strained character of such an implication, the explanation would be acceptable, if it did not require such an implication to be made in all contracts—unilateral and absolute as well as bilateral and conditional.¹⁹

§ 1319. Time of performance fixed by act of the promisee.

The time for the defendant's performance is frequently fixed in a contract, not by naming a definite day, but by some act to be done by the plaintiff—either a counter-performance or a request. If the defendant repudiates the contract, it excuses the plaintiff from doing a nugatory act, and, as in the case of any other condition which the defendant's conduct excuses, he cannot take advantage of its non-performance.²⁰ He is deprived

207 N. Y. 377, 101 N. E. 162, 49 L. R. A. (N. S.) 922; *Millan v. Bartlett*, 69 W. Va. 155, 71 S. E. 13.

In *United States v. Behan*, 110 U. S. 338, 346, 28 L. Ed. 168, 4 Sup. Ct. 81, the court said: "The wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained." It should be noted that this statement was made before the Supreme Court had accepted the doctrine of anticipatory breach. See also *Indian Contract Act*, § 53, and *supra*, § 677. But see *Murdock v. Caldwell*, 10 Allen, 299.

¹⁶ See *supra*, § 1298. See also *Cort*

v. Ambergate, etc., Ry. Co., 17 Q. B. 127, 145.

¹⁷ *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Chapman v. Kansas City, etc., Ry. Co.*, 146 Mo. 481, 48 S. W. 646.

¹⁸ See *infra*, § 1328.

¹⁹ *Ibid.* This is recognised and the conclusion cheerfully accepted by L. Hand, J., in *Equitable Trust Co. v. Western Pac. R.*, 244 Fed. 485, 501 (aff'd. 250 Fed. 327, 162 C. C. A. 397, 246 U. S. 672, 62 L. Ed. 932, 38 S. Ct. Rep. 423); but it may be doubted whether most courts would go so far. See *infra*, § 1328.

²⁰ The leading case for this well-settled doctrine is *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B. 127. A few of

of **nothing** thereby, except what he has indicated a willingness to **go without**, for he has said that even if the request be made **he will not heed it**, or if the counter-performance be offered **he will not accept it**. The case is very different where the defendant promises to pay on a fixed day, or when an outside event happens. To hold him immediately liable on such a contract is to enlarge the scope of his promise, and entirely without his assent. If he prevented the time for his performance from coming, his assent might be dispensed with, but not otherwise.²¹ The English cases before *Hochster v. De La Tour*,²² which are cited in support of the doctrine of anticipatory breach,²³ may be satisfactorily explained on these principles with possibly one exception.²⁴

the many other cases which might be cited are: *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Dwyer v. Tulane*, etc., *Adm's*, 47 La. Ann. 1232, 17 So. 796; *Brackett v. Knowlton*, 109 Me. 43, 82 Atl. 436; *Murray v. Mayo*, 157 Mass. 248, 31 N. E. 1063; *Canda v. Wick*, 100 N. Y. 127, 2 N. E. 381.

The distinction here contended for is well brought out in *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538. In that case there was a contract for an exchange of real estate. No time was fixed for performance. Before any tender or demand for performance the defendant repudiated the contract. Holmes, J., in delivering the opinion of the court, held that this "not only excused the plaintiff from making any tender and authorized him to rescind if he chose, but amounted to a breach of the contract. The contract was for immediate exchange, allowing a reasonable time for necessary preparations. In the absence of special circumstances, which do not appear, sufficient time had been allowed, even if any consideration of that sort could not be and was not waived by the defendant. The case is not affected by *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, but

falls within principles that have been often recognized."

²¹ In *Ford v. Tiley*, 6 B. & C. 325, the time for performance was to be fixed by the defendant's coming into possession of certain property—an event depending on outside contingencies, which the defendant prevented from happening as expected. In the nature of the case, however, a party cannot prevent a day fixed by reference to the calendar from arriving.

²² 2 E. & B. 678.

²³ *Bowdell v. Parsons*, 10 East, 359; *Ford v. Tiley*, 6 B. & C. 325; *Caines v. Smith*, 15 M. & W. 189. In *Bowdell v. Parsons* and *Caines v. Smith* the defendant promised to perform upon request, and later by making his own performance impossible excused the request. As to *Ford v. Tiley*, see n. 21. So in *Clements v. Moore*, 11 Ala. 35—a decision before the days when anticipatory breaches were talked of—the defendant was held liable without a request, on his marriage with another than the plaintiff, for breach of a promise to marry on request.

²⁴ *Short v. Stone*, 8 Q. B. 358. The promise was to perform within a reasonable time after request. The defendant, by making his own performance

§ 1320. Contracts to marry.

A great many of the cases cited in support of the doctrine of anticipatory breach are upon contracts to marry;²⁵ and these cases may well be distinguished. Lord Cockburn said in *Frost v. Knight*: "On such a contract being entered into . . . a new status, that of betrothment, at once arises between the parties."²⁶ When a man promises to pay money or deliver goods at a future day, all he understands, all a reasonable man could understand, is that he will be ready to perform on the day. When a man promises to marry, his obligation, as he understands it and as it is understood, is wider, and includes some undertaking as to conduct before the marriage-day. If this be so, marriage with another than the betrothed is an immediate breach, not directly of the promise to marry, but of the subsidiary obligation implied from it. As this breach necessarily involves a loss of the marriage, full damages could be recovered. Lord Cockburn tries to apply the same line of reasoning to other contracts, saying, "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may

impossible, clearly dispensed with the necessity of a request as such. It does not seem so clear why he should forego the "reasonable time." Coleridge, J., avoided the difficulty by a strained construction of the declaration, holding the promise to mean after request made within a reasonable time. The other members of the court simply say the request is dispensed with.

²⁵ *Frost v. Knight*, L. R. 7 Ex. 111; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Adams v. Byerly*, 123 Ind. 368; *Holloway v. Griffith*, 32 Ia. 409, 7 Am. Rep. 208; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Sheahan v. Barry*, 27 Mich. 217; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am.

St. Rep. 302; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749. The distinction here suggested was referred to in *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760, and in *Lewis v. Tapman*, 90 Md. 294, 308, 45 Atl. 459, 47 L. R. A. 385; the court said: "There is no occasion to adopt and we do not adopt *Hochster v. De La Tour* further than it applies under *Frost v. Knight* to an action for breach of promise to marry." See also *Swiger v. Hayman*, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. Rep. 899.

²⁶ L. R. 7 Ex. 111, 115.

be essential to his interests." ²⁷ But this is fanciful. If true the action should be brought for breach of a promise to have the contract kept open. If there is such an implied obligation in any case there should be in case of negotiable paper, for in no other case is it more important that the promise should not be discredited before the time for performance. Yet it may be doubted if any court would apply the doctrine to bills and notes.²⁸

§ 1321. Practical convenience.

The reason most strongly urged in support of the doctrine of anticipatory breach is, however, its practical convenience. It is said that if it is certain that the plaintiff is going to have an action, it is better for both parties to have it disposed of at once. It may be conceded that practical convenience is of more importance than logical exactness, but yet the considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts. The law is not important solely or even chiefly for the just disposal of the litigated cases immediately before the court. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected. But it is not logic alone which is injured. The defendant is injured. He is held liable on a promise he never made. He has only promised to do something at a future day. He is held to have broken his contract by doing something before that day. En-

²⁷ L. R. 7 Ex. 112, 114.

²⁸ *Benecke v. Haber*, 38 N. Y. App. Div. 344, 58 N. Y. S. 16, affirmed without opinion in 166 N. Y. 631, 60 N. E. 1107. See also *Honour v. Equitable Soc.*, [1900] 1 Ch. 852; *Greenway v. Gaither*, Taney, 227; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006.

In *Roehm v. Horst*, 178 U. S. 1, 7, 44 L. Ed. 953, 20 Sup. Ct. 780, Chief Justice Fuller distinguishes the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations. This has not

before been suggested, though in fact the cases where the doctrine has been applied have been cases of bilateral contracts. Lord Cockburn's line of reasoning is certainly as applicable to unilateral as to bilateral contracts. It would be interesting to know what Chief Justice Fuller would say to the case of a promissory note given in exchange for an executory promise, or of an instrument containing mutual covenants, one of which was to pay money on a fixed day, the party bound to the money payment having repudiated his obligation before it was due.

larging the obligation of contracts is perhaps as bad as impairing it. This may be of great importance. Suppose the defendant, after saying that he will not perform, changes his mind and concludes to keep his promise. Unless the plaintiff relying on the repudiation, as he justly may, has so changed his position that he cannot go on with the contract without injury, the defendant ought surely to be allowed to do this.²⁹ But if the plaintiff is allowed to bring an action at once this possibility is cut off. "Why," says Fuller, C. J., "should a *locus poenitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage?"³⁰ Because such is the contract the parties made. A promise to perform in June does not preclude changing position in May.³¹

§ 1322. Necessity of election to treat repudiation as a breach.

Not only, moreover, do logic and the defendant suffer, but the very practical convenience which is the excuse for their suffering is not attained. A few illustrations from recent cases will show that as at present applied the doctrine of anticipatory breach is so full of pitfalls for the unwary as to be objectionable rather than advantageous practically. In a leading English case it is stated: "It would seem on principle that the declaration of such intention [not to carry out the contract] is not in itself and unless acted on by the promisee a breach of contract. . . .

²⁹ See *infra*, § 1335.

³⁰ *Roehm v. Horst*, 178 U. S. 1, 19, 44 L. Ed. 953, 20 Sup. Ct. 780.

³¹ The California Civil Code, § 1440, provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

This necessarily implies that if the notice is retracted the obligation

cannot be enforced without an offer to perform. Yet in California the doctrine of anticipatory breach, which in effect denies the right of retraction, is followed, and no reference is made to this section of the Code. The California cases are cited *supra*, § 1314, n. 1.

The same provision is contained in the Montana Civil Code, § 1956.

The North Dakota Civil Code also has copied in § 3774 this provision of the California Code, but the Supreme Court of North Dakota has denied the doctrine of anticipatory breach. *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938.

Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."³² The conception that a breach of contract is caused by something which the promisee does is so foreign to the notions not only of lawyers but of business men that it cannot fail to make trouble.

§ 1323. What constitutes an election to treat repudiation as a breach.

Though an election by the injured party is stated to be a prerequisite of an anticipatory breach, what action constitutes such an election has not been much considered. Logically it would seem that an election, if necessary, must be exercised before an action is brought, but presumably the mere bringing of an action immediately after an anticipatory repudiation would be sufficient;³³ as also would a notice to the repudiator of the election without any other change of position. It is, however, apparently not necessary to bring home to the repudiating party the election of the injured party. Presumably any change of position by the plaintiff whether known to the repudiator or not, would be enough. Thus a resale of goods by a seller for the account of one who had contracted to buy them in the future but who had repudiated his contract, was held a sufficient election, though no notice of the seller's intention to make a resale was given.³⁴

How long delay may be permitted before an election is made is also somewhat uncertain. On the one hand it is not infrequently said that the election must be promptly made; on the other hand, it has been held that unless the repudiation is withdrawn it operates as a "continuing offer" of a breach which may be taken advantage of at any time.³⁵

³² *Johnstone v. Milling*, 16 Q. B. D. 460, 472, per Lord Bowen. The late authorities continually refer to the necessity of the promisee acting on the repudiation. What action is necessary is not stated. It is to be noticed, however, that in *Hochster v. De La Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111, and most of the other cases, there was no mani-

festation of election other than bringing an action. This was held enough in *Mutual, etc., Life Assoc. v. Taylor*, 99 Va. 208, 37 S. E. 854. See also *supra*, § 686.

³³ See *Landes v. Klopstock*, 252 Fed. 89, 92, 154 C. C. A. 201.

³⁴ *Churchill Grain, etc., Co. v. Newton*, 88 Conn. 130, 89 Atl. 1121.

³⁵ In *United Press Assoc. v. National*

§ 1324. Positiveness of repudiation.

It is stated in the decisions that in order to give rise to an anticipatory breach of contract the defendant's refusal to perform must have been positive and unconditional.³⁶ In *Dingley v. Oler*,³⁷ the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote, "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered it to other parties here (fifty cents a ton), or give you ice when the market reaches that point." At the time when this letter was written ice was worth five dollars a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one-tenth of the price for which it is selling in July, and yet the court held the letter constituted no anticipatory breach of contract because the refusal was not absolute, but "accompanied with the expression of an alternative intention" to ship the ice "if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them." Surely a man must be well advised to know when he has the right to regard his contracts as broken by anticipation. So it is said that a mere threat

Newspaper Assoc., 237 Fed. 547, 150 C. C. A. 429, the court said: "It must be borne in mind that the defendant never at any time retracted what was stated in the telegram of February 7th, the letter of February 11th, or the Tammen telegram of March 10, 1911. The evidence shows that the defendant intended, if it was possible, to end the contract, and its president so testified. It never by declaration or act changed its position after sending the telegrams and letter above mentioned. To act on the refusal of the defendant to perform the contract so far as the rights of the defendant were concerned, leaving out of consideration for the present the effect, if any, that the notice of March 11, 1911, would have upon the same, was the same on

March 10, 1911, as it was on February 7 or 11, 1911. The defendant had not placed itself in any different position than it occupied on those dates."

³⁶ See especially *Johnstone v. Milling*, 16 Q. B. D. 460; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354; *National Contracting Co. v. Hudson River Water Power Co.*, 110 N. Y. App. D. 133, 97 N. Y. S. 92; *Vittum v. Estey*, 67 Vt. 158, 31 Atl. 144; *Provident Sav. L. Assur. Soc. v. Ellinger* (Tex. Civ. App.), 164 S. W. 1024; *Sniger v. Hayman*, 56 W. Va. 123, 48 E. 839, 107 Am. St. Rep. 899.

³⁷ 117 U. S. 450, 29 L. Ed. 984, 6 Sup. Ct. 850.

to abandon a contract will not amount to a breach,³⁸ and "a mere assertion that the party will be unable to or will refuse to perform his contract is not sufficient."³⁹ One might think a mere assertion that the party will refuse to perform his contract was a pretty definite repudiation. But surely, though it is not a breach of contract to say before the time for performance, "I do not think that I shall perform," it would be a valid excuse to the other party, justifying him in failing to begin or to continue performance.⁴⁰ A party to a contract is under no obligation in reply to inquiries to state his intentions concerning the performance of his future duties under a contract.⁴¹

§ 1325. What amounts to total repudiation.

Such repudiation as will constitute a breach may take various forms besides that of a positive statement of refusal to perform. Thus selling land,⁴² or goods,^{42a} to which the contract relates before the time for performance has been allowed as a cause of action. So denying the validity of the contract between the parties,⁴³ or insisting that its meaning or legal effect are different in a material particular from the true meaning or effect, coupled with the assertion, express or implied in fact, that performance will be made only according to the erroneous interpretation.⁴⁴ Marriage to another than the one

³⁸ *Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731; *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354; *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 Tex. 585, 142 S. W. 867.

³⁹ *Benj. Sale*, § 568, quoted in *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107. See also *McIntosh v. Miner*, 37 N. Y. App. D. 483, 55 N. Y. S. 1074.

⁴⁰ See *infra*, § 1331.

⁴¹ *Ripley v. McClure*, 4 Ex. 345. See also *Moel & Tryvan v. Weir*, [1910] 2 K. B. 844; *Street v. Progresso*, 42 Fed. 229, 50 Fed. 835, 2 C. C. A. 45; *Karran v. Peabody*, 145 Fed. 166, 76 C. C. A. 136.

⁴² *Ford v. Tiley*, 6 B. & C. 325; *Roehm v. Horst*, 178 U. S. 1, 18, 44 L. Ed. 953, 20 Sup. Ct. 780; *Adams v.*

Bridges, 141 Ga. 418, 81 S. E. 203; *Arlington Heights Realty Co. v. Citizens' Ry., etc., Co.* (Tex. Civ. App.), 160 S. W. 1109.

In *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30, it was held in an action by the purchaser for the breach of an executory contract for the sale of land, that an averment merely that the vendor, since the contract was entered into, had sold the land to another, is not sufficient, since it does not negative the possibility that the rights of the purchaser were reserved in such sale.

^{42a} *Bowdell v. Parsons*, 10 East, 359.

⁴³ *Draper v. Miller*, 92 Kan. 695, 141 Pac. 1014.

⁴⁴ But see *Mowry v. Kirk*, 19 Ohio St. 375, 383.

to whom the defendant was engaged necessarily involves repudiation.⁴⁵

§ 1326. Whether anticipatory inability to perform amounts to a breach.

One of the first cases relied on as establishing the doctrine of anticipatory breach involved prospective inability to perform because of a lease to a third person of land contracted to be leased to the plaintiff.⁴⁶ In such a case, however, the inability was caused by a voluntary act of the defendant, and this act indicated intention not to perform as well as inability to perform. Inability, however, may exist without unwillingness to perform. In *Johnstone v. Milling*,⁴⁷ though the promisor stated that he could not get money enough to perform his promise, and though he made this statement "constantly in answer to the defendant's direct question, and at other times in conversation," it was held that this was not such a repudiation as would justify an action. Lord Esher, M. R., made the test, "Did he mean to say that whatever happened, whether he came into money or not, his intention was not to rebuild the premises,"⁴⁸ as he had promised, and the other judges expressed similar views. A distinction between unexcused inability and wilful intention not to perform is not of practical value. As far as the performance of the contract is concerned they are of equal effect, and should be followed by the same consequences.⁴⁹

§ 1327. Supreme Court holds bankruptcy anticipatory breach.

In *Central Trust Company v. Chicago Auditorium Association*⁵⁰ in discussing the question whether on bankruptcy of a party to a bilateral contract before a breach the solvent party had a provable claim, the Supreme Court of the United States held that he had, and unquestionably any other decision would have been unfortunate.⁵¹ But in doing so the court held that

⁴⁵ See *supra*, § 1320.

⁴⁶ *Ford v. Tiley*, 6 B. & C. 325.

⁴⁷ 16 Q. B. D. 460. But see *Newsum v. Bradley*, [1918] 1 K. B. 271.

⁴⁸ Page 468. There were also other grounds of decision to which the present criticism is not intended to apply.

⁴⁹ In *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575, a statement of probable inability was held a breach.

⁵⁰ 240 U. S. 581, 36 Sup. Ct. Rep. 412, 60 L. Ed. 811, L. R. A. 1917 B. 580.

⁵¹ The difficulty in reaching this result was due to a failure of the Bank-

the bankruptcy itself amounted to an anticipatory breach, saying: "It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors," and answering this argument thus; ⁵²

"Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement." ⁵³ Decisions of lower federal courts had previously taken the same ground. ⁵⁴ It is to be observed that in order to sustain the position that the bankruptcy operates as a breach of contract which gives

ruptcy Statute to express clearly that contingent claims should be provable. Unmatured claims are not on that account unprovable (see *infra*, § 1984), but in an unmatured bilateral contract where the promises are mutually dependent the obligation of each party depends on the continuing performance or ability to perform of the other party. Since the Supreme Court had already held that a contingent claim might nevertheless be provable, if it could be valued (*Williams v. United States Fidelity, etc., Co.*, 238 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. 289), there would seem to have been no difficulty in holding that though there had been as yet no breach of contract in the case of *Central Trust Company v. Chicago Auditorium Assoc.* there was nevertheless a provable claim. Such a claim though both unmatured and con-

ditional is provable in England. *Re Fitz George*, [1905] 1 K. B. 462.

⁵² *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 Sup. Ct. Rep. 412, 415, 60 L. Ed. 811, L. R. A. 1917 B. 580.

⁵³ The decisions in bankruptcy denying proof of unmatured rent (*infra*, § 1985), may be considered in this connection.

⁵⁴ *Ex parte Pollard*, 2 Lowell, 411; *In re Imperial Brewing Co.*, 143 Fed. 579; *In re Inman*, 175 Fed. 312, and after the decision of the Supreme Court the same doctrine was followed in *Equitable Trust Co. v. Western Pacific Railroad*, 244 Fed. 485, 250 Fed. 327, 162 C. C. A. 397, 246 U. S. 672, 62 L. Ed. 932, 38 S. Ct. Rep. 423. See also *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918 A. 539, 252 Fed. 667.

a provable claim to the solvent party, it is necessary to assert that not the adjudication in bankruptcy but the petition is the breach, for only claims are provable which existed as provable claims at the time of the petition.⁵⁵ It is for this reason that some courts have distinguished in this matter between a voluntary and an involuntary bankruptcy.⁵⁶ In voluntary bankruptcy the debtor himself petitions and the adjudication follows immediately after. It is easier to regard such a voluntary petition as a repudiation than to regard the filing by a creditor of a petition in bankruptcy as such a repudiation. It is certainly difficult to see how a creditor can repudiate the debtor's contract for him. Moreover, if filing the petition is a repudiation on the theory that the debtor must at his peril keep his credit good, it seems equally a repudiation and breach of contract whether the petition is ultimately sustained and followed by an adjudication in bankruptcy or not. A further objection to the theory that bankruptcy whether involuntary or voluntary is a breach of contract, arises from the well-settled doctrine that the trustee in bankruptcy may adopt the obligations of the bankrupt under a contract and thereby become entitled to the benefits of the contract on behalf of the estate.⁵⁷ On any sound principle, the trustee can have no greater rights than the bankrupt and if there has been repudiation or material breach, it seems impossible to deny the solvent party the right to refuse to proceed with the contract even though the trustee in bankruptcy subsequently desires to adopt it.

§ 1328 There can be no anticipatory breach of unilateral obligations.

If the reasoning suggested in *Frost v. Knight*⁵⁸ and adopted by the Supreme Court of the United States⁵⁹ for the doctrine of anticipatory breach is accepted, namely, that a contract gives immediately an inchoate right to the performance of the

⁵⁵ See *infra*, § 1984.

⁵⁶ *In re Imperial Brewing Co.*, 143 Fed. 579; *In re Inman*, 175 Fed. 312. But see *contra*, *In re Pettingill*, 137 Fed. 143.

⁵⁷ See *supra*, § 880. This difficulty

was suggested by the court in *Wolins v. Conrad*, 172 N. Y. S. 216.

⁵⁸ L. R. 7 Ex. 111.

⁵⁹ *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 60 L. Ed. 811, 36 Sup. Ct. Rep. 412, L. R. A. 1917 B. 580.

bargain, which becomes complete when the time for performance has arrived; giving, in the meantime, a right to have the contract kept open as a subsisting and effective contract, the reasoning is as applicable to unilateral obligations to pay money, for instance by promissory note, as to any other form of contract. Indeed, the right to the unimpeached efficacy of the obligation before its maturity, is perhaps as desirable in the case of a promissory note as in any other case which can be put; yet it is probable that no court would enforce a promissory note prior to the date of its maturity.⁶⁰ And it seems also unlikely that a unilateral promise for executed consideration to pay money at a future day can be enforced until that day arrives;⁶¹ nor is it easy to draw a distinction between unilateral promises to pay money and unilateral promises for other performances. The distinction, therefore, taken by the Court of Appeals of New York,⁶¹ and approved by the Supreme Court of the United States,⁶² will probably be generally adopted. It was said by the latter court:⁶³ "It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a

⁶⁰ *Roehm v. Horst*, 178 U. S. 1, 17, 44 L. Ed. 953, 20 Sup. Ct. 780; *Benecke v. Haebler*, 38 N. Y. App. D. 344, 58 N. Y. S. 16, *aff'd* without opinion, 166 N. Y. 631, 60 N. E. 1107.

⁶¹ *Werner v. Werner*, 169 N. Y. App. D. 91 154 N. Y. S. 570.

⁶² *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 487, 33 N. E. 561.

⁶³ *Roehm v. Horst*, 178 U. S. 1, 17, 44 L. Ed. 953, 20 Sup. Ct. 780.

⁶⁴ *Ibid.*

breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."⁶⁴

§ 1329. Independent obligations.

As independent promises in a bilateral contract are in effect separate unilateral obligations, a rule which forbids enforcement of anticipatory repudiation as a breach in unilateral contracts also forbids such treatment in case of an independent obligation in a bilateral contract.⁶⁵ Therefore when a tenant repudiates a lease, the landlord cannot at once sue for future rent.⁶⁶

⁶⁴ In *O'Neill v. Supreme Council*, 70 N. J. L. 410, 57 Atl. 463, the doctrine was stated as applicable "where a contract embodies mutual and interdependent conditions and obligations" and the statement was repeated in *Samuel v. Super*, 85 N. J. L. 101, 88 Atl. 954. See also *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621; *Moore v. Security Trust & Life Ins. Co.*, 168 Fed. 496, 93 C. C. A. 652; *Werner v. Werner*, 160 N. Y. App. Div. 9, 154 N. Y. S. 570; *McCready v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208; *Kelly v. Security Mut. L. Ins. Co.*, 186 N. Y. 16, 78 N. E. 584. See also decisions in the following section. In *Equitable Trust Co. v. Western Pac. Railroad*, 244 Fed. 485 (aff'd 250 Fed. 327, 162 C. C. A. 397, 246 U. S. 672, 62 L. Ed. 932, 38 S. Ct. Rep. 423), L. Hand, J., however, denied the validity of this distinction, stating that the basis in principle of the doctrine of anticipatory breach is that every promise by implication includes "an engagement not deliberately to compromise the possibility of performance." The force of this decision, however, is weakened by the assumption that in *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A.

1917 B. 580, the promisee had wholly performed and that, therefore, the obligation of the bankrupt was unilateral. In fact the contract in question in that case seems to have been executory on both sides.

⁶⁵ See preceding notes.

⁶⁶ *McCready v. Lindenborn*. 172 N. Y. 400, 65 N. E. 208. In *Oliver v. Loyden*, 163 Cal. 124, 124 Pac. 731, 732, the court said:—

"It is settled by the recent decision in *Bradbury v. Higginson*, 123 Pac. 797, that the repudiation of a lease by the lessee does not operate at once to mature all the rent reserved in the lease and to enable the lessor to recover, not only the instalments already accrued, but those to accrue in the future. In that case it was said as to this proposition: 'But the proposition cannot be successfully maintained. It finds no support in the authorities with the exception of a few cases decided in Louisiana, a jurisdiction which is largely governed by the doctrines of the civil law. The general common-law rule is that rent, as such, is not payable until it falls due under the lease, and this rule is not altered by the fact that the tenant has abandoned the premises and notified the landlord that he will repudiate the lease.

For the same reason a seller of goods in a jurisdiction where, after a wrongful refusal of the goods by the buyer, the seller under an executory contract may treat the goods as the buyer's and recover the full price,⁶⁷ cannot be allowed this remedy for an anticipatory repudiation by the buyer before an agreed period of credit has expired. The seller may sue at once for damages based on the difference between the market price and the contract price, but he can not recover the full price.⁶⁸ In a jurisdiction which treats a lease like a bilateral contract with dependent promises,⁶⁹ a landlord on an anticipatory repudiation of the lease might similarly have the right to recover the difference between the agreed rent and the rental value of the premises.⁷⁰

§ 1330. Repudiated contract of insurance.

The uncertainty which marks the boundaries of the doctrine of anticipatory breach is well illustrated by three cases which arose in the States of Massachusetts, New Jersey and New York, respectively, on precisely the same facts. The Legion of Honor, a beneficiary society, issued a number of insurance policies and subsequently undertook by a change in its by-laws to increase the assessment payable by policy holders in order to continue their policies. A holder of an unmatured policy thereupon brought suit against the society in each of the States

Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708. Viewing the action as one for rent, it is not distinguishable, in principle, from *Tatum v. Ackerman*, 148 Cal. 357, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276." In this connection also may be considered the decisions in bankruptcy denying proof of unmatured rent (*infra*, § 1985) if a petition in bankruptcy is to be regarded as equivalent to repudiation (see *supra*, § 1327).

⁶⁷ *Supra*, § 1365.

⁶⁸ In *Tatum v. Ackerman*, 148 Cal. 357, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276, 278, the court said: "An attempted repudia-

tion of the contract *in toto* by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such repudiation and insist that the contract shall be enforced according to its terms, which they have the right to do, but they have no right to make a new contract for the defendant. If, against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms."

⁶⁹ See *infra*, § 1403.

⁷⁰ *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918 A. 539, 252 Fed. 667. But see *Johnstone v. Milling*, 60 Q. B. D. 480.

just mentioned. The courts all agreed that the attempted change of the by-laws involved a repudiation of the terms of the plaintiff's contracts. There, however, the agreement ended. The Massachusetts Court held that the repudiation was not a present breach and that as the doctrine of anticipatory breach was not adopted by the law of Massachusetts, the plaintiff could not recover.⁷¹ The New Jersey Court held that the repudiation amounted to an anticipatory breach and in spite of a dictum in an earlier case,⁷² adverse to giving a right of action on anticipatory repudiation, held the plaintiff entitled to recover.⁷³ The New York Court, though committed by previous judicial statements to the doctrine of anticipatory breach, held that the contract in question was not of such a kind that it could be broken by an anticipatory repudiation.⁷⁴ In fact it seems clear that there was an actual breach of contract in the cases, and that there was no necessity of discussing anticipatory breach. Though the time for payment of the face of the policies had not arrived, the time for payment of a premium had arrived before the time of suit. That a contract of insurance includes by necessary implication a promise on the part of the insurer to accept premiums at the rate fixed by the original contract seems obvious; and this had indeed been so held by the New York Court of Appeals prior to its adoption of the doctrine of anticipatory breach.⁷⁵

§ 1331. Repudiation may be a defence though it does not amount to a breach.

It has been shown⁷⁶ that the treatment of anticipatory repudiation as a breach was probably due to a recognition of the necessity of giving the injured party a defence, coupled with the

⁷¹ *Porte v. Supreme Council American Legion of Honor*, 183 Mass. 326, 67 N. E. 238.

⁷² *Parker v. Pettit*, 43 N. J. L. 512, 517.

⁷³ *O'Neill v. Supreme Council of American Legion of Honor*, 70 N. J. L. 410, 57 Atl. 463. To similar effect is *Mutual &c. Assoc. v. Taylor*, 99 Va. 208, 37 S. E. 854.

⁷⁴ *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932. See also *Kelly v. Security Mut. L. Ins. Co.*, 186 N. Y. 16, 78 N. E. 584.

⁷⁵ *Fischer v. Hope Ins. Co.*, 69 N. Y. 161. See also *Lovell v. St. Louis L. Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, 4 Sup. Ct. 390.

⁷⁶ *Supra*, §§ 1313, 1315.

assumption that unless there was a breach there could be no defence. The same confusion tends to induce the supposition that if an anticipatory repudiation is not sufficiently absolute or positive to amount to a breach, it cannot operate as a defence to the other party for not performing. But surely if one who has agreed to buy on credit says to the seller, "I don't think I shall pay for those goods," he cannot sustain an action for refusal to deliver the goods. Any breach seriously threatened without excuse should be a sufficient defence whether there is positive repudiation or not and whether the doctrine of anticipatory breach is accepted or not.⁷⁷ On the other hand, it is clear that the law neither does nor ought to allow an immediate action for a repudiation which is not positive or at least where there is not a pretty clear inability to perform.

§ 1332. Time when repudiation becomes effectual.

The prevailing doctrine seems to be that expressed in a leading English case,⁷⁸ by Lord Bowen "that the declaration of such intention by the promisor is not in itself, and unless acted on by the promisee, a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract." If this is true, no right of action can arise until there has been not only repudiation but action upon it. Therefore a New York decision holding that a telegram repudiating a contractual obligation operated as a breach as soon as received for transmission cannot be accepted.⁷⁹

§ 1333. Effect of failing to elect to treat repudiation as a breach under the English rule.

Under the rule laid down in the English cases a failure to elect to treat anticipatory repudiation as a breach involves a continuance of the obligations of the contract upon both sides

⁷⁷ See *Ripley v. McClure*, 4 Exch. 345.

⁷⁸ *Johnstone v. Milling*, 16 Q. B. D. 460.

⁷⁹ *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914 B. 377. The parties in the case had

been in correspondence so that implied authority to use the telegraph might be found, but this would not avoid the difficulty in regard to acceptance of the breach. See *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354.

It is this feature of the English doctrine that is most objectionable practically. As has been seen it involves the right to enhance the defendant's damages, and the American cases generally refuse to follow the English law.⁸⁰ Another equally unjust consequence of following the English doctrine has not yet so clearly been rejected in the United States. Under the English law if the promisee, after receiving the repudiation, demands or manifests a willingness to receive performance, his rights are lost. Not only can he not thereafter bring an action on the repudiation,⁸¹ but "he keeps the contract alive for the benefit of

⁸⁰ See *supra*, § 1298.

⁸¹ This is involved in the statement of Lord Cockburn, *supra*, § 1297. See also *Dingley v. Oler*, 117 U. S. 490, 503, 29 L. Ed. 984, 6 Sup. Ct. 850, quoting from *Benjamin on Sale*; *Zuck v. McClure*, 98 Pa. 541; *Dalrymple v. Scott*, 19 Ont. App. 477; *Cromwell v. Morris*, 34 Dom. L. R. 305, 307. But see *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 164 N. Y. App. D. 477, 150 N. Y. S. 17, 19. The court there said:

"The defendant invokes the rule that, while an anticipatory breach will entitle the party against whom it is made to sue at once for damages without tendering performance, still, in order to do so, he must elect to consider the contract as broken; and he urges that plaintiff's repeated tenders of performance are conclusive evidence that it did not so elect. We do not so understand the rule. It is true that, in order to sue upon an anticipatory breach, the party suing must elect to consider the contract as terminated by the breach; but there is no particular time within which he must make that election, and an offer, or repeated offers, to complete on the contract terms, or on modified terms, unless accepted by the vendee, does not constitute a waiver of the breach. *Canda v. Wick*, 100 N. Y. 127, 2 N. E. 381; *Poel v. Brunswick-Balke-*

Collender Co., 159 App. Div. 365, 144 N. Y. S. 725."

Ingraham, P. J., dissenting said: "None of these acts which are now relied upon to sustain the claim of an anticipatory breach by the defendant, was relied upon by the plaintiff, for they afterwards made abortive tenders of the rubber, treated the contract as in full force and effect and never, prior to the time that the amendment was made to the complaint, treated the acts of the defendant prior to the time of the refusal as an absolute and unequivocal breach of the contract. It is settled in this state that, for a party to such a contract to avail himself of such a repudiation, it must be adopted by the other party and acted upon by him. *Becker v. Seggie*, 139 App. Div. 463, 124 N. Y. S. 116; *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922." The Court of Appeals (221 N. Y. 127, 116 N. E. 789) reversed the decision of the Appellate Division of the Supreme Court and partly based its conclusion on similar reasoning to that of Ingraham, P. J. On the facts the decision of the upper court seems sound, since the plaintiff not only failed to manifest an election to treat the repudiation as a breach, but also while performance was still possible, itself imposed unwarranted conditions as the only ones on which

the other as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."⁸² This is a severe penalty imposed upon the injured party for not seizing the right moment. When A repudiates his promise, what is more natural or reasonable than for B to write urging him to perform. Yet if B does so, it seems not only does he lose his right of immediate action, but he is bound to perform his own promise, though he has reason to expect A will not perform his; as a condition of holding the repudiator liable after the time for performance arrives.⁸³ An intermediate case may be supposed where no performance under the contract is due from the injured party until after performance by the repudiator. Here there is no hardship in denying a right of action for the repudiation unless election to treat it as a breach is promptly made; and if the injured party not only fails to make such election but imposes conditions, not warranted by the contract, on his willingness to accept performance from the repudiation he will lose all right to maintain

it would perform; but so far as the decision casts discredit on the passage quoted above from the opinion of the majority of the lower court, there is cause for regret. See *infra*, § 1334.

⁸² *Frost v. Knight*, L. R. 7 Ex. 111, 112. Quoted as stating the law in *Leake, Contracts* (4th ed.), 618.

⁸³ In *Avery v. Bowden*, 5 E. & B. 714, 728, Campbell, C. J., speaking of remarks made to a ship captain who was acting on behalf of the promisee, said: "The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still con-

tinued to insist upon having a cargo in fulfilment of the charter party."

In accordance with this rule in *Dalrymple v. Scott*, 19 Ont. App. 477, the plaintiff lost his case. The defendant had repudiated the contract. The plaintiff did not manifest an election to treat that as an immediate breach, but on the contrary testified that he would have been willing to have accepted performance after the repudiation. When the time for performance had passed he brought an action. Judgment was given for the defendant, because the plaintiff had not performed or offered to perform on his part. See also *Reid v. Hoskins*, 6 E. & B. 953; *Smith v. Georgia &c. Co.*, 113 Ga. 975, 39 S. E. 410; *Shields v. Carson*, 102 Ill. App. 38; *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120, 116 N. E. 789.

an action at any time,⁸⁴ though he should himself also be free from liability.⁸⁵

§ 1334. American decisions opposed to English rule.

Most of the American decisions seem indisposed to follow the undesirable lead of the English decisions, holding rather that the repudiation though not taken advantage of as a cause of action is, nevertheless, unless withdrawn, operative as an excuse for the failure of the injured party to perform or to be ready and willing to perform,⁸⁶ if in fact the injured party was

⁸⁴ *Landes v. Klopstock*, 252 Fed. 89, 164 C. C. A. 201.

⁸⁵ See the following section.

⁸⁶ In *Tri-Bullion Smelting, etc., Co. v. Jacobsen*, 233 Fed. 646, 649, 147 C. C. A. 454, the court said: "Viewed, however, as an anticipatory breach, the action of Jacobsen in writing the letter of July 8, 1913, insisting that Tri-Bullion should carry out his contract, did not, in any manner, cure such anticipatory breach by Tri-Bullion. . .

"Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out."

In *United Press Assoc. v. National Newspaper Assoc.*, 237 Fed. 547, 150 C. C. A. 429, the court said: "The refusal of the defendant to perform the contract was without justification or excuse. It now remains to be seen if, under such conditions, the attempt of the plaintiff for about a month to try and get the defendant to perform the contract deprives it of its right to treat the persistent refusal of the defendant to perform it as ending the contract. It is true that the conduct of the plaintiff during the period from February 7 and 11, 1911, to March 10,

1911, kept the contract open for both parties. The defendant could have withdrawn its renunciation, either by an express declaration or by acts inconsistent therewith. It, however, said nothing, and the evidence shows that it was its intention to do nothing, towards continuing the contract. It is true that the plaintiff continued to furnish the service, but the defendant refused to pay for the same, which was the substantial consideration for the contract on the part of the plaintiff. We are of the opinion that on March 13, 1911, it was open to the plaintiff to treat the contract as ended on account of the refusal to substantially perform the same by the defendant."

In *Zuck v. McClure*, 98 Pa. 541, the court said of a repudiation, that "If not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance."

See also *Consumers' Bread Co. v. Stafford County Flour Mills Co.*, 239 Fed. 693, 152 C. C. A. 527; *Rederiaktiebolaget Amie v. Universal Transp. Co.*, 250 Fed. 400, 162 C. C. A. 470; *Progressive Smelting & Metal Corp. v. Ansonia Foundry Co.*, (Conn. 1918), 105 Atl. 322; *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575, 579; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Hadfield v. Colter*, 103 N. Y. Misc. 474, 170 N. Y. S. 643; *Mutual &c. Assoc. v. Taylor*,

induced by the repudiation to refrain from performance on his part.⁸⁷ The situation must not be confused with one where there has been a material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract. In such a case the injured party has a genuine election offered him of continuing performance or of ceasing to perform,⁸⁸ and any action indicating an intention to continue will operate as a conclusive choice;⁸⁹ not indeed depriving him of a right of action for the breach which has already taken place,⁹⁰ but depriving him of any excuse for ceasing performance on his own part. A reasonable man in the position of the injured party would understand this, since the wrongdoer is willing to continue performance; but where the contract is totally renounced there can be no real election between continuation and cessation of performance. The repudiator has announced that he will not perform and ordinarily maintains this attitude; and the American law though giving the injured party in such a case an election of remedies,⁹¹ has not only wisely denied him in most cases the right to continue performance,⁹² but has refused to regard a continued willingness to receive performance as more than an indication that if the repudiator will withdraw his repudiation, but not otherwise, the contract may proceed.

§ 1335. Withdrawal of repudiation.

Where a defendant has repudiated the contract after an actual breach but before the time for full performance has arrived, there seems no doubt that this repudiation can be withdrawn before the other party has either manifested an election to

99 Va. 208, 37 S. E. 854; *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250. Cf. *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623, 116 N. E. 115.

⁸⁷ The importance of this qualification is shown by *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 127, 116 N. E. 789. The defendant repudiated, but the plaintiff apparently still wishing to continue the contract made a tender of performance, but with an unwarranted condition

vitiating the tender. He later sought to recover on the ground that the defendant's repudiation excused the necessity of tender; but was rightly denied recovery. See *supra*, § 677.

⁸⁸ *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255.

⁸⁹ See *supra*, § 688.

⁹⁰ See *supra*, §§ 700 *et seq.*

⁹¹ See *infra*, § 1337.

⁹² See *supra*, § 1298.

rescind the contract, or changed his position in reliance on the repudiation in such a way as to make performance more burdensome.⁹³ And presumably if the repudiation was wholly anticipatory the same privilege would be allowed.⁹⁴ If, however, the injured party has changed his position such withdrawal is ineffectual.⁹⁵

§ 1336. Possible distinction between the effect of repudiation before breach and after partial breach of a contract.

In many of the cases discussing the doctrine of anticipatory breach, there had been already an actual breach of contract, but the time for the full completion of the defendant's performance had not yet arrived.⁹⁶ The inquiry suggests itself, are the rights of the parties different in any respect in such a case from one where the repudiation is wholly anticipatory? Of course, in a jurisdiction which denies altogether the doctrine of anticipatory breach, the distinction is vital. In a jurisdiction which accepts the doctrine there should be, it seems, no distinction between the two cases. But under the doctrine of anticipatory breach as stated by the English courts, and often repeated by American courts, a difference seems to exist. Where there has already been an actual breach of contract no election on the part of the plaintiff need be manifested. The breach, being a normal breach of contract, exists as soon as the defendant breaks his promise, irrespective of action by the plaintiff and will remain an enforceable breach until the Statute of Limitations has run. The plaintiff, it is true, may elect to continue the contract in spite of the breach, but this will require affirmative action on his part.⁹⁷ In the case of an anticipatory repudiation, however, as has been seen, some manifestation of election to treat the repudiation as a breach is requisite.

⁹³ Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378; Traver v. Halsted, 23 Wend. 66; Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981; J. P. Gentry Co. v. Margolius, 110 Tenn. 669, 75 S. W. 959; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1. See also Perkins v. Frazer, 107 La. 390, 31 So. 773.

⁹⁴ It was so stated in Zuck v. McClure, 98 Pa. 541.

⁹⁵ See cases in notes 93 and 94, also Quarton v. American Law Book Co., 143 Ia. 517, 529, 121 N. W. 1009, 32 L. R. A. (N. S.) 1.

⁹⁶ See *supra*, § 1317.

⁹⁷ See *supra*, § 686.

§ 1337. Summary of American doctrine in regard to anticipatory breach.

Unquestionably the great weight of American authority, whether rightly or wrongly, accepts the doctrine of anticipatory breach but with some differences from the English law. If the doctrine is to be accepted at all, the modifications which American decisions suggest should certainly be incorporated into it. The rights of a party to a bilateral contract of mutually dependent promises upon an anticipatory repudiation by the other party will then be: (1) To rescind the contract altogether, and if any performance has already been rendered by the injured party, to recover its value on principles of quasi-contract;⁸⁸ (2) to elect to treat the repudiation as a breach, either by bringing suit promptly, or by making some change of position, or (3), to await the time for performance of the contract and bring suit after that time has arrived. Even if the plaintiff thus elects to wait until the stated time for performance, he will be excused from the necessity of performing or being ready to perform on his own part unless the repudiating party withdraws his repudiation before a change of position by the injured party makes this performance more burdensome. Indeed, the injured party has no right to perform, if, by so doing, damages will be enhanced.⁸⁹

⁸⁸ See *supra*, §§ 1454 *et seq.*

⁸⁹ In *United Press Ass'n v. National Newspaper Ass'n.*, 237 Fed. 547, 553, 150 C. C. A. 429, the court stated the alternatives in language substantially that of the court in *Lake Shore &c. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, and other cases: "It is well settled that where one party repudiates a contract, and refuses longer to be bound by it, the injured party has an election to pursue one of three remedies: First, he may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; second, or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover

under the contract; third, or he may treat the repudiation as putting an end to the contract for all purposes of performance and sue to recover so far as he has performed, and for the profits he would have realized if he had not been prevented from performing. 6 R. C. L., § 389. There is no difference in the law as to the measure of recovery between anticipatory breaches before the time of the performance of the contract arrives and a refusal to further perform during the performance of the contract, except that the injured party may recover so far as he has performed." This statement, however, includes as a possibility, continuing performance as if there had been no repudiation. As has been seen (§ 1298), such a right is not generally allowed in the United States.

CHAPTER XXXVII

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

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§ 1338. Compensation is the fundamental principle.

For the injury caused by the non-performance of most contracts the primary if not the only remedy of the injured party is an action for damages for the breach. In fixing the amount of these damages, the general purpose of the law is, and should be, to give compensation:—that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.¹ In some cases this rule of law enables the court to fix with mathematical exactness the amount of a plaintiff's recovery, as in an action on negotiable paper or in other

¹ Lord Atkinson in *Wertheim v. Harman*, 1 Ex. 850, 855; *Federal Chicoutimi Pulp Co. [1911] A. C.* *Wall Paper Co. v. Kempner*, 244 Fed. 301, 307; *Parke, B.*, in *Robinson v.* 240, 243.

cases where there is a unilateral obligation for the payment of a liquidated sum of money; but frequently the jury must estimate under proper instructions from the court the amount which the plaintiff should receive. The principle of compensation though now definitely established was not that recognized in the early law. In the first place the amount of damages seems to have been in the control of a jury even where the contract called for a liquidated sum;² but the contrary principle is now well established. The measure of damages is subject to rules of law which cannot be disregarded by the jury.³ It also seems to have been the theory upon which recovery was allowed in the early law in assumpsit that the damages were based on the consideration given rather than on the value of the defendant's performance.⁴ Such a rule was natural when assumpsit was regarded as in the nature of a tort, and when therefore it might well seem that the law should put the plaintiff in as good a position as he was in before the contract was entered into rather than in as good a position, as he would have been in had the contract been carried out.

§ 1339. Compensation should be not the value of the contract, but of the performance of the contract.

It is sometimes said that the law regards a breach of contract as in effect a destruction of the contract by the wrongdoer, for which the law substitutes a right of action for damages in favor of the injured party, and that therefore the appropriate measure of damages is the value of the contract. Though little practical difficulty usually follows from such a statement, it is not strictly accurate. Except in a case presenting the anomalous doctrine of anticipatory breach, it is necessarily true that at the time of the breach of contract the time for performing the contract had arrived. It is, therefore, performance that the

²Sedgwick on Damages, § 605.

³*Alder v. Keighley*, 15 M. & W. 117, 120; *Jenkins v. Kirtley*, 70 Kans. 801, 79 Pac. 671; *Leland v. Stone*, 10 Mass. 459, 462; *Dana v. Fiedler*, 12 N. Y. 40, 50, 62 Am. Dec. 130; *McDowell v. Oyer*, 21 Pa. 417.

⁴*In Best v. Jolly*, 1 Sid. 38, it was

said: "Where there were two considerations, and one is good and the other void, the damages given upon it shall be intended to be all given for the good consideration." See also *Cripps v. Goulding*, 1 Rolle's Abr. 30; *Crisp v. Gamel*, Cro. Jac. 128.

injured party was then entitled to, and it is not the contract of which he has been wrongly deprived by the breach, but the performance of the contract. The law in giving him a right of action for damages, therefore, should adjust the damages in such a way as to equal the value of the performance. Not, indeed, necessarily the value of the defendant's performance alone, for in a bilateral contract not yet fully performed by the plaintiff, unless the promises are independent, the performance by the defendant had it been made would necessarily have been accompanied or followed by performance on the part of the plaintiff. The defendant's non-performance, therefore, saves the plaintiff from the labor or expense of wholly or partly performing on his own part, and in order to settle finally the rights of both parties in a single action, the court deducts this saving made by the plaintiff from the value of the performance which the defendant should have made. Moreover, though the time for some performance by the defendant has arrived, the time for all the performance he has promised may not have; and the present value of this future performance must often be discounted. But even for such promised performance the measure of damages is not the value of a present obligation to render this performance in the future. If the case is not tried too soon to make it possible, evidence is admissible to show that in the future the damage if not speculative or remote actually turned out to be greater or less than the value which would have been placed at the time of the breach on the future undertakings in the contract.⁵

§ 1340. Exceptions to the principles of compensation.

Though the general principle stated in the preceding section is clear, the rule of compensation is not without exception. There are instances⁶ where the law because of the lack of definite proof of damages caused by the non-performance of the defendant's promise or for other reasons allows the plaintiff to recover in an action on a contract such damages as will place him in as good a position as he would have been in had the contract not been entered into. In some instances also the

⁵ See *infra*, §§ 1347, 1393.

⁶ See *infra*, §§ 1341, 1363, 1396, 1402.

rule of compensation is infringed by allowing the plaintiff to recover exemplary damages in excess of the value of the wrong. In some jurisdictions it is true such damages are never allowed.⁷ But in most jurisdictions exemplary damages are allowed in certain cases. Generally it is only in actions of tort that they are permitted;⁸ but in actions for breach of promise to marry exemplary damages are allowed if the defendant's conduct was wanton and such as to show a total disregard of the plaintiff's feelings.⁹ In actions against public service companies also for breach of duty which though imposed by law is enforced in an action of contract exemplary damages are often allowed.¹⁰ Likewise, in an action on a statutory bond, breach of which involves a tort for which exemplary damages would be appropriate, such damages are allowed in some jurisdictions,¹¹ but other courts take a contrary view.¹² There are also certain

⁷ The following cases are actions of tort but the rule they state would be applied *a fortiori* to actions of contract. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 84 N. E. 1018, 126 Am. St. Rep. 454; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, 82 N. W. 28. In Colorado and Washington, also, except in certain cases where especially permitted by statute such damages are not allowed. *Howlett v. Tuttle*, 15 Col. 454, 24 Pac. 921; *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626.

⁸ That they are not generally allowed in actions of contract, see—*Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275; *Ford v. Fargason*, 120 Ga. 708, 48 S. E. 180; *Cumberland & T Co. v. Cartwright & Tel. Co.*, 128 Ky. 395, 108 S. W. 875; *Trout v. Watkins Livery & Co.*, 148 Mo. App. 621, 130 S. W. 136; *Richardson v. Wilmington & R. Co.*, 126 N. C. 100, 35 S. E. 235. In South Carolina any

breach of contract, accompanied by fraud may be indemnified by exemplary damages. *Prince v. State Mutual Life Ins. Co.* 77 S. C. 187, 57 S. E. 766.

⁹ *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557; *Sneve v. Lunder*, 100 Minn. 5, 110 N. W. 99; *Johnson v. Jenkins*, 24 N. Y. 252; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; *Kaufman v. Fye*, 99 Tenn. 145, 42 S. W. 25.

¹⁰ *Pullman Co. v. Lutz*, 154 Ala. 517, 45 So. 675, 14 L. R. A. (N. S.) 907, 129 Am. St. Rep. 67; *Strauss v. Postal & Co.*, 83 S. C. 22, 64 S. E. 913; *Steinberger v. Western Union Tel. Co.*, 97 Miss. 260, 52 So. 691; *Trout v. Watkins Livery & Co.*, 148 Mo. App. 621, 130 S. W. 136.

¹¹ *Floyd v. Hamilton*, 33 Ala. 235; *Richmond v. Shickler*, 57 Iowa, 484, 10 N. W. 882; *Rankert v. Elliot*, 11 Lea, 235; *Gross v. Hays*, 73 Tex. 515, 1 S. W. 523; *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384.

¹² *Cobb v. People*, 84 Ill. 511; *Johnson v. Williams*, 23 Ky. L. Rep. 658, 63 S. W. 759; *McClendon v. Wells*, 20 S. C. 514; *North v. Johnson*, 58

other rules of damages which qualify the general principle; as for instance, rules limiting the recovery of consequential damages actually suffered from a breach,¹³ confining the damages recoverable for the non-payment of money to interest,¹⁴ and denying as a general rule damages for mental suffering caused by breach of contract.¹⁵ But where other than pecuniary benefits are contracted for such damages have been allowed.¹⁶ It should be added that actual damage is not a necessary element of an action of breach of contract. If a contract has been broken and the plaintiff cannot prove that any damage has been caused he is, nevertheless, entitled to nominal damages.¹⁷ Even though the plaintiff is benefited by a breach of contract his action is maintainable.¹⁸

§ 1341. Recovery for the plaintiff's preparations.

Since the measure of recovery in an action of contract is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended, recovery cannot ordinarily be allowed for expenses incurred by the plaintiff in preparing to perform. Such preparations would have been required if the contract had been carried out, and the only reward which would have been received for them would have been the defendant's performance. To

Minn. 242, 59 N. W. 1012; *Emerson v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671.

¹³ See *infra*, § 1345.

¹⁴ See *infra*, § 1410.

¹⁵ *Russell v. Western U. T. Co.*, 3 Dak. 315, 19 N. W. 408; *Beaulieu v. Great Northern Ry.*, 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564. An exception to this rule has been made in actions for breach of promise of marriage. See the following note.

¹⁶ *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855; *Lewis v. Holmes*, 109 La. 1030, 34 So. 66, 61 L. R. A. 274; *Smith v. Leo*, 92 Hun, 242, 36 N. Y. S. 949; *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. 1; *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695, 703, 8 S. W.

574, 6 Am. St. Rep. 864. It is perhaps on this principle that such damages have been allowed in an action for breach of promise of marriage. *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Coolidge v. Neat*, 129 Mass. 146; *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936.

¹⁷ *Treadwell v. Tillis*, 108 Ala. 262, 18 So. 886; *Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729; *Sloggy v. Crescent Creamery Co.*, 72 Minn. 316, 75 N. W. 225; *VanSchoick v. VanSchoick*, 76 N. J. L. 242, 69 Atl. 1080; *Coppola v. Kraushaar*, 102 N. Y. App. Div. 306, 92 N. Y. S. 436; *Cooper v. Clute*, 174 N. Car. 366, 93 S. E. 915.

¹⁸ *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. 693.

allow recovery for the expense of preparation as such, involves a rescission with restitution rather than an enforcement of the contract. Nevertheless, in cases where any profits which the plaintiff might have made from the contract are so uncertain, that they cannot be used as an effective measure of damages, the plaintiff has been allowed to recover expenses incurred in preparations.¹⁹ It is to be observed that the ordinary common counts by means of which a quasi-contractual right for restitution is generally enforced under common-law procedure cannot be applied to an action to recover expenses of preparation from which the defendant derived no benefit. In allowing such expenses as damages in an action on the contract, a court may be merely enforcing in the only action available a right to restitution which is becoming more clearly recognized as an appropriate alternative remedy for breach of contract. Many cases cited in this section may be explicable on this ground, but in others the plaintiff is allowed to combine some elements of damage appropriate for putting him in as good a position as he would have been in had the contract been performed with the element of expense of preparation. Unless it can be said that by a somewhat artificial presumption the court is justified in assuming that the profit on the contract would at least have equalled the expense of preparation, it is hard to explain these cases satisfactorily. The boundaries distinguishing the cases where expense of preparation can be recovered as damages for breach of contract are somewhat difficult to mark. The cases included are chiefly contracts for building or for work and labor, or for arbitration.²⁰ So for a breach of warranty in the

¹⁹ *Phillips &c. Co. v. Seymour*, 91 U. S. 646, 654, 23 L. Ed. 341; *Griffen v. Sprague Electric Co.*, 115 Fed. 749; *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Worthington v. Gwin*, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382; *Cederberg v. Robison*, 100 Cal. 93, 34 Pa. 625; *McKensie v. Mitchell*, 123 Ga. 72, 51 S. E. 34; *Southern Pac. Co. v. American Well Works*, 172 Ill. 9, 49 N. E. 575; *Paola Gas Co. v. Paola Gas Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; *Johnson v. Arnold*, 2 Cush. 46; *New Haven & N. Co. v.*

Hayden, 117 Mass. 433; *Quay v. Duluth &c. R. Co.*, 153 Mich. 567, 116 N. W. 1101, 18 L. R. A. (N. S.) 250; *People v. Flynn*, 189 N. Y. 180, 82 N. E. 169; *Nelson v. Hatch*, 70 N. Y. App. Div. 206, 75 N. Y. S. 389; *K. & R. Filan Co. v. Brady*, 172 N. Y. S. 268; *Brown v. East Carolina R. Co.*, 154 N. C. 300, 70 S. E. 625; *Rogers v. Davidson*, 142 Pa. 436, 21 Atl. 1083; *Martin v. Seaboard, etc., Ry.*, 70 S. C. 8, 48 S. E. 616.

²⁰ See cases in the preceding note.

quality of seeds, though where there is only a partial failure of the crop, the plaintiff is allowed to recover for the difference in value between the crop raised and the crop which should have been raised, some cases hold that where there has been no germination, damages should be measured by the cost of the seed plus the cost of planting, plus the value of the use of the land less any value in the use remaining after the time when the failure of the seed had become obvious.²¹

Expense of preparations for transacting a business which owing to the defendant's breach of contract was never entered upon has also been allowed.²²

§ 1342. Value.

Since the only compensation a court of law can give is pecuniary, it is constantly necessary in applying the rule of compensation to determine the pecuniary value of performance which has been promised and frequently also of performance which has been given. An attempt to fix pecuniary value involves the use of standards, and different standards are conceivable. There is a standard of market price if there is a market for the performance in question; there is a standard of the cost of replacing; there is the standard of the pecuniary value

²¹ *Moorhead v. Minneapolis Seed Co.*, 139 Minn. 11, 165 N. W. 484, L. R. A. 1918 C. 391; *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. Rep. 798. In the former case the court said: "It is manifest that where there is a partial crop, and that is the usual case, the first measure [Difference between the value of the crop as it was, and as it should have been] is the true one. There is no other. Some of the cases involving partial failures and applying the first measure distinctly state that the second measure is the true one when the loss is total. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410; *Ford v. Farmers' Exchange*, 136 Tenn. 287, 189 S. W. 368, L. R. A. 1917 B. 1106. Still there are cases applying rather as a matter of course and without dis-

cussion the first measure when the failure is total. *Shaw v. Smith*, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681; *Crutcher v. Elliott*, 13 Ky. L. Rep. 592; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Depew v. Peck Hardware Co.*, 121 N. Y. App. Div. 28, 105 N. Y. S. 390." The Minnesota court deemed the measure of damages based on the crop which should have been raised too conjectural where there was a total failure.

²² *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, 39 Fed. 440, 3 L. R. A. 587; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015; *Howe Machine Co. v. Bryson*, 44 Ia. 159, 24 Am. Rep. 735; *K. & R. Film Co. v. Brady*, 172 N. Y. S. 268; *Sterling O. Co. v. House*, 25 W. Va. 64; *Ramsey v. Holmes, etc., Co.*, 85 Wis. 174, 55 N. W. 391.

of the performance for use by a party to a contract. Where there is a market price this will generally be the test though in special cases the defendant may be chargeable under another standard.

It is not simply the value of the defendant's performance which may be in question but that of the plaintiff, and it is possible for the defendant to assume such liability that he is chargeable with a low value for the plaintiff's performance, and a high value for his own.²³ On the other hand, where the defendant has notice of a special use for goods which he has promised, though the goods have a market value, it will not be the sole basis of the plaintiff's recovery if the goods are not immediately replaceable.²⁴

§ 1343. Value to the plaintiff.

As the plaintiff is the injured party, the fundamental inquiry is the value to him of the performance of the contract (which may be a different thing from the value to the general public) subject to the qualification which limits the defendant's liability to consequences which he might have foreseen when the contract was made.²⁵ Thus, as has been said, if the plaintiff agreed to sell by description goods of his own manufacture for a certain price, and the defendant failed to take and pay for them, the value to be deducted from the price which the defendant promised to pay is the cost to the plaintiff of procuring the article, and if he can obtain it by manufacturing it himself for less than the market price, this lesser cost will be the proper deduction. So if the subject of the sale was a specific chattel having but slight market value, though having a greater value to the defendant, the smaller value is the only credit the defendant can claim as an offset to his own obligation to pay the price. On the other hand if the seller had broken the contract and the buyer had brought suit, the value of the goods for the purpose of damages would be their value to the buyer—the market price, or cost of securing other similar goods—not the seller's cost of manufacturing them.

²³ See the following section.

²⁴ *Supra*, § 1344.

²⁵ See *infra*, § 1347.

§ 1344. Proximate and natural consequences.

With the qualification stated in the following sections a plaintiff can recover for breach of contract compensation for only such consequences of the breach as are both proximate and natural. When a seller wrongfully fails to deliver the promised goods, the buyer's damage from inability to use them for a special profitable purpose he has had in mind is a consequence which is proximate, but not natural or to be reasonably expected by the seller. The law of torts and of contracts differ in this respect. For a tort the defendant becomes liable for all proximate consequences, while for breach of contract he is liable only for consequences which were reasonably foreseeable at the time when it was entered into, as probable if the contract were broken.²⁶ For these he is liable whether they were actually foreseen or not,²⁷ or whether even the criminal act of a third person intervenes.²⁸

§ 1345. Damages must be reasonably certain.

Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will

²⁶ See, e. g., *Cory v. Thames, etc., Ship Building Co., Ltd.*, L. R. 3 Q. B. 181 (cf. *Shaw v. Symmons*, [1917] 1 K. B. 799, where a bailee was held liable for the loss of the bailed goods by accidental fire, because he had failed to redeliver them within a reasonable time after demand as bound by his contract). The following cases also illustrate the general rule: *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171, 23 Sup. Ct. 754; *Fuerst v. Polasky*, 249 Fed. 447, 162 C. C. A. 13; *Cassell's Mill v. Strater, etc., Co.*, 166 Ala. 274, 51 So. 969; *Western Union Tel. Co. v. Stewart* (Ala. App.), 79 So. 200; *Lee Lumber Co. v. Union Naval Stores Co.* (La.), 77 So. 131; *Illinois Central R. Co. v. New Orleans Terminal Co.*

(La.), 78 So. 738; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184; *Davis v. New England Cotton Yarn Co.*, 77 N. H. 403, 92 Atl. 732; *Dunning v. Reid*, 76 N. J. L. 384, 69 Atl. 1013; *Meyer v. Haven*, 70 N. Y. App. D. 529, 75 N. Y. S. 261; *Meyer v. Hudson Trust Co.*, 181 N. Y. App. D. 69, 163 N. Y. S. 387; *Cornelius v. Lytle*, 246 Pa. 205, 92 Atl. 78; *Thomas Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. 468, 104 Atl. 750; *Spies v. Mutual Trust Co.*, 258 Pa. 414, 102 Atl. 121; *Sweeney v. Lewis & Co.*, 66 Wash. 490, 119 Pac. 1108. See also *infra*, § 1357.

²⁷ See cases in the preceding note.

²⁸ *De La Bere v. Pearson*, [1908] 1 K. B. 280; *Deane v. Michigan & Co.*, 69 Ill. App. 106.

not justify damages based on the assumption that the profit would have been made.²⁹ But though substantial damage must be shown in order to justify recovery of more than a nominal sum, the exact amount need not be. Where it is clear that substantial damage has been suffered the impossibility of proving its precise limits is no reason for denying substantial damages altogether.³⁰ Under this principle, profits that the plaintiff would have made if the contract had been carried out may be recovered if their loss was a proximate and natural consequence of the breach, and any reasonable method of estimation is possible, even though the exact amount of profit to have been anticipated is necessarily uncertain.³¹ On the other hand, "such

²⁹ *Troy, etc., Co. v. Dolph*, 138 U. S. 617, 34 L. Ed. 1083; *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Deslandes v. Scales*, 187 Ala. 25, 65 So. 393; *Hart v. Georgia R. Co.*, 101 Ga. 188, 28 S. E. 637; *Alkahest Lyceum System v. Curry Co.*, 6 Ga. App. 625, 65 S. E. 580; *Morgan v. Sutlive*, 148 Ia. 318, 126 N. W. 175; *Lowrie v. Castle*, 225 Mass. 37, 51, 113 N. E. 206; *Wade v. Belmont & Co.*, 87 Neb. 732, 128 N. W. 514, 31 L. R. A. (N. S.) 743, 138 Am. St. Rep. 506; *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Delp v. Edlis*, 190 Pa. 25, 42 Atl. 462.

³⁰ *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168, 4 Sup. Ct. 81; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 549, 38 L. Ed. 814, 14 Sup. Ct. 876; *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566, (Conn. 1919), 105 Atl. 680; *Wright v. Maynard Corset Co.*, 229 Mass. 343, 118 N. E. 654; *Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Depew v. Peck, etc., Co.*, 121 N. Y. App. Div. 28, 105 N. Y. S. 390.

³¹ *Fletcher v. Tayleur*, 17 C. B. 21; *Howard v. Stillwell Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147, 11 S. Ct. 500; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 549, 38 L. Ed. 814, 14 Sup.

Ct. 876; *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Sanford v. East R. I. District*, 101 Cal. 275, 35 Pac. 865; *Chapman v. Kirby*, 49 Ill. 211; *Washington County & Co. v. Garver*, 91 Md. 398, 46 Atl. 979; *Dennis v. Maxfield*, 10 Allen, 138; *Emerson v. Pacific Coast & Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. 603; *Lewistown Iron Works v. Vulcan Process Co.*, 139 Minn. 180, 165 N. W. 1071; *White v. Leatherberry*, 82 Miss. 103, 34 So. 358; *Masterton v. Mayor*, 7 Hill, 61, 42 Am. Dec. 38; *Bagley v. Smith*, 10 N. Y. 499, 61 Am. Dec. 756; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291; *Fletcher v. Jacob Dold Packing Co.*, 41 N. Y. App. Div. 30, 58 N. Y. S. 612; *Depew v. Peck & Co.*, 121 N. Y. App. D. 28, 105 N. Y. S. 390; *Bredemeier v. Pacific S. Co.*, 64 Ore. 576, 131 Pac. 312; *Hughes v. Robinson*, 60 Mo. App. 194, 195. See also *infra*, §1355, n. 74.

In *Gagnon v. Sperry, etc., Co.*, 206 Mass. 547, 555, 92 N. E. 761, it was said: "The loss of prospective profits may be allowed as an element of damages in an action for breach of contract where it appears that the loss was the natural, primary and probable consequence of the breach, that the profits arising from the performance of the contract or the loss

damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty. The nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. When the elements, upon which the claim for prospective profits rests, are numerous and shifting contingencies whose relation to the wrong complained of is problematical, and such profits are not provable with assurance as a trustworthy result of the alleged cause, then there can be no recovery. Manifest ambiguities in ascertaining what would have been the course of events in the face of complicated factors, under circumstances which have never come to pass, and inherent difficulties in calculating the amount of prospective gains, prevent the recovery of damages. Pure chances lying between the alleged wrong and the anticipated profits, dependent upon unsettled conditions, render impracticable the assertion of cause and effect."³²

likely to result from its non-performance were within the contemplation of the parties, and that the profits are not so uncertain or contingent as to be incapable of reasonable proof. *Fox v. Harding*, 7 Cush. 516; *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219, and cases cited; *Hadley v. Baxendale*, 9 Exch. 341; *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *Howard v. Stillwell, etc., Manuf. Co.*, 139 U. S. 199, 35 L. Ed. 147; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38."

³² *Lowrie v. Castle*, 225 Mass. 37, 51, 113 N. E. 206, citing *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020; *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *John Hetherington & Sons, Ltd., v. William Firth Co.*, 210 Mass. 8, 95 N. E. 961; *New England Iron Works Co. v. Jacot*, 223 Mass. 216, 220, 111 N. E. 867; *Doane v. Preston*, 183 Mass. 569, 572, 67 N. E. 867; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255; *United*

States v. Behan, 110 U. S. 338, 344, 28 L. Ed. 168, 4 Sup. Ct. 81; *Holt v. United Security Life Ins. Co.*, 47 Vroom, 585, 596; *Emerson v. Pacific Coast, etc., Co.*, 96 Minn. 1, 4, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603; *Winslow Elevator Co. v. Hoffman*, 107 Md. 621, 640, 69 Atl. 394, 17 L. R. A. (N. S.) 1130; *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, 141 N. C. 284, 53 S. E. 885, 8 L. R. A. (N. S.) 255; *McKinnon v. McEwan*, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458; *Webster v. Beau*, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81; *Wright v. Mulvaney*, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. (N. S.) 807, 23 Am. St. Rep. 393; *Paola Gas Co. v. Paola Glass Co.*, 56 Kans. 614, 44 Pac. 621, 54 Am. St. Rep. 598. See also *United States v. Purcell Envelope Co.* 51 Ct. Cl. 211, affd. 249 U. S. 313, 395, Ct. 300.

§ 1346. Certainty of damage and certainty of amount of damage.

An attempt is sometimes made to distinguish between certainty that some damage has been caused, and certainty as to the amount of damage; but no broad statement can be made that where it is uncertain that any damage has been caused by the breach no recovery is allowable. In almost every case where prospective profits are allowed it will be true that the profit was a chance—dependent upon the ability to make a large number of contracts with other persons on advantageous terms. All reasonable expectations might have been disappointed by the happening of divers contingencies. But if the plaintiff has given valuable consideration for the promise of a performance which would have given him a chance to make a profit, the defendant should not be allowed to deprive him of that performance without compensation unless the difficulty of determining its value is extreme. In a recent English case³³ the plaintiff by contract was entitled to become one of fifty persons, twelve of whom were to be selected by judges for the bestowal of prizes. The plaintiff was not notified of the time when the decision and award was to be made and therefore failed to present herself, and twelve other persons were awarded the prizes. A recovery of substantial damages was upheld. It was recognized that the plaintiff would have had, if the defendant had not committed a breach, about one chance in four of securing a prize. The court declined to take a distinction between a chance and a probability so far as the right to recovery was concerned. As was said in a Minnesota decision:³⁴ “It is no exoneration to defendant that his misconduct, which has made inquiry as to the quantum of harm necessary, renders that inquiry difficult.”³⁴ The best the law can do is to award approximate compensation. Its failure to do even and exact justice in such cases is not more conspicuous than in many others. No other remedy is available. To allow only for loss of time and

³³ *Chaplin v. Hicks* [1911] 2 K. B. 786.

573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603.

³⁴ *Emerson v. Pacific Coast, etc., Packing Co.*, 96 Minn. 1, 8, 104 N. W.

³⁴ Citing *Simpson v. London, etc., Ry. Co.*, 1 Q. B. Div. 274; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291.

expenses would put a premium upon breaking contracts and deny substantial justice."

Though the fact that the plaintiff's damage is uncertain in amount or even that it is uncertain that substantial damage has been caused should not deprive the plaintiff of a right to compensation for the loss of the defendant's performance which would have given the plaintiff a chance to make profit or avoid damage, such uncertainty is a good reason for applying some other test, if another test is possible, for estimating his damage than by letting a jury guess at the value of the plaintiff's chance or probability by seeking to estimate his probable profits and losses. For this reason where the performance of which the plaintiff has been deprived has a market value, courts will be more reluctant to allow the test of prospective profits than in a case where if prospective profits are not allowed the plaintiff will be denied relief altogether. Thus where the defendant has wrongfully broken a contract to furnish power to run a mill, some courts restrict the damages to a difference between the rental value of the mill if the contract had been kept and its rental value in view of breach.³⁵ Other courts allow loss of profits to be estimated by the jury.³⁶ But courts which would deny the plaintiff in such a case the right to recover anticipated profits would doubtless allow proof of such profits in a case where no other method of estimating the plaintiff's damage was possible and where, therefore, a rejection of the test of anticipated profits would result in denying the plaintiff all substantial relief. Where a breach of contract involves deprivation of a chance which has value in a business sense, a just reluctance will be felt by most courts to deny altogether the recovery of substantial damages.

³⁵ *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Foundry, etc., Co. v. Union Compress, etc., Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482; *Hurxthal v. St. Lawrence & Co.*, 65 W. Va. 346, 64 S. E. 355. See also *Rogers v. Bemus*, 69 Pa. 432; *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366;

Wade v. Belmont & Co., 87 Neb. 732, 128 N. W. 514, 31 L. R. A. (N. S.) 743.

³⁶ *Johnson v. Wild Rice, etc., Co.*, 118 Minn. 24, 136 N. W. 262; *Clifford v. Richardson*, 18 Vt. 620. See also *Carter v. Cairo, etc., Ry.* 145 Ill. App. 653; *Carter v. Cairo U. & C. R. Co.*, 240 Ill. 152, 88 N. E. 493; *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124.

§ 1347. Illustrations of consequential damages allowed when the defendant had proper notice.

When a defendant has been notified, before entering into the contract in question, of facts indicating that unusual damages will follow or may follow his failure to perform his agreement, he is liable for such damages. Common consequential damages of this sort are those suffered from loss of a resale.³⁷ The defendant may have had notice of a sub-contract but not of the price at which the resale was to be made. In such a case he will be liable for such ordinary profit as might be expected on a resale.³⁸ Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated,³⁹ and defendant knew that other goods of the kind contracted for could not be obtained by the buyer. The same principle applies where a seller has notice of a particular use for the goods contracted for, which will be defeated if the contract is not fulfilled. This has been held in regard to contracts to deliver machinery, lack of which caused a loss of production or injury to material, whether the action is against a seller or a carrier.⁴

³⁷ *Federal Wall Paper Co. v. Kempner*, 244 Fed. 240; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Carolina Portland Cement Co. v. Columbia Imp. Co.*, 3 Ga. App. 483, 60 S. E. 279; *Hagan v. Rawle*, 143 Ill. App. 543; *Pulaaki Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96; *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67; *Delafield v. J. K. Armsby Co.*, 131 N. Y. App. Div. 572, 116 N. Y. S. 71, affd. 199 N. Y. 518, 92 N. E. 1083; *Meyer v. Rottenberg* (Supr. Ct. App. Term.), 168 N. Y. S. 630; *Chisholm & Co. Mfg. Co. v. United States & Co.*, 111 Tenn. 202, 77 S. W. 1062; *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100; *Hubbard Steel Foundry Co. v. Federal Bridge & Co.*, 169 Wis. 277, 171 N. W. 949.

³⁸ *Morgan & Wright v. Sultive Bros.*, 148 Iowa, 318, 126 N. W. 175;

Collins v. A. Luban Co., 127 N. Y. S. 461; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487. But if the price was exceptional or extraordinary, such recovery is not allowable. *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131.

³⁹ *Hammond v. Bussey*, 20 Q. B. Div. 79; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Pulaaki Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96; *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100.

⁴⁰ *D. A. Tompkins Co. v. Monticello C. O. Co.*, 153 Fed. 817; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; *Elsy v. Adams Express Co.*, 141 Ia. 407, 119 N. W. 705; *Bates Machine Co. v. Norton Iron Works*, 113 Ky. 372, 68 S. W. 423; *Industrial Works v. Mitchell* 114 Mich. 29, 72 N. W. 25;

So for breach of a contract to deliver raw material or other goods,⁴¹ or land or buildings known to be designed for a particular use,⁴² or a telegram containing a message indicating by its contents not only that it is important, but the nature of the business to which it relates,⁴³ or to do work known to be

Cleveland, etc., *Co. v. Consumers' Carbon Co.*, 75 Ohio St. 153, 78 N. E. 1009; *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155; *Story Lumber Co. v. Southern Ry.*, 151 N. C. 23, 65 S. E. 460; *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 584, 41 S. E. 797.

⁴¹ *Gee v. Lancashire, etc., Ry. Co.*, 6 H. & N. 211; *Taber Lumber Co. v. O'Neal*, 160 Fed. 596, 87 C. C. A. 498; *Iowa Mfg. Co. v. B. F. Sturtevant Co.*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *Pacific, etc., Works v. California Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108; *Ledgerwood v. Bushnell*, 128 Ill. App. 555; *Meyer v. Haven*, 70 N. Y. App. Div. 529, 75 N. Y. S. 261; *Lukens Iron & Steel Co. v. Hartmann-Greiling Co.*, 169 Wis. 350, 172 N. W. 894. In *Hammer v. Schenfelder*, 47 Wis. 455, 2 N. W. 1129, damage for loss of meat was held recoverable for breach of a contract to deliver ice, the seller knowing the ice was needed to preserve meat. If damages were not foreseeable, they are not recoverable. *Thomas Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. 468, 104 Atl. 750.

⁴² *O'Conner v. Nolan*, 64 Ill. App. 357; *Skinner v. Gibson*, 86 Kans. 431, 121 Pac. 513; *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913 D. 205.

⁴³ *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156. In *Stone & Co.*

v. Postal Telegraph Cable Co., 35 R. I. 498, 509, 87 Atl. 319, 46 L. R. A. (N. S.) 180, the court said:—

"The plaintiff contends, however, that under the authority of a number of cases in several of the states, enough appeared in the messages in question to show that they related to business transactions between the plaintiff and the senders and that that is sufficient to charge the defendant with all the damages resulting from its negligence in transmission and delivery. *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583. The plaintiff claims that that circumstance would bring this case within the portion of the rule in *Hadley v. Baxendale*, which provides that if the special circumstances under which the contract was made were communicated to the defendant it would be liable for the extraordinary damages which might arise from a breach of the contract under those special circumstances. The weight of authority, however, and it seems to us the better reason is, that the knowledge merely that the messages are important or that they relate to a business transaction without information as to the exact nature and extent of that business transaction does not constitute such a disclosure of special circumstances as would render the defendant liable for unusual damages arising from a breach of the contract. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. 1098; *Wheelock v. Postal Telegraph Cable Co.*, 197 Mass. 119, 83 N. E. 313; *Baldwin v. United States Telegraph*

needed for a purpose which will be defeated if the contract is broken.⁴⁴

§ 1348. Principle is applicable to partial breach.

The principle is applicable to a partial as well as to a total breach. Thus the importance of performance exactly at the time agreed or with unusual promptness may be brought home to the defendant by notice which will make him liable for exceptional consequences of delay.⁴⁵ If the action is against a carrier for breach of a contract of interstate carriage, the inquiry may be made whether the Interstate Commerce Acts will permit a carrier to subject itself to heavy consequential damages for the same rate as is fixed by its schedules for a contract of transportation without such damages. Certainly if liability to consequential damages can be regarded as based on a contractual agreement the assumption of extraordinary liability could not be allowed without special provision in the schedules.⁴⁶

Not only profits prevented but losses sustained are within the rule. Losses which would not otherwise have been foreseeable as likely to happen if a contract was broken may be taken into consideration if in view of the circumstances of which the defendant had notice when he entered into the contract he might have anticipated them.⁴⁷

Co., 45 N. Y. 744, 6 Am. Rep. 165; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471, 17 Am. Rep. 452; *United States Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

⁴⁴ *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611.

⁴⁵ *Iowa Mfg. Co. v. B. F. Sturtevant Co.*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *Cobb, Bladell & Co. v. Illinois Central Railroad Co.*, 38 Iowa, 601; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25; *Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229; *Wolfe v. Weir*, 61 N. Y. Misc. 57, 112 N. Y. S. 1078; *Waugh v. Gulf, C. & S. F. Ry.* (Tex.

Civ. App.), 131 S. W. 843. In *Hart-Parr Co. v. Barth Mfg. Co.*, 249 Fed. 629, 161 C. C. A. 539, there having been no prior notice such damages were denied.

⁴⁶ See *supra*, § 1073.

⁴⁷ *Iowa Mfg. Co. v. B. F. Sturtevant Co.*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Nelson v. Wilson*, 157 Ia. 80, 137 N. W. 1048; *Feland v. Berry*, 130 Ky. 328, 113 S. W. 425; *Berghuis v. Schults*, 119 Minn. 87, 137 N. W. 201; *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67; *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129.

§ 1349. Unilateral and bilateral contracts.

Where a unilateral contract is broken, the only performance to be valued is that of the defendant promisor. The plaintiff *ex hypothesi* has already performed and is therefore entitled to the full value of the defendant's performance. The situation is the same where the contract was originally bilateral but the plaintiff has fully performed his part. Where, however, a bilateral contract is wholly or partly unperformed by the plaintiff, a distinction must be taken between the usual case of a bilateral contract with dependent promises and the exceptional case of a bilateral contract with mutually independent promises. In the former case if there has been a total breach of contract, the value of the performance promised by the plaintiff and still unperformed by him must be deducted from the value of the performance still due from the defendant.

In the exceptional case of independent promises the plaintiff's recovery will be governed by the same principles as if the defendant's promise was unilateral. There may indeed in such a case be a right of set-off, recoupment or counterclaim, but the law of damages will not adjust in an action by one party, the rights of both, except on the basis of setting off against one another two cross claims.

§ 1350. Rule of damages where promises are dependent.

Where not only the promises but also the performances in a bilateral contract are intended as the exchange for one another,⁴⁸ it may be supposed (1) that the plaintiff's performance was to precede that of the defendant; (2) that the performances were concurrently due, or (3) that the plaintiff's promise was to follow the performance by the defendant. In neither of the first two cases supposed is there any difficulty in effecting by the measure of damages applied a cancellation of the mutual obligations of the parties. In the case first supposed if the plaintiff has already performed, the defendant's obligation became absolute and the measure of damages will be based on the full value of the performance due from the defendant. If the plaintiff has not performed but has been excused from performing, the value of the plaintiff's performance will be deducted

⁴⁸ See *supra*, §§ 812 *et seq.*

from the value of the defendant's performance. In the second case supposed the situation is similar; the plaintiff will ordinarily not have performed but will have merely tendered performance conditionally; therefore the value of his performance must be credited to the defendant. In the third case, however, the problem is more troublesome. It may seem that since a right of action arises as soon as the defendant has broken his promise the plaintiff should at once acquire a right of action for the full value of the defendant's performance, though it may be that the plaintiff himself will not subsequently perform, and in that event the recovery of the plaintiff against the defendant will prove excessive. If the plaintiff is bound to perform the subsequent act and is able to do so; and if the defendant will acquire an effective right of action against him later, the result is proper. The defendant when he made a contract of the kind in question assumed the risk incident to giving credit to the plaintiff. It may be, however, that the plaintiff has been legally excused from his performance because of the failure of the defendant to render prior performance. Obviously the defendant cannot be charged with the full value of his performance while the plaintiff is subjected to no liability because of his non-performance of the subsequent duty. Therefore, if the plaintiff recovers the full value of the defendant's performance, this recovery must operate as an election to go on with the contract; and as a general rule undoubtedly the plaintiff may thus recover full damages, remaining subject to his own duty to perform subsequently when the obligation on his part matures.⁴⁹

§ 1351. Where the defendant's performance is due before the plaintiff's.

May the plaintiff have this full damage even though the defendant has totally repudiated the contract or it appears that he will not subsequently get the advantage of the plaintiff's performance? Clearly not if the defendant's prospective failure to get the advantage of the plaintiff's subsequent performance is due to any other cause than his own refusal to take it.⁵⁰

⁴⁹ See *infra*, § 1364.

⁵⁰ E. g., where the plaintiff because

of the defendant's failure to perform, himself has refused or failed to per-

The mere fact, however, that the defendant repudiates the contract and asserts that he will not take the performance of the plaintiff when that becomes due seems no reason in itself why the plaintiff should not recover full damages. The defendant will thereupon acquire a right to the plaintiff's performance subsequently. If the defendant does not choose to avail himself of this right it is his own fault. But this statement should be qualified by the rule of avoidable consequences. The power of one who has contracted to buy manufactured goods to preclude by repudiation or countermand the seller from enhancing damages by completing the manufacture⁵¹ cannot depend on whether the purchaser had agreed to pay the price in advance. The plaintiff will always be entitled to the profit he would have made on the contract, but he should never be allowed in effect to enforce it specifically if by so doing he will needlessly enhance damages. This is a principle of obvious justice.⁵²

form. *Stix, Baer & Fuller Dry Goods Co. v. Ottawa Realty Co.*, 273 Mo. 376, 202 S. W. 577. But see *Dunlop v. Grote*, 2 Car. & Kir. 153.

⁵¹ See *supra*, § 1298.

⁵² This question has arisen in several recent decisions on contracts made by correspondence schools. The following extract from a Massachusetts decision cites the authorities: It is submitted that only on the assumption that there was no saving to the plaintiff, or none shown, by the defendant's failure to take the instruction contracted for, can the decision be supported. That the mutual promises were not wholly independent in any proper sense may be determined by considering what the court would have done if the plaintiff had repudiated or failed wrongfully to keep its promise to instruct. The contract was not aleatory; the defendant did not agree to pay a fixed sum for a chance. In the case in question, *International Text-Book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469, 470, it was said: "The defendant's contention comes

to this: The maker of an independent promise who renounces his right to the thing paid for by him can show that fact in reduction of the sum the promisee is entitled to recover under the independent promise. The case of *International Text-Book Co. v. Martin*, 82 Neb. 403, 117 N. W. 994, seems in effect to be a decision that there is such a right to reduce the amount to be recovered in such a case. It was there held that the burden was on the defendant to prove the benefit ensuing to the plaintiff by the defendant's renunciation, and in the absence of proof of such a benefit that the sum stipulated for had to be paid.

"If that be so ordinarily, or if ordinarily there is a question as to that, it is disposed of in the case at bar by the terms of the contract between the plaintiff and the son, which was guaranteed by the defendant and by reference made part of the contract of guaranty. It is there expressly provided that:

" 'This subscription, when accepted by you [the plaintiff], shall not be

The form of the promise should not be controlling. Even though the contract in terms provide that the full amount shall be recovered, the deduction should be allowed. Such a provi-

subject to cancellation, and that you will not be required to refund any part of the money paid for said scholarship,' and 'We [the plaintiff] do not refund money paid for scholarship.'

"The direct effect of these two provisions is confined to the return of money paid by the scholar. But indirectly they affect the construction of the contract. If money paid for the 'scholarship' is not to be returned under any circumstances, it is plain that as matter of construction the contract between the plaintiff and the son was a contract by which the son bought a 'scholarship,' that is to say a right to be instructed in telephone engineering for a period of five years or until he became qualified to receive a diploma before the expiration of that time. He was not bound to study at all if he did not wish to. On the other hand although he was at liberty to study when he wished at any time during the five years, he was bound to pay for the 'scholarship' in instalments the last of which came due in one year and three months after the signing of the contract. What he paid for was the right to the instruction, and the sum to be paid for that right was to be paid whether the son did or did not exercise his right to be instructed.

"The defendant has placed great reliance on *International Text-Book Co. v. Schulte*, 151 Mich. 149, 151, 114 N. W. 1031; *International Text-Book Co. v. Jones*, 166 Mich. 86, 88, 131 N. W. 98, 99; *International Text-Book Co. v. Marvin*, 166 Mich. 660, 668, 132 N. W. 437; *International Text-Book Co. v. Roberts*, 168 Mich. 501, 506, 134 N. W. 160. The doctrine established by the first two of these cases and recognized by the

other two is stated in these words in the second case: 'It is the rule in this state that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform brought on by the refusal of either party to go on.'

It was accordingly held in the first two cases that the only sum which could be recovered was the damage proved by the plaintiff; and there being no affirmative proof of damages suffered by the plaintiff in those cases it was held that the plaintiffs were entitled to nominal damages only. That doubtless is the rule in case of dependent promises. For example, where A agrees to buy of B, a chattel and to pay a specified sum for it. If A refuses to go on with the contract before the title to the chattel passes all that B can recover is damages. See for example *Barrie v. Quimby*, 206 Mass. 259, 92 N. E. 451. But see in this connection *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; *National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965, where it was held that even in case of sales of chattels the rule does not apply in case it is agreed that payment is to be made before the title passes. The case at bar does not come within the rule stated in the Michigan cases because in the contract here in question the promise to pay was an independent promise." The facts in the Michigan decisions are not distinguishable from those

sion is clearly penal, amounting in effect, as it does, either to a statement that the defendant if in default shall pay the full price for something which he will not get and which the plaintiff obtains a benefit by retaining, or at least to a statement that the plaintiff may needlessly enhance damages.

§ 1352. Recovery of full value of defendant's performance where plaintiff's performance is of no value.

If excuse from the performance under a bilateral contract to which a plaintiff is bound will be of no pecuniary advantage to him he may recover the full amount promised him by the defendant even though, owing to the defendant's fault, he himself has not rendered the performance for which he contracted. Thus, a seller who has not delivered goods contracted for may recover the full price if the goods are valueless.⁵³ A wrongly discharged servant may recover his full wages if unable to get other employment. A school teacher has been permitted to recover full tuition for pupils wrongfully withdrawn from the school.⁵⁴

§ 1353. Avoidable consequences.

The plaintiff's right is to recover such damages as the defendant's wrong necessarily caused him. It is usually said that the plaintiff is under a duty to mitigate damages; but the truth

in the Massachusetts case. In accord with the Michigan and Nebraska decisions is *Dulude v. Jutras*, 18 Quebec S. C. 327. On the other hand, a decision similar in principle to the earlier Massachusetts case, is *St. John v. St. John*, 223 Mass. 137, 111 N. E. 719, 720. The defendant promised the plaintiff one-half of a certain mortgage note upon her return to his home to make a home for him. He remarried and voluntarily abandoned the home later, and the court held her entitled to the full amount. The contingency of his remarriage, "as well as the possibility that he might die before the full consideration had been actually earned were

not guarded against and form no part of the contract. Having complied with the condition we see no reason why she should not recover the amount stipulated. *Gardner v. Dennison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108; *Gunther v. Gunther*, 181 Mass. 217, 63 N. E. 402; *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164."

⁵³ *Infra*, § 1379.

⁵⁴ *Collins v. Price*, 5 Bing. 132; *McLendon v. Godfrey*, 3 Ala. 181; *Sprague v. Morgan*, 7 Ala. 952; *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659.

seems rather to be that damages which the plaintiff might have avoided, without loss to himself, are not really caused by the defendant's wrong and, therefore, are not to be charged against him. The principle has wide application and frequently involves the establishment of a standard of reasonable conduct. Where a plaintiff has contracted to buy goods or services he cannot ordinarily recover damages for the consequences of going without such goods or services altogether because it is possible to substitute other goods or services obtained elsewhere, and thus in large measure avoid these injurious consequences. Thus a failure to perform a contract to insure, will not justify a recovery of the value of the property when destroyed,⁵⁵ unless the plaintiff was ignorant of the failure prior to the loss.⁵⁶ A breach of contract of service will not justify damages for loss of a crop which the employee was to oversee.⁵⁷ Similarly where a plaintiff has contracted to sell goods or services, which the defendant has wrongfully refused to take, the breach causes only such damage as will occur if the plaintiff makes the best use of the goods or services left on his hands. Where inferior goods have been furnished under a contract, the buyer cannot recover greater consequential damages caused by using them when he knew of their unfitness, than would have been caused by another possible course, though the seller had sold the goods for that purpose.⁵⁸ But a plaintiff may charge injurious avoidable consequences to the defendant, if in order to avoid them he would have to forego profits or advantages to which he is entitled by the terms of the contract.⁵⁹ When by his contract a buyer is entitled to a period of credit, he need

⁵⁵ *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638. See also *Grindle v. Eastern Exp. Co.*, 67 Me. 317, 34 Am. Rep. 31.

⁵⁶ *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312; *Latham, etc., Co. v. Harrod*, 71 Kans. 565, 81 Pac. 214; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901.

⁵⁷ *Dryer v. Lewis*, 57 Ala. 551. See also *Thompson v. Shattuck*, 2 Metc. 615.

⁵⁸ *British, etc., Mfg. Co. v. Underground Electric, etc., Co.*, [1911] 1

K. B. 575 (rev'd [1912] A. C. 673, on the ground that positive benefit derived from the purchase of machines of a different kind from those contracted for should be taken into account); *Fuerst v. Polasky*, 249 Fed. 447, 162 C. C. A. 13; *Hitchcock v. Hunt*, 28 Conn. 343; *Oliver v. Hawley*, 5 Neb. 439; *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749; *Carson v. Bunting*, 154 N. C. 530, 70 S. E. 923.

⁵⁹ *Bridgeport v. Aetna Indemnity Co.*, (Conn. 1919), 105 Atl. 680.

not buy the goods elsewhere for cash when the seller makes default, and base his damages on the price thus paid plus interest for the period of credit to which he was entitled under the broken contract, but may make the best terms he can for a new contract with a like period of credit.⁶⁰ So where a contract for future delivery of goods specified only by general description is repudiated, the injured party should not be obliged to make a similar contract on account of the repudiator, though he may be justified in so doing, for he is entitled to make for his own account as many similar contracts, in addition to that with the defendant, as his capital and credit will allow.⁶¹

§ 1354. Replacement.

When a defendant has broken his contract to furnish goods or services, it may become a question of judgment on the part of the plaintiff whether loss is likely to be greater if he seeks to replace at once what had been promised by the defendant, or if he defers replacement until later, or makes alterations in what has been furnished him, or goes without what was promised altogether. The course which he takes affects the damages to which he is entitled in only two classes of cases: (1) Where consequential damages are recoverable and (2) where the breach is anticipatory or at least precedes the time of performance of part of the defendant's obligation. In the typical case of a breach when, and not before, the defendant's entire performance was due, the plaintiff's direct damages are based on the value at that time of the performance which the defendant agreed to render. This will be true whether the plaintiff replaces the promised performance by going into the market or not. Replacement or opportunity of replacement in such a case may be evidence of value, but that is all. In the two classes of cases first mentioned, however, the amount of damages recoverable may be affected. If in the exercise of reasonable judgment the plaintiff clearly ought to have replaced or repaired, or ought not to have done so, and by failing to take the prudent

⁶⁰ *Coppola v. Marden, Orth & Hastings Co.*, 282 Ill. 281, 118 N. E. 499; *Cook Mfg. Co. v. Randall*, 62 Ia. 244, 17 N. W. 507; *Frohlich v. Independent Glass Co.*, 144 Mich. 278,

107 N. W. 889. See further, *infra*, § 1385.

⁶¹ See *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

course suffers unnecessary injury, he cannot recover the damages which might thus have been avoided.⁶² On the other hand, if he reasonably chooses one of these courses and it turns out that the damages are thereby increased rather than diminished the defendant is liable for the increased damages.⁶³

Where the defendant has not wholly failed to perform but has given inadequate performance, it becomes a question of judgment whether it is possible by further expenditure (and if possible whether it is likely to be profitable) to repair or add to the inadequate performance or whether it is better to take the performance for what it is worth in the condition in which it was rendered. In any event the question to be determined is the value of the performance rendered. A machine with defective parts may be easily repaired; if so, the value of the defective machine is that of a perfect machine less the cost of repair. On the other hand, it may be more expensive to repair the machine than to buy a new one, or the success of any attempt to repair it may be so problematical as to make it unreasonable to attempt repair. In such cases the value of the machine is its value as scrap, or for any purpose a defective machine can be put to.

§ 1355. When consequential damages are natural and proximate.

As has been seen, damages for the proximate and natural con-

⁶² *Payzu v. Saunders*, [1919] 2 K. B. 581; *Mather v. Butler County*, 28 Ia. 253; *Frick Co. v. Falk*, 50 Kans. 644, 32 Pac. 360; *Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341; *Grindle v. Eastern Express Co.*, 67 Me. 317, 24 Am. Rep. 31; *Caves v. Bartek*, 85 Neb. 511, 123 N. W. 1031; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Bates v. Fish, etc.*, Co., 50 N. Y. App. D., 38, 63 N. Y. S. 649, 169 N. Y. 587, 62 N. E. 1094; *Carson v. Bunting*, 154 N. C. 530, 70 S. E. 923; *Parker v. Meadow*, 86 Tenn. 181, 6 S. W. 49; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571; *Muth v. Frost*, 68 Wis. 425, 32 N. W. 231; *Northern Supply Co. v. Wangard*,

123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

⁶³ In *British &c. Mfg. Co. v. Underground Electric &c. Co.*, [1911] 1 K. B. 575, [1912] 3 K. B. 128, [1912] A. C. 673, the defendant furnished machines inferior to those contracted for. Expenses of trying to repair and perfect them for a time were allowed by each court which considered the case, though it would have avoided damage, as it afterwards appeared, to have bought new machines at once. See also *Summers v. Tarney*, 123 Ind. 560, 24 N. E. 678; *Watson v. Lisbon Bridge*, 14 Me. 201. The last two cases related to torts, but the principle involved is the same.

sequences of a breach are recoverable, and it becomes necessary to inquire when consequential damages fall within this category, when no notice has been given of special circumstances.⁶⁴

Where a seller fails to deliver goods which he has contracted to, consequential loss from injury to business,⁶⁵ or from inability to carry out or get the advantage of a subcontract,⁶⁶ or to make other special use of the promised performance,⁶⁷ cannot be recovered unless from the character of the contract, the known character of the buyer's business,⁶⁸ or otherwise, the seller had notice when the contract was entered into that the loss in question would be a natural consequence of the breach.⁶⁹ Under this principle where goods are sold with a warranty to a dealer, it must be assumed that the dealer may resell them with a similar warranty to a sub-purchaser. Accordingly if this is done and the sub-purchaser recovers damages from the original buyer, the latter has a *prima facie* right to recover these damages against the seller who originally sold him the goods.⁷⁰ And even though the original buyer has not yet been

⁶⁴ See *supra*, § 1347, for cases where such notice has been given.

⁶⁵ *Peace River Phosphate Co. v. Grafflin*, 58 Fed. 550; *Connersville v. McFarlan Carriage Co.*, 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; *McFarlan Carriage Co. v. Connersville*, 49 Ind. App. 418; *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057.

⁶⁶ *Clare v. Raymond*, 6 A. & E. 519; *Thol v. Henderson*, 8 Q. B. D. 457; *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 So. 333; *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Henry v. Hobbs*, 165 Mich. 183, 130 N. W. 616; *Devlin v. Mayor*, 63 N. Y. 8; *Brauer v. Oceanic & Co.*, 66 N. Y. App. D. 605, 73 N. Y. S. 1130; *Goepel v. Kurtz Action Co.*, 179 N. Y. App. D. 687, 167 N. Y. S. 317; *Waynesville & Co. Mfg. Co. v. Berlin & Co. Works*, 144 N. C. 689, 57 S. E. 455; *Dean & Co. Works v. Astoria & Co. Works*, 40 Oreg. 83, 66 Pac. 605; *Clyde Coal Co. v.*

Pittsburg, etc., R. Co., 226 Pa. 391, 75 Atl. 596, 26 L. R. A. (N. S.) 1191.

⁶⁷ *Mitchell v. Clarke*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; *Liljengren & Co. v. Mead*, 42 Minn. 420, 44 N. W. 306.

⁶⁸ *J. P. Smith Shoe Co. v. Curmelfelman Shoe Co.*, (Ind. App. 1918), 118 N. E. 360.

⁶⁹ *Benton v. Fay*, 64 Ill. 417; *Smith v. Flanders*, 129 Mass. 322; *Chalice v. Witte*, 81 Mo. App. 84; and see *supra*, § 1347.

⁷⁰ *Hammond v. Bussey*, 20 Q. B. D. 79; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. 159; *Olson v. Hurd*, 20 Ida. 47, 116 Pac. 358; *Lissberger v. Kellogg*, 78 N. J. Law, 85, 73 Atl. 67; *Reggio v. Braggiotti*, 7 Cush. 166; *Carleton v. Lombard*, 19 N. Y. App. Div. 297, 46 N. Y. S. 120 (aff'd without opinion 162 N. Y. 628, 57 N. E. 1106); *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065; *Cleave v. King*, 3 N. Z. L. R. 277. See also *Nashua Steel Co. v. Brush*, 91 Fed. 213, 50 U. S. App.

held liable to his sub-vendee, the amount of his probable liability may be recovered from the original seller.⁷¹ The buyer's right is only *prima facie*, where the warranty in question is of quality, differing from his right for breach of warranty of title. If a buyer of personal property, the title to which is warranted, is sued by one claiming a superior title existing at the time when the warranty was given, the seller is concluded by the judgment, if he is given notice and an opportunity to defend the action.^{71a} The judgment necessarily measures the seller's breach of duty. The rule governing covenants of title to realty is the same.^{71b} But where quality is warranted, and the goods are resold with a similar warranty, the original seller, though notified of an action by the sub-purchaser against the first purchaser, and asked to defend may refuse to do so without thereby becoming estopped to deny, in spite of a judgment in favor of the sub-purchaser, that his own warranty was not broken, or not broken so seriously.^{71c} The goods may not have been in

461, 33 C. C. A. 456; *Ryerson v. Chapman*, 66 Me. 557. *Cf. Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. But where the buyer knew of the defective condition before reselling, his damages must be otherwise calculated. *Cooper v. National Fertilizer Co.*, 132 Ga. 529, 64 S. E. 650.

⁷¹ *Randall v. Raper*, E. B. & E. 84; *Buckbee v. P. Hohenadel, Jr., Co.*, 224 Fed. 14, 139 C. C. A. 478; *Passinger v. Thorburn*, 34 N. Y. 634, 639, 90 Am. Dec. 753.

^{71a} *Salle v. Light's Ex.*, 4 Ala. 700, 39 Am. Dec. 317; *Marlutt v. Clary*, 20 Ark. 251; *Thurston v. Spratt*, 52 Me. 202; *Fallon v. Murray*, 16 Mo. 168; *Kelly v. Forty-Second St. &c. R. Co.*, 37 N. Y. App. D. 500, 55 N. Y. S. 1006; *Buchanan v. Kauffman*, 65 Tex. 235; *Farnham v. Chapman*, 60 Vt. 338, 14 Atl. 690.

^{71b} *Boyd v. Whitfield*, 19 Ark. 447; *Ferrea v. Chabot*, 63 Cal. 564; *Hardin v. Larkin*, 41 Ill. 413; *Marsh v. Smith*, 73 Ia. 295, 34 N. W. 866; *Elliot v.*

Saufley, 89 Ky. 52, 11 S. W. 200, *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Lebanon v. Mead*, 64 N. H. 8, 4 Atl. 392; *Oceanic Steam Nav. Co. v. Compania Transatlantica Española*, 144 N. Y. 663, 39 N. E. 360; *Clark v. Mumford*, 62 Tex. 531; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191. It is universally true that notice to the covenantor is necessary to estop him. Many cases are collected in a note to *Jones v. Caldwell*, 176 Ky. 15, 195 S. W. 122, L. R. A. 1918 B. 50, in the report last cited. In some States an unequivocal demand that the covenantor defend the action is requisite; but this is not usually held necessary. The cases are collected in a note to *Morgan v. Holey*, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846 in the report last cited.

^{71c} *Booth v. Scheer (Kans.)*, 185 Pac. 898; *Smith v. Moore*, 7 So. Car. 209, 24 Am. Rep. 479; *Morgan v. Winston*, 2 Swan, 472.

the same condition when resold as they were when first sold. It must always be open to the original seller to contest this question. The rule in regard to special damage due to delay in the delivery of goods is the same as in regard to failing to deliver them altogether. There have been allowed as damages for the failure of a carrier promptly to transport a theatrical company's scenery the profits which were lost through inability to give an entertainment which was prevented by the carrier's default;⁷² but in the absence of notice when the con-

⁷² *Weston v. Boston & Maine R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Illinois Cent. R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720.

In *Chapman v. Fargo*, 223 N. Y. 32, 119 N. E. 76, the court said: 'As was pointed out in the *Weston* case, the ordinary result of failure to transport a traveling theatrical company or its properties would be prevention of a performance, and the loss of expected returns from such entertainment would not be special profits or damages, but ordinary damages such as were to be anticipated.' But in the particular case before the New York court it was held that notification to an express company, upon delivery of moving picture films to it for shipment that the films were to be "rushed" because they were to be exhibited, was insufficient basis to render the express company liable, as special damages for delay, for prospective profits which the consignee lost by non-attendance in his theatre of a large number of persons paying a higher price than was charged for admission to the pictures necessarily shown in lieu of those shipped.

The court said: "Defendant, knowing that the package contained films which were passed around a circuit for exhibition and having been notified to 'rush' them on that account, is chargeable with such dam-

ages as would naturally result from unreasonable delay, and which, therefore, must be deemed to have been within the contemplation of the parties when the shipment was made. *Sutherland on Damages* (4th ed.), vol. 3, §§ 903, 905, 913; *Hutchinson on Carriers* (3d ed.), vol. 3, § 1369; *Harvey v. Connecticut, etc., R.*, 124 Mass. 421, 26 Am. Rep. 673; *Pilcher v. Central of Georgia Ry. Co.*, 155 Ala. 316, 46 So. 765; *Louisville & N. R. Co. v. Mink*, 126 Ky. 337, 106 N. W. 294; *St. Louis & S. F. R. Co. v. Farmers' Union Co.*, 33 Okl. 270, 125 Pac. 894. In the case of property like films intended for use as distinguished from sale or some other purpose, the ordinary damages would be the loss of rental value caused by the delay and perhaps certain incidental expenses if incurred. *Sutherland on Damages*, vol. 4, § 905; *Hutchinson on Carriers*, vol. 3, § 1373. But before defendant could be held to special damages, such as the present alleged loss of profits on account of delay or failure of delivery, it must have appeared that he had notice at the time of delivery to him of the particular circumstances attending the shipment, and which probably would lead to such special loss if he defaulted.

"It was not a sufficient basis for recovery for loss of special profits that the carrier should know of the general purposes for which the films were to be used. He should have been notified

tract was entered into of circumstances rendering special damages probable, they cannot be recovered whether the delay is by a seller,⁷³ or carrier.⁷⁴

For the same reason defects in goods sold will not justify the recovery of consequential damages,⁷⁵ other than those which might be expected to flow from the defects.⁷⁶ A failure by an employee to fulfill a contract of service will ordinarily cause merely the expense of securing a substituted employee, and therefore the consequences which follow from leaving the proposed work wholly undone cannot be recovered.⁷⁷ So the de-

of the particular circumstances and purpose already recited making important their delivery by a certain day and which have been made the foundation of the special damages which have been allowed. In effect he should have been made aware that plaintiff had made certain plans based upon the arrival of the films at a certain time, and that in case of non-arrival these plans would be destroyed in all probability, causing certain damages. *Hutchinson on Carriers*, vol. 3, § 1369; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Illinois Central R. Co. v. Nelson*, 139 Ky. 449, 97 S. W. 757; *Express Co. v. Jennings*, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; *Higgins v. United States Express Co.*, 83 N. J. L. 398, 85 Atl. 450; *Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co.*, 62 Wis. 642, 22 N. W. 827, 51 Am. St. Rep. 725; *Simpson v. London & N. R. Co.*, 1 Q. B. 274; *Hadley v. Baxendale*, 9 Exch. R. 341; *Gee v. Lancashire, etc., Ry. Co.*, 6 H. & N. 210; *Mather v. Amer. Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288." In *Orbach v. Paramount Pictures Corp.*, (Mass. 1919), 123 N. E. 669, the plaintiff was allowed recovery of prospective profits for failure of the defendant to deliver "star" films to him as it had con-

tracted to do. See also *supra*, § 1345, n. 31.

⁷³ *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147, 11 Sup. Ct. 500; *Central Trust Co. v. Clark*, 92 Fed. 293, 34 C. C. A. 354; *Acme Cycle Co. v. Clarke*, 157 Ind. 271, 61 N. E. 561; *Simpson Brick-Press Co. v. Marshall*, 5 S. D. 528, 59 N. W. 728. See also *infra*, § 1390.

⁷⁴ *Hadley v. Baxendale*, 9 Ex. 341; *Gee v. Lancashire & Co. R.*, 6 H. & N. 211; *Great Western R. v. Redmayne*, L. R. 1 C. P. 329; *Alabama Great Southern Ry. Co. v. Whorton*, 184 Ala. 439, 63 So. 1016; *Williams v. Atlantic C. L. R. Co.*, 56 Fla. 735, 48 So. 209, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169; *Goodin v. Southern Ry. Co.*, 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054; *Louisville & N. R. Co. v. Mink*, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833; *Bracco v. Merchants' Despatch Co.*, 113 N. Y. S. 131, 61 N. Y. Misc. 60; *Sharpe v. Southern Ry.*, 130 N. C. 613, 41 S. E. 799.

⁷⁵ *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. 153; *Sycamore & Co. v. Sturm*, 13 Neb. 210, 13 N. W. 202; *Brayton v. Chase*, 3 Wis. 456.

⁷⁶ See *infra*, §§ 1393, 1394.

⁷⁷ *Riech v. Bolch*, 68 Ia. 528, 27 N. W. 507; *Peters v. Whitney*, 23 Barb. 24. See also *Tennessee v. Ward*, 9

struction of goods which would not have occurred had a contract been carried out to remove them from the place in which they were at the time of the accident cannot be compensated,⁷⁸ unless the possibility of accident should have been reasonably foreseen as a consequence of failing to remove them.⁷⁹

§ 1356. The rule of *Hadley v. Baxendale*.

In a leading English case,⁸⁰ decided in 1854, an extension of the rule governing consequential damages was stated which has been generally adopted. Under this extension (in the language of the court) "If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract." The same principle has been expressed by Mr. Justice Holmes, as follows: "It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his con-

Heisk. 100. Cf. *Eten v. Lunyster*, 60 N. Y. 252.

⁷⁸ *Ashe v. De Rossett*, 5 Jones L. 299, 72 Am. Dec. 552. See also *McRae*

v. Hill, 126 Ill. App. 349. Cf. *Lilley v. Doubleday*, 7 Q. B. D. 510.

⁷⁹ *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526; *Mott v. Chew*, 137 Fed. 197.

⁸⁰ *Hadley v. Baxendale*, 9 Ex. 341.

temptation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."⁸¹ The result of the rule in *Hadley v. Baxendale* is to increase the possibility of consequential damages since not only is the defendant liable for natural and proximate consequences of the breach; but also, if notice is given of special circumstances, for damages which those circumstances make probable, though apart from such circumstances they would be unusual.

§ 1357. Basis of the rule in *Hadley v. Baxendale*.

If it were true that the extent of the defendant's damages was based on his assumption in the contract of a greater or less degree of risk, it would follow that where consequential damages were in question it might be asked with great force "whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability."⁸² No doubt notice subsequent to the formation of the contract though prior to the breach is insufficient. A suggestion was indeed made by Baron Bramwell,⁸³ that perhaps notice after the contract was made, and before breach, would be enough. This, however, has been rejected by later cases.⁸⁴ The result thus reached does not nec-

⁸¹ *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 543, 47 L. Ed. 1171, 23 Sup. Ct. 754.

⁸² *Mayne on Damages* (2d ed.) 10, quoted with approval by Blackburn, J., in *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, 478. So in *British Columbia Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 508, Willes, J., said: "Though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him." And in *Globe Refining Co. v. Landa Cotton Oil Co.*,

190 U. S. 540, 545, 47 L. Ed. 1171, 23 Sup. Ct. 754, Holmes, J., said: "It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as a matter of law to charge the seller with special damage on that account if he fails to deliver the goods."

⁸³ *Gee v. Lancashire, etc., Ry. Co.*, 6 H. & N. 211, 218.

⁸⁴ *Smeed v. Foord*, 1 E. & E. 602, 606; *British Columbia, etc., Co. v. Nettleship*, L. R. 3 C. P. 499, 509; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 545, 47 L. Ed. 1171, 23 Sup. Ct. 754; *Pusey & Jones Co. v. Combined Locks Paper Co.*,

essarily involve the conclusion that an agreement to pay the higher measure of damages is a prerequisite to their recovery. It seems generally held that notice prior to the formation of the contract is sufficient to charge the defendant with the damages which might naturally be foreseen as a consequence of the breach by one having such notice, without other evidence of a promise to assume liability for unusual consequences.⁸⁵ If it were necessary to establish a contract by the defendant to assume liability for such consequences, it would also be true that oral notice would not be effectual if the contract were in writing, for the oral notice cannot form part of the contract; yet an oral notice has been held sufficient.⁸⁶ To assert then, as is sometimes done expressly or impliedly, that the measure of damages for breach of a contract is based on the terms of the contract is to assert a fiction which obscures the truth and invites misapprehension which may lead to error. One who on borrowing money agrees to pay it the following month does not stipulate for the alternative right to keep the money at legal interest until the lender can get judgment and levy execution, though this is the only remedy the law can enforce. Nor can it be supposed that a seller contracts to be liable for the difference between the contract and the market price, or for consequential damages according as he does or does not know certain facts. Parties generally have their minds addressed to the performance of contracts—not to their breach or the consequences which will follow a breach. The fiction here criticised is a manifestation of the broader fiction that parties contract for whatever obligations or consequences the law may impose upon them.⁸⁷ The true reason why notice to the defendant of the plaintiff's spe-

255 Fed. 700; *Dickerson v. Finley*, 158 Ala. 149, 48 So. 548; *Booth v. Spuyten Duyil, etc., Co.*, 60 N. Y. 487; *McMee-kin v. Southern Ry.*, 82 S. C. 468, 64 S. E. 413; *Missouri, etc., Ry. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Bradley v. Chicago, etc., Ry. Co.*, 94 Wis. 44, 68 N. W. 410. But see *Virginia-Carolina Peanut, etc., Co. v. Atlantic Coast Line R. Co.*, 155 N. C. 148, 71 S. E. 71; *Bourland v. Choctaw, etc., Ry. Co.*, 99 Tex. 407, 90 S. W.

483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 649. And see cases cited *supra*, § 1344.

⁸⁵ See cases cited *infra*, §§ 1390, 1393.

⁸⁶ *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *American Bridge Co. v. American Dist. Steam Co.*, 107 Minn. 140, 119 N. W. 783; *Messmore v. New York &c. Co.*, 40 N. Y. 422.

⁸⁷ See *supra*, § 615.

cial circumstances is important is because just as a court of equity under circumstances of hardship arising after the formation of a contract may deny specific performance, so a court of law may deny damages for unusual consequences where the defendant was not aware when he entered into the contract how serious damage would flow from its breach.

CHAPTER XXXVIII

APPLICATION OF RULES OF DAMAGES TO PARTICULAR CASES

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§ 1358. Contracts of employment.

If an employer fails to pay the promised wages or salary after the employee has completed his services or any divisible portion of them for which separate payment was promised, the measure of damages is the amount of money which was promised. If the employee was wrongfully discharged before fully completing his service he is entitled to recover not only for any divisible portion of his promised salary which he has already earned, but for the injury caused him by not allowing him to complete his services and earn the promised reward.¹ The rule of avoidable consequences here finds frequent application. The obvious consequence of this injury is the failure of the employee to receive the pay which he was promised, but on the other hand his time is left at his own disposal. If the employee remains idle the loss of his pay is actually suffered without deduction. If, however, the employee can obtain other employment he can avoid part at least of these damages. Therefore, in an action by the employee, the net amount of what he earned, or what he might reasonably have earned in other employment will be deducted from what he would have received.² This is in effect giv-

¹ See *supra*, § 1028.

² In *re* English Joint Stock Bank,

ing to the employee the difference in value between the contract price for his labor and its value when used in other directions. The rule is therefore in effect the same as in a contract to buy and sell goods except that services of a particular man can never be regarded as having a definite market value in the same sense as standard goods have, and, therefore, the particular use which an employee is able to make of his time after breach of contract is always important, while in contracts for the sale of goods the use which the seller in fact makes of the goods is not so often material.³ Moreover, human feelings must be taken into account in contracts of employment. An employee "employed in a special service . . . is not obliged to engage in a business that is not of the same general character, in order to mitigate the defendant's damages."⁴

§ 1359. Mitigation or enhancement of damages.

An offer by the employer to employ again a discharged employee will mitigate the damages to which he is entitled if noth-

L. R. 4 Eq. 350; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520; *Ansley v. Jordan*, 61 Ga. 482; *Fisher v. Massillon Iron & Steel Co.*, 209 Ill. App. 616; *School Directors v. Birch*, 93 Ill. App. 499; *Hinchcliffe v. Koontz*, 121 Ind. 422, 29 N. E. 271, 16 Am. St. Rep. 403; *Byrne v. Independent School Dist.*, 139 Ia. 618, 117 N. W. 983; *Bertholf v. Fisk*, 182 Ia. 1308, 166 N. W. 713; *Mortonville Coal Co. v. Sisk*, 145 Ky. 55, 139 S. W. 1086; *Sutherland v. Wyer*, 67 Me. 64; *Baltimore Base Ball Club Co. v. Pickett*, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Maynard v. Royal, etc., Co.*, 200 Mass. 1, 85 N. E. 877; *Prichard v. Martin*, 27 Miss. 305; *King v. Will J. Block Amusement Co.*, 115 N. Y. S. 243; *Golberg v. Weinberger*, 115 N. Y. S. 1098; *Hutner v. Bernstein*, (Supr. Ct. App. Term) 168 N. Y. S. 529; *Currier v. W. M. Ritter Lumber Co.*, 150 N. C. 694, 64 S. E. 763, 134 Am. St. Rep. 955; *Kirk v. Hartman*, 63 Pa. 97; *Coates v. Allegheny Steel Co.*, 234 Pa. 199, 83 Atl. 77; *Latimer v. New York*

Cotton Mills, 66 S. C. 135, 44 S. E. 559; *Fowler v. Waller*, 25 Tex. 695; *G. A. Kelly Plow Co. v. London* (Tex. Civ. App.), 125 S. W. 974; *Willoughby v. Thomas*, 24 Gratt. 521; *Winkler v. Racine Wagon Co.*, 99 Wis. 184, 74 N. W. 793. The employer is not to be credited with wages which the employee earned in another employment but could not collect. *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. S. 667.

³ *Leatherberry v. Odell*, 7 Fed. 641; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Jackson v. Independent School Dist.*, 110 Ia. 313, 81 N. W. 596; *Farrell v. School District*, 98 Mich. 43, 56 N. W. 1053; *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N. S.) 1011; *Fuchs v. Koerner*, 107 N. Y. 529, 14 N. E. 445; *Kramer v. Wolf Cigar Stores Co.*, 99 Tex. 597, 91 S. W. 775.

⁴ *Hussey v. Holloway*, 217 Mass. 100, 104 N. E. 471; *Saunders v. Smith Granite Co.*, (Mass. 1919), 121 N. E. 431, and see cases *supra*, n. 2.

ing connected with the discharge makes a renewal of the service inequitable.⁵ It has been held that supervening illness of the employee which would have prevented him from fulfilling his contract does not diminish the damages for which the employer who wrongfully discharged him is liable;⁶ but it would seem possible for the jury to find that such illness would have occurred had he not been discharged, and if they so find, damages should be diminished accordingly, as they should be if the servant died after his discharge and before the end of the term for which he was employed.⁷

If the employee after vainly seeking other employment works on his own account, and thereby secures some profit, this should also be deducted if the work could not have been done had the original contract remained in force.⁸ It may sometimes happen that the employee's injury consists not only in his failure to receive the agreed compensation, but also in not being allowed to do the work for which he was engaged, and which would increase his skill or reputation.⁹ It is not often, however, that the employee can be entitled to damages exceeding the wages or salary promised in the contract. It is true that not infrequently a motive for entering into a contract of employment, and an advantage of pecuniary value to the employee in doing so, is the improvement in skill or the enhancement of reputation which might be derived from performance of the contract. An actor obviously derives advantage from appearing in a successful play at a fashionable theatre. Perhaps in less degree, but in similar kind, a salesman derives advantage from employment by a successful firm of high character; and a housemaid also may find it to her future pecuniary advantage to have been employed in the service of

⁵ *Brace v. Calder*, [1895] 2 Q. B. 253; *Birdsong v. Ellis*, 62 Miss. 418; *Mitchell v. Toale*, 25 S. C. 238, 60 Am. Rep. 502.

⁶ *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. S. 667.

⁷ See *Ga. Nun v. Palmer*, 202 N. Y. 483, 489, 96 N. E. 99, 36 L. R. A. (N. S.) 932; *Rubin v. Siegel*, 188 N. Y. App. Div. 636, 177 N. Y. S. 342.

⁸ *Gates v. School District*, 57 Ark.

370, 21 S. W. 1060, 38 Am. St. Rep. 249; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; *Huntington v. Ogdensburgh, etc., R. Co.*, 33 How. Pr. 416; *Richardson v. Hartmann*, 68 Hun, 9, 22 N. Y. S. 645; *Kramer v. Wolf Cigar Stores Co.*, 99 Tex. 597, 91 S. W. 775, 777. But see *contra*, *Harrington v. Gies*, 45 Mich. 374, 8 N. W. 87.

⁹ See *supra*, § 1015.

fashionable people. If such an employee is wrongfully discharged, therefore, there is real deprivation of what would have been obtained by performance of the contract, beyond the amount of money damages calculated on the basis of the agreed pecuniary compensation. Nevertheless, such damages cannot generally be recovered. Without much discussion, the wages or salary promised has been made the sole basis of damage in the numerous actions by employees that have been brought. On the whole, the conclusion reached in these cases seems sound, for in the absence of any proof to the contrary, it must be assumed that the parties agreed that the money promised by the employer should be the full equivalent of the services to be rendered by the employee. If indeed either the contract or the surrounding circumstances indicate the contrary the employee should be allowed to recover other damages.¹⁰ Whether such indication must be found in the language of the contract or may be sought in the probable views of the parties to the contract not stated in their agreement is not so clear;¹¹ but if the surrounding circumstances in connection with the

¹⁰ In *Bunning v. Lyric Theatre*, 71 L. T. 396, the defendants engaged the plaintiff as musical director of their theatre and agreed expressly that his name should be announced as such director in certain daily newspapers and also upon their bills and programs. The contract recited that Mr. Bunning had no experience in conducting a theatre orchestra in England and that he therefore agreed to give his services free of charge for a certain period. The defendants duly paid the plaintiff's salary and never dismissed him from their service, but they omitted to advertise him as musical director or to employ him as such. For this breach of contract the plaintiff sought damages upon the ground that the conduct of the defendants had deprived him of the professional reputation which he would have gained had the defendants fulfilled their bargain. He was awarded substantial damages by Stirling, J.

¹¹ In *Turpin v. Victoria Palace, Ltd.*, [1918] 2 K. B. 539, it appeared that the plaintiff, a music hall performer, without metropolitan reputation, had been employed to appear at the Victoria Palace, a well known London music hall. It was found as a fact that a performer who secured the approbation of the Victoria Palace, had opened the gateway of London success, for there the managers of other London halls attended to select those who succeeded and offer them important and lucrative engagements. The defendants repudiated their bargain with the plaintiff, and it can hardly be doubted that she suffered thereby a real damage beyond the amount of her fixed salary. Nevertheless, the court confined her damages to that amount. It may be thought the speculative character of the other damage is a ground for supporting the decision.

nature of the contract clearly show that the promised salary or wages was not contemplated as the full return which the employee was to receive, there seems no reason why any additional damages, not too speculative in character, should not be allowed.¹² For breach of the employee's contract the master may recover damages either total¹³ or partial,¹⁴ according as the breach involves the dissolution of the relationship or not. Consequential damages are also recoverable if the case can be brought within the general rules governing such damages. If an employee has been guilty himself of a breach of the contract, but not of such a character as to afford a complete defense to the employer, the latter may reduce the employee's damages by recoupment or counterclaim.¹⁵

§ 1360. Burden of proof.

It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of some kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract.¹⁶

¹²In *Manubens v. Leon*, [1919] 1 K. B. 208, a wrongfully discharged employee was allowed damages based not only on wages payable by the defendant, but also on tips customarily received from the defendant's customers.

¹³*Cannon Coal Co. v. Taggart*, 1 Col. App. 60, 27 Pac. 238; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507; *Myers R. S. Co. v. Griswold*, 77 Neb. 487, 109 N. W. 736; *Peters v. Whitney*, 23 Barb. 24.

¹⁴*E. E. Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336; *Lee v. Clements*, 48 Ga. 128; *Alberts v. Stearns*, 50 Mich. 349, 15 N. W. 505; *Still v. Hall*, 20 Wend. 51; *Branch v. Chappell*, 119 N. C. 81, 25 S. E. 783.

¹⁵*Columbus Co. v. Clowes*, [1903] 1 K. B. 244; *Dobbins v. Grer*, 50 Colo. 10, 114 Pac. 303; *Weymer v.*

Belle Plaine &c. Co., 151 Ia. 541, 132 N. W. 27; *Ann. Cas.* 1913 A. 451; *C. W. Hunt Co. v. Boston Elevated R.*, 217 Mass. 319, 104 N. E. 728; *Williams v. Crane*, 153 Mich. 89; 116 N. W. 554; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865.

¹⁶*Maynard v. Royal &c. Co.*, 200 Mass. 1, 6, 85 N. E. 877, citing. *Mathesius v. Brooklyn Heights Railroad*, 96 Fed. 792; *Troy Co. v. Logan*, 96 Ala. 619, 12 So. 712; *Fitzpatrick Square Bale Ginning Co. v. McLaney*, 153 Ala. 586, 44 So. 1023; *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 43 Pac. 963; *Saxonia Mining, etc., Co. v. Cook*, 7 Col. 569, 4 Pac. 1111; *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832; *Roberts v. Crowley*, 81 Ga. 429, 7 S. E. 740; *Fuller v. Little*, 61 Ill. 21; *Hamilton*

The contrary view, which prevails in Kentucky, Mississippi and perhaps elsewhere ¹⁷ seems, however, logically correct. The value of the plaintiff's time should be deducted from the sum promised by the defendant, and there is no presumption either of law or fact that the time has no value.

§ 1361. Employee's right to sue for future wages.

The English courts formerly permitted a wrongly discharged servant to sue for subsequently accruing wages, as such, either waiting until the termination of the period for which he was hired,¹⁸ or bringing an action for each instalment of wages as the time for the payment thereof arrived.¹⁹ The recovery of each instalment was based on a theory of constructive service. If this theory was logically carried out, it would seem as if the employee in order to avail himself of the remedy must remain continuously ready to serve, and therefore free of any obligation to take other employment.²⁰ The doctrine of con-

v. Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; *Chisholm v. Preferred Bankers' Assur. Co.*, 112 Mich. 50, 55, 70 N. W. 415; *Bennett v. Morton*, 46 Minn. 113, 48 N. W. 678; *Beissel v. Vermillion Farmers' Elevator Co.*, 102 Minn. 229, 113 N. W. 575, 12 L. R. A. (N. S.) 403; *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. 151; *Larkin v. Hecksher*, 22 Vroom, 133; *Milage v. Woodward*, 186 N. Y. 252, 78 N. E. 873; *King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419; *Chamberlin v. Morgan*, 68 Pa. St. 168; *Hendrickson v. Anderson*, 5 Jones, 246; *Latimer v. York Cotton Mills*, 66 S. C. 135, 44 S. E. 559; *Porter v. Burkett*, 65 Tex. 383; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630, 638; *Winkler v. Racine Wagon, etc., Co.*, 99 Wis. 184, 74 N. W. 793. To the same effect are *Fisher v. Masillon Iron & Steel Co.*, 209 Ill. App. 616, 120 N. E. 467; *Mindes Millinery Co. v. Wellborn* (Tex. Civ. App.), 201 S. W. 1059.

¹⁷*John C. Lewis Co. v. Scott*, 95 Ky. 484, 26 S. W. 192, 44 Am. St.

Rep. 251; *Shepherd v. Gambill*, 29 Ky. L. Rep. 1163, 96 S. W. 1104; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381. In *Maynard v. Royal & Co.*, 200 Mass. 1, 85 N. E. 877, the court found it unnecessary to decide which was the proper rule.

¹⁸*Gandell v. Pontigny*, 4 Camp. 375, S. C. 1 Stark. 198. See also *Collins v. Price*, 5 Bing. 132; *Smith v. Kingsford*, 3 Scott, 279.

¹⁹See *per Crompton, J.*, in *Emmens Elderton*, 4 H. L. C. 624.

²⁰In *Doherty v. Schipper*, 250 Ill. 128, 134, 95 N. E. 74, 34 L. R. A. (N. S.) 557, Ann. Cas. 1912 B. 364, the court said:

"The doctrine of constructive service, as applied to a case like this and where used as a basis of recovery, is illogical and unsound. This court has universally held that the proper measure of damages in a case like this is the contract price, less what the employee earned or could have earned. That being so, if the discharged employee can find employment it is his duty to accept it. How

structive service has, however, been abandoned in England,²¹ and is discredited in the United States. The proper remedy for the discharged employee being recognized as the breach of a contract to employ and thereby allow the employee to earn the promised reward.²²

This principle is as applicable where the agreed compensation is to be made at the testator's death by a legacy, as where it is a fixed amount payable at stated intervals.²³ A few jurisdictions still allow the remedy of suing for the wages, as such.²⁴ But even in such jurisdictions though the employer may be vexed by successive actions, presumably the ultimate damages allowed would be the same as in other jurisdictions; that is,

can it then be said that while he is performing service for another person he is constructively engaged in the employ of the employer by whom he was discharged? The result of this doctrine would be that the employee was actually performing service for one person while he was constructively performing service for another. The only true basis upon which an action like this can rest is for damages for breach of contract, and as the breach of contract occurs at the time of the discharge the cause of action is then complete, and such cause of action cannot be split up but all the damages must be recovered in one judgment and in the first action, and this being true, no subsequent action can be based upon the cause of action which has been merged in the first judgment."

²¹ *Smith v. Hayward*, 7 A. & E. 544; *Fewings v. Tisdal*, 1 Ex. 295; *Emmens v. Elderton*, 4 H. L. C. 624; *Brace v. Calder*, [1895] 2 Q. B. 253; *James v. Evans*, [1897] 2 Q. B. 180.

²² *Doherty v. Schipper*, 250 Ill. 123, 95 N. E. 74, 34 L. R. A. (N. S.) 557; *Ann. Cas.* 1912 B. 364; *Richardson v. Eagle Machine Works*, 78 Ind. 422, 41 Am. Rep. 584; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273;

Howard v. Daly, 61 N. Y. 362, 19 Am. St. Rep. 285; *Fisher v. Mechanicville*, 158 N. Y. S. 908, 910, 172 N. Y. App. Div. 426 (*cf.* *Potter v. City of New York*, 59 N. Y. App. Div. 70, 68 N. Y. S. 1039; *Bell v. City of New York*, 46 N. Y. App. Div. 195, 61 N. Y. S. 709); *Buffkin v. Baird*, 73 N. C. 283, 292; *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; *Menihan Co. v. Hopkins*, 129 Tenn. 24, 164 S. W. 775; *Derosia v. Ferland*, 83 Vt. 372, 28 L. R. A. (N. S.) 577, 76 Atl. 153; *Jameson v. Board of Education*, 78 W. Va. 612, 89 S. E. 255, L. R. A. 1916 F. 926.

²³ *Edwards v. Slate*, 184 Mass. 317, 68 N. E. 342; *Henry v. Rowell*, 31 N. Y. Miss. 384, 64 N. Y. S. 488, *aff'd* without opinion, 63 N. Y. App. D. 620, 71 N. Y. S. 1137; *McCurry v. Purgason*, 170 N. Car. 463, 87 S. E. 244, *Ann. Cas.* 1918 A. 907; *cf.* *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922.

²⁴ *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Marx v. Miller*, 134 Ala. 347, 32 So. 765; *Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Allen v. Colliery Engineers' Co.*, 196 Pa. 512, 46 Atl. 899; *Allen v. International Text Book Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. Rep. 834.

the value of the employee's time as shown by wages which he obtained, or might have obtained in other employment would be deducted.²⁵ It should be observed, however, that if the rule laid down in England in regard to the effect of an anticipatory breach²⁶ is actually carried into effect, when an employer repudiates the contract before the time for performance begins, the employee may disregard the repudiation and hold himself ready to carry out his contract until the period of employment begins. This involves the conclusion that he may refuse other employment if offered. The American cases on the effect of repudiating a contract to manufacture²⁷ make it seem probable that in the case of an anticipatory repudiation of a contract of service, as well as in the case of a wrongful discharge after the service has begun an employee must avoid unnecessary damage by seeking other employment.

§ 1362. Employee's recovery where trial precedes the expiration of contract.

Where the employee's suit comes to trial before the expiration of the term of his contract, it is impossible to say exactly how much the plaintiff may be able by his earnings to mitigate the damages caused by the defendant's wrong, and for this reason some courts restrict the plaintiff's recovery to the damages he has suffered up to the time of trial.²⁸ Such a conclusion,

²⁵ See *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. 511.

²⁶ See *supra*, § 1297.

²⁷ See *supra*, § 1298.

²⁸ *Darst v. Mathieson Alkali Works*, 81 Fed. 284; *Schroeder v. California, etc., Co.*, 95 Fed. 296; *Fowler v. Armour*, 24 Ala. 194; *Marx v. Miller*, 134 Ala. 347, 32 So. 765; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853 (see also *Spenser Medicine Co. v. Hall*, 78 Ark. 336, 93 S. W. 985); *Saxonia &c. Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111; *Harris v. Moss*, 112 Ga. 95, 37 S. E. 123; *Mt. Hope Cemetery Assoc. v. Weidenmann*, 139 Ill. 67, 28 N. E. 834 (see also

Doherty v. Schipper, 250 Ill. 128; 95 N. E. 74, 34 L. R. A. (N. S.) 557. Ann. Cas. 1912 B. 364; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. 154; *Wilson S. M. Co. v. Sloan*, 50 Iowa, 367; *Louisville & N. R. Co. v. Offutt*, 15 Ky. L. Rep. 301; *Everson v. Powers*, 89 N. Y. 527, 528, 42 Am. Rep. 319; *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. S. 667; *Sommer v. Conhaim*, 25 N. Y. Misc. 166, 54 N. Y. S. 146; *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439 (but see *Davis v. Dodge*, 126 N. Y. App. Div. 469, 110 N. Y. S. 787); *Pacific Exp. Co. v. Walters*, 42 Tex. Civ. App. 355; *Litchenstein v. Brooks*, 75 Tex. 196, 198, 12 S. W.

however, is wholly indefensible on principle. "The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time. But it is not the law that damages that may be larger or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit."²⁹

975; *Gordon v. Brewster*, 7 Wis. 355; *Stumm v. Western U. T. Co.*, 140 Wis. 528, 531, 122 N. W. 1032.

²⁹ *Cutter v. Gillette*, 163 Mass. 95, 97, 39 N. E. 1010. The weight of authority supports this conclusion. *Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 43 L. Ed. 591, 19 Sup. Ct. 335; *American China, etc., Co. v. Boyd*, 148 Fed. 258; *Lewis v. Sherin*, 194 Fed. 976; *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88; *Hamilton v. Love*, 152 Ind. 641, 43 N. E. 873, 71 Am. St. Rep. 384; *Inland Steel Co. v. Harris*, 49 Ind. App. 157; *Bridgeford v. Meagher*, 144 Ky. 479, 139 S. W. 750; *Sutherland v. Wyer*, 67 Me. 64; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; *Maynard v. Royal & Co.*, 200 Mass. 1, 85 N. E. 87; *Webb v. Depew*, 152 Mich. 698, 116 N. W. 560, 16 L. R. A. (N. S.) 813, 125 Am. St. Rep. 431; *Newhall v. Journal Printing Co.*, 105 Minn. 44,

117 N. W. 228, 20 L. R. A. (N. S.) 899; *Prichard v. Martin*, 27 Miss. 305; *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. 151; *Hicks v. National Surety Co.*, 185 Mo. App. 500, 172 S. W. 489; *School District v. McDonald*, 68 Neb. 610, 94 N. W. 829; *Moore v. Central Foundry Co.*, 68 N. J. L. 14, 52 Atl. 292; *Davis v. Dodge*, 128 N. Y. App. Div. 469, 110 N. Y. S. 787; *James v. Allen Co.*, 44 Ohio St. 228, 6 N. E. 246, 58 Am. Rep. 821; *Morrison v. McAtee*, 23 Ore. 530, 32 Pac. 400; *Wilke v. Harrison*, 166 Pa. 202, 30 Atl. 1125; *Helfferich v. Sherman*, 28 S. Dak. 627, 134 N. W. 815; *Eastern, etc., R. Co. v. Staub*, 7 Lea, 397; *Tarbox v. Hartenstein*, 4 Baxt. 78; *Hassell v. Nutt*, 14 Tex. 260; *G. A. Kelly Plow Co. v. London* (Tex. Civ. App.), 125 S. W. 974; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Rhoades v. Railway Co.*, 49 W. Va. 494, 39 S. E. 209, 87 Am. St. Rep.

§ 1363. Contract for a particular service.

The principle governing contracts for a particular piece of work are the same as those governing more general contracts of employment. If the work is done according to the contract³⁰ or if, though not completed, there is no saving to the contractor by being relieved from finishing it,³¹ the contractor is entitled to recover the contract price. So the plaintiff even though himself in default may recover where a division of performance, for which a separate price is promised, has been rendered;³² and wherever a payment has become due under a contract which is still in force, though the contract is not strictly divisible, a contractor who is not in default may recover the payment in full.³³ Where there are no divisible payments due and unpaid, a contractor who is not in default should recover the total price promised less the cost of completing the work.³⁴ This will put him in as good a position as he would have been in had there been no breach. As it is sometimes easier to prove the total cost of a whole building or construction than the cost of completion, the rule is sometimes stated that the builder may recover the total contract price for the building less the total cost, plus the expense already incurred.³⁵ The latter statement is

826; *Hopkins v. Gooderham*, 10 Brit. Col. 250. In New York the decisions of the lower courts several times restricted the plaintiff's damages to the time of trial, and these decisions were warranted by a dictum in *Everson v. Powers*, 89 N. Y. 527, 528, but in a carefully considered decision, the Appellate Division of the Supreme Court adopted the logical rule. *Davis v. Dodge*, 128 N. Y. App. Div. 469, 110 N. Y. S. 787.

³⁰ *St. Louis &c. R. v. Hall*, 186 Ala. 353; *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

³¹ *Ware v. Cortland &c. Co.*, 192 N. Y. 439, 85 N. E. 666, 22 L. R. A. (N. S.) 272, 127 Am. St. 914; *United Merchants &c. Co. v. American &c. Co.*, 71 N. Y. Misc. 457, 128 N. Y. S. 666. See also *Phelps v. La Salle Hotel Co.*, 209 Ill. App. 430.

³² See *supra*, § 1030.

³³ *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324; *Schillinger v. Bosch Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961; *Bailey v. Fredonia Gas Co.*, 82 Kan. 746, 109 Pac. 411; *Milake v. Steiner &c. Co.*, 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354; *Beatty v. Howe L. Co.*, 77 Minn. 272, 79 N. W. 1013; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Keel v. East Carolina, etc., Construction Co.*, 143 N. C. 429, 55 S. E. 826; *Tilton v. Gates &c. Co.*, 140 Wis. 197, 121 N. W. 331.

³⁴ *Millen v. Gulesian*, 229 Mass. 27, 118 N. E. 267; *Shapiro v. Mollet*, 168 N. Y. S. 723; *Spearin v. United States*, 51 Ct. Cl. 155.

³⁵ *Warner v. McLay*, (Conn. (1918), 103 Atl. 113. See also *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *Fox v. Harding*, 7 Cush. 523.

unobjectionable if it is remembered that it is merely a way of applying the rule, as previously stated, and not a device for giving the contractor on principles of quasi-contract the value of what he has done in addition to a contractual right to profit,³⁶ but not infrequently courts combine in a way that cannot be justified a right to prospective profits on the contract with a right to recover past expenditures.³⁷ The injured plaintiff should elect between rescission with restitution of the value of what he has given and an action on the contract for what he would have received. If the contractor himself has made some breach of contract but not such as to deprive him entirely of his right of recovery, the employer may take advantage of this by recoupment or counterclaim.³⁸ These principles are applicable to all kinds of contracts for a particular piece of work; for instance, where a charter-party is broken by the failure of the charterer to load the vessel.³⁹

Where the contractor fails to keep his agreement, the measure of damages is always the sum which will put his employer, the plaintiff, in as good a position as if the contract had been performed. Sometimes the sum will be based on the market price of the performance, which will generally be shown by the cost of getting the work done or completed by another person.⁴⁰

* If the contract price of the work is \$10,000, and x = the cost of the work which has been done, and y = the cost of what remains to be done the proper formula for the plaintiff's recovery is \$10,000 — y , but the same result is obtained from the formula criticised in the text, of $x + \$10,000 - (x + y)$. But if the fair value of what has been done is not identical with the actual cost to the builder, it is important in applying the second formula to give x the same meaning in both places where it occurs.

³⁶ See, e. g., *Berry v. Huntington Assoc.*, 80 W. Va. 342, 93 S. E. 355.

³⁷ *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 So. 46; *Sheldon v. Leahy*, 111 Mich. 29, 69 N. W. 76.

³⁸ In *Thebideau v. Cairns*, 171 Fed. 233, the court said: "Scrutton on

Charter Parties, pp. 271, 272, states the English rule: 'In an action against charterer for not loading a cargo, the measure of damage is the amount of the freight which would have been earned under the charter, after deducting the expenses of earning it, and also any net profit the ship may have earned during the period of the charter. It is probable that any freight the ship might have earned by reasonable diligence after the final breach is to be deducted also.' See also *Jordan v. Eaton*, Fed. Cas. No. 7520; *Watts v. Camors*, 10 Fed. 145, affirmed in 115 U. S. 353, 6 S. C. Rep. 91, 29 L. Ed. 406."

³⁹ *Marcus v. Myers*, 11 T. L. Rep. 327; *Plunkett v. Meredith*, 72 Ark. 3, 77 S. W. 600; *World's Columbian Exp. v. Pasteur & Co.*, 82 Ill. App. 94;

But consequential or special damages may also be recovered when they were foreseeable when the contract was made.⁴¹

§ 1364. Seller of goods may recover price where property has passed.

Where the property in goods which are the subject of a bargain has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price,⁴² even though the buyer refuses to accept delivery.⁴³

Of course credit may have been given or the price may have been payable upon condition, and unless the term of credit has expired or the condition happened, no recovery can be had. In such a case the refusal of the buyer to pay would not be wrongful. Thus if the seller has contracted to deliver the goods he cannot recover the price without tender, though the title has passed; unless indeed the goods have been destroyed or tender otherwise has been excused.⁴⁴ And where the seller accepts the goods back he cannot recover the price,⁴⁵ unless he reverts himself with possession merely as bailee or lienholder.⁴⁶

Winona v. Jackson, 92 Minn. 453, 100 N. W. 368; *National &c. Co. v. Hudson River &c. Co.*, 118 N. Y. App. D. 665, 103 N. Y. S. 641; *Electric Sales Corp. v. Radford*, 103 Wash. 130, 173 Pac. 942.

⁴¹ *American-Hawaiian S. S. Co. v. Morse &c. Co.*, 169 Fed. 678; *Hayaler v. Owen*, 61 Mo. 270; *Blagen v. Thompson*, 23 Ore. 239, 31 Pac. 647, 18 L. R. A. 315; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. 167, 32 Atl. 432; *Hutchinson v. Mt. Vernon &c. Co.*, 49 Wash. 469, 95 Pac. 1023.

⁴² *Scott v. England*, 2 Dowl. & L. 520; *Oleese v. Fruit, etc., Co.*, 211 Ill. 539, 71 N. E. 1084; *Armstrong v. Turner*, 49 Md. 589; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117; *Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Doremus v. Howard*, 23 N. J. L. (3 Zab.) 390;

Hayden v. Demets, 53 N. Y. 426. It is unnecessary to multiply citations for so obvious a proposition. The Uniform Sales Act so provides in Sec. 63 (1). Decisions on this subsection are *Urbansky v. Kutinsky*, 86 Conn. 22, 84 Atl. 317; *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19, 88 Conn. 22, 90 Atl. 33.

⁴³ *Bates Street Shirt Co. v. Place*, 76 N. H. 448, 84 Atl. 47; *Storm v. Rosenthal*, 156 N. Y. App. D. 544, 141 N. Y. S. 339; *Seneca Co. v. Crenshaw*, 89 S. C. 470, 71 S. E. 1061.

⁴⁴ *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

⁴⁵ *Friedman v. Pierce*, 210 Mass. 419, 97 N. E. 82.

⁴⁶ *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19, 88 Conn. 22, 90 Atl. 33.

§ 1365. Recovery of price allowed in some jurisdictions where property has not passed.

The general rule of the English law⁴⁷ and of many of the United States⁴⁸ denies an action for the price unless the property has passed, and the reason for the rule is plain. As the seller still is owner of the goods, he ought not to be given also the price for them. His damage is the difference in value between what he now has, namely, the goods, and what he would have had if the defendant had not broken his contract, namely, the price. Nevertheless, a large number of States do not follow the English law in this matter. If the reason why the property in the goods has not passed to the buyer is because the buyer wrongfully refused to take title when offered to him, according to the weight of authority, perhaps, in this country, the seller may recover the full purchase price.⁴⁹ The enactment of the Uniform

⁴⁷ *Atkinson v. Bell*, 8 B. & C. 277. See also *Elliott v. Pybus*, 10 Bing. 512.

⁴⁸ See *infra*, § 1369.

⁴⁹ *Habeler v. Rogers*, 131 Fed. 43, 45, 65 C. C. A. 281; *Kinkad v. Lynch*, 132 Fed. 692; *Kawin v. American Colortype Co.*, 243 Fed. 317, 156 C. C. A. 97; *Magnes v. Sioux City Seed Co.*, 14 Colo. App. 219, 59 Pac. 879; *Leeper v. Schroeder*, 24 Colo. App. 164, 132 Pac. 701; *Darby v. Hall*, 3 Pennw. (Del.) 25; *Robson v. Hale*, 139 Ga. 753, 78 S. E. 177; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Trunkey v. Hedstrom*, 131 Ill. 204, 209, 23 N. E. 587; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869; *International Filter Co. v. Hartman*, 141 Ill. App. 239; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612; *Moline Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; *McCormick Machine Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; *Pate v. Ralston*, 158 Ia. 411, 139 N. W. 906, 51 L. R. A. (N. S.) 735; *Bell v. Offutt*, 10 Bush (Ky.), 632, 639; *Singer Mfg. Co. v. Cheney*,

21 Ky. L. Rep. 550, 51 S. W. 813; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *St. Louis Range Co. v. Kline-Drummond Co.*, 120 Mo. App. 438, 96 S. W. 1040; *Koenig v. Truscott Mfg. Co.*, 155 Mo. App. 685, 135 S. W. 514; *Dehner v. Miller*, 166 Mo. App. 504, 148 S. W. 953; *Gordon v. Norris*, 49 N. H. 376; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Cragin v. O'Connell*, 50 N. Y. App. Div. 339, 169 N. Y. 573, 61 N. E. 1128; *Gross v. Ajello*, 132 N. Y. App. D. 25, 901, 116 N. Y. S. 380, 1137; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Rhodes v. Mooney*, 43 Ohio St. 421, 425, 4 N. E. 233; *Haynes v. Brown*, 18 Okla. 389, 89 Pac. 1124; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Daniels v. Morris*, 65 Or. 289, 130 Pac. 397, 132 Pac. 958; *Ballentine v. Robinson*, 46 Pa. St. 177; *Reynolds v. Callender*, 19 Pa. Super. Ct. 610; *Ogburn-Dalchau Lumber Co. v. Taylor* (Tex.

Sales Act in many States has extended the seller's right in jurisdictions of the first class and limited it in those of the latter class.⁵⁰

§ 1366. Decisions under Statute of Frauds as basis of rule.

Why the price should be recoverable is not always made clear. The earliest decision was in *Bement v. Smith*,⁵¹ an action for the price of a sulky built to order by the plaintiff for the defendant and refused when tendered by the plaintiff, who thereupon said he would leave it with a third person and accordingly did so. In allowing the plaintiff to recover the full price the court relied on early cases under the Statute of Frauds.⁵² In these early cases it was held that such a contract as the one in suit was a contract not of sale but for work and labor. This being true, the court held as a consequence that though the plaintiff did not recover the price directly, as for goods sold, the amount of recovery should be, nevertheless, fixed by the price, since that was the agreed value of the labor. The only way in which this reasoning can be answered in a wholly satisfactory way is by confessing that the authorities, under the Statute of Frauds, which have held that a contract for goods to be made to order is not a contract of sale but a contract for work and labor are erroneous. This is now admitted in England, and the early decisions are overruled.⁵³ But in many of the United States it is still law that where goods are to be made to order, which are of a special kind differing from those ordinarily made by the seller, the contract is not one of sale, but for work and labor;⁵⁴ and the Uniform Sales Act has adopted this rule.⁵⁵ In other States it is held that in any case where the contract is for the sale of a commodity not in existence at the time, and which the seller is to manufacture or put in a condition to be delivered, the con-

Civ. App.), 126 S. W. 48; *Leventhal v. Hollamon*, (Tex. Civ. App.), 165 S. W. 6; *Pratt v. Freeman Mfg. Co.*, 115 Wis. 648, 92 N. W. 368; *Haueter v. Marty*, 156 Wis. 208, 145 N. W. 775.

⁵⁰ See *infra*, § 1367. The States which have passed this act are enumerated, *supra*, § 506.

⁵¹ 15 Wend. 493 (1836).

⁵² *Towers v. Osborne*, 1 Strange, 506; *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187.

⁵³ *Lee v. Griffin*, 1 B. & S. 272. See *supra*, § 508.

⁵⁴ See *supra*, § 509.

⁵⁵ See *supra*, § 506.

tract is one for work and labor.⁵⁶ It may be doubted whether the States which have adopted one or the other of these views under the Statute of Frauds would generally admit, as a consequence of their decisions, that the contracts in question should be treated as contracts for work and labor in such a sense that the price must be paid for the work rather than for the title to the property. It would be indeed unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases. It should rather be said, and probably would be, that though a contract may not be a contract of sale within the meaning of the Statute of Frauds, if it is contemplated that special work and labor by the seller shall go into it, it is, nevertheless, a contract of sale for other purposes. There can, in fact, be no doubt that the price is promised for the completed article, not for the work and materials which have gone into its manufacture. The reason, therefore, on which *Bement v. Smith*⁵⁷ was rested cannot be supported. It is not generally adopted to-day,⁵⁸ and the New York court has long ceased to rest the buyer's right to the price on this reason. A later New York decision⁵⁹ laid down the rule broadly that any seller might at his option store or retain the property for the vendee and sue him for the entire purchase price. The doctrine is stated as applicable not only to cases where the title has passed, but to cases where the buyer's default consists in not letting it pass.⁶⁰ This decision and the rule laid down therein have been very influential in other jurisdictions, and cases which refuse to confine the seller to the difference between the contract price and the market price generally go back to this New York decision for their foundation. Of course, if the seller is entitled to the price, the buyer must be entitled to the goods. At what moment the title passes to him is not much discussed in the decisions, but the statement of the rule that the seller may store or retain the property for the buyer

⁵⁶ See *supra*, § 509.

⁵⁷ 15 Wend. 493.

⁵⁸ It was, however, followed in *Balentine v. Robinson*, 46 Pa. St. 177.

⁵⁹ *Dustan v. McAndrew*, 44 N. Y. 72.

⁶⁰ *Dustan v. McAndrew*, 44 N. Y.

72, 78, per Earl, C., and see cases cited in the preceding section. The same statement is expressly applied to executory contracts of sale in *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728.

implies that when the seller deposits the goods with a third person for the buyer, or gives notice to the buyer by suing for the price or otherwise, that he himself is holding the goods for the buyer, either the title thereupon passes, or, what amounts to the same thing, the rights of the parties will subsequently be adjusted as if it had passed at that time.⁶¹ The remedy thus allowed is neither more nor less than specific performance of the contract. In a court of equity a contract for a purchase of land is enforced by a decree ordering the defendant to pay the price upon the transfer of title. In the case of a sale of goods the New York court and other courts following its rule allow the seller by force of his own expressed volition to make the buyer owner in spite of the buyer's dissent, and thereupon to recover the price.

§ 1367. Restriction of New York rule.

Some States restrict the application of the New York doctrine to cases where the goods contracted for are of a peculiar kind, not readily salable on the market and for which, therefore, a market price cannot readily be fixed.⁶² And in this restricted form the principle is adopted in the Uniform Sales Act.⁶³

⁶¹ *Illustrated Postal Card Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061. It would follow that thereafter the risk of loss must be upon the buyer, and this is borne out by the reasoning in *Neal v. Shewalter*, 5 Ind. App. 147, 154. The property in question in that case after having been wrongfully refused by the buyer was destroyed by fire. The court said the goods "remained the property of the [sellers]. They did not place themselves in the position of bailees for the [buyers]. Therefore, they would be entitled only to the difference between the contract price and the market price at the time and place at which the [buyers] became in default."

⁶² *Kinhead v. Lynch*, 132 Fed. Rep. 692; *River Spinning Co. v. Atlantic Mills* (R. I.), 155 Fed. 466; *Fisher & Co. Machine Co. v. Warner*, 233 Fed. 527, 147 C. C. A. 413; *Black River*

Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Gordon v. Norris*, 49 N. H. 376; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Ballentine v. Robinson*, 46 Pa. St. 177.

⁶³ Sec. 63 (3). "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price." The excepted case covered by Sec. 64 (4) is where damages would be unnecessarily enhanced. See *supra*, § 1298.

This provision of the Act will either enlarge or diminish the previously existing seller's rights in most of the States where it has been passed.

§ 1368. Rule often condemned, but just.

The doctrine, whether in its broadest or most restricted form, at first sight strikes most legal theorists as both anomalous and erroneous. It is sometimes condemned by text-writers.⁶⁴ But the rule in its more limited form should be approved. The very fact of the wide adoption of a doctrine which is, and is known to be, contrary to the rule previously prevailing shows that the new doctrine must commend itself to the sense of justice of the courts, and if the matter be looked at broadly as one of justice rather than one of technical remedies permitted by the law, it will be hard to find a reason why the seller of land should be allowed to force the buyer to take it and pay the price while the manufacturer of goods for a special and peculiar order should not be. In such a case the seller may urge the very reason which courts of equity have habitually given for allowing specific performance of contracts in regard to sales of land, the inadequacy of damages. It is true the remedy is not mutual. The buyer is without specific redress if the seller refuses to make the goods, or refuses to give them up when he has made them. But the buyer is much less in need of the remedy of specific performance in this kind of case than the seller. If the seller does not manufacture the goods, the buyer can ordinarily do better by getting some one else to manufacture them than he could do by trying to force the seller to manufacture against his will. If the goods are already manufactured, the seller will rarely be disposed to withhold them from the buyer. The very fact that

Decisions under this section are: *Illustrated Postal Card Co. v. Holt*, 86 Conn. 140, 81 Atl. 1061; *Urbanaky v. Kutinsky*, 86 Conn. 22, 84 Atl. 317; *Home Pattern Co. v. Merts & Co.*, 86 Conn. 494, 86 Atl. 19, 88 Conn. 22, 90 Atl. 33; *Rylance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597; *Friedner v. Schneck*, 163 N. Y. S. 150; *Gourd v. Healy*, 176 N. Y. App. D.

461, 163 N. Y. S. 637; *Mosler Safe Co. v. Brenner*, 100 N. Y. Misc. 107, 165 N. Y. S. 336; *Michael v. Floridine Co.*, 167 N. Y. S. 244; *E. H. Gallagher Trucking Co. v. Hudford Co.*, 169 N. Y. S. 83.

⁶⁴ *Mechem, Sales*, § 1604; *Burdick, Sales* (2d ed.), § 364; *Tiffany, Sales* (1st ed.), § 103 (compare 2d ed., § 112). Benjamin does not refer to the doctrine.

the goods are of a special kind and have no general market value will preclude the seller from making any other disposition of them. Doubtless cases could be put, however, where the buyer is in need of specific performance, but the fact that he is allowed no such right either at law or in equity ought not to debar the seller from specific redress. The requirement of mutuality of remedy has perhaps been pushed to the extreme of a technicality in equity.⁶⁵

§ 1369. Rule thought anomalous, and opposed by some authorities.

It is not, however, chiefly because the rule is unjust that fault is found with it; it is rather because it seems at variance with established legal principles. It seems anomalous that the seller should be able to force title upon the buyer by simply electing to do so. This is probably the reason why many jurisdictions reject the New York doctrine and follow the English law.⁶⁶ Is it, however, so anomalous as is sometimes supposed

* The Uniform Sales Act provides: Sec. 63. Action for the price.—(1) Where under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

⁶⁵ *Malcolmson v. Reeves Pulley Co.*,

167 Fed. 939, 93 C. C. A. 339; *Hoffman v. Gosline*, 172 Fed. 113, 96 C. C. A. 318; *Grier v. Simpson*, 8 Houst. 7; *Deere Co. v. Gorman*, 9 Kans. App. 675, 59 Pac. 177; *Singer Mfg. Co. v. Cheney*, 21 Ky. L. Rep. 550, 51 S. W. 813; *Fairbanks v. Heltsley*, 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248; *Indiana Tie Co. v. Phelps (Ky.)*, 124 S. W. 833; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Tufts v. Grewer*, 83 Me. 407, 22 Atl. 382; *Greenleaf v. Gallagher*, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798; *Arons v. Cummings*, 107 Me. 19, 78 Atl. 98, 31 L. R. A. (N. S.) 942; *Maine Farmers' Pub. Co. v. Rowe*, 108 Me. 194, 79 Atl. 471; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *McCormick Machine Co. v. Balfany*, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; *Backes v. Schlick*, 82 Neb. 289, 117 N. W. 707; *Massman v. Steiger*, 79

for one party to an obligation to enforce it specifically against the other without the aid of a court of equity? Is it not constantly done in cases where rescission of title to personal property is allowed as a remedy?

§ 1370. Defrauded seller may specifically enforce his rights.

If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby.⁶⁷ Yet there is no more doubt that the seller may regain his title by his own election so to do. Not only may he bring trover,⁶⁸ but he may also bring replevin.⁶⁹ And if the seller can regain possession of the goods peaceably without the

N. J. L. 442, 75 Atl. 746; Roswel Nursery Co. v. Mielens, 18 N. Mexl 417, 137 Pac. 579; Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; Jones v. Jennings, 168 Pa. St. 493, 32 Atl. 51; Puritan Coke Co. v. Clark, 204 Pa. St. 556, 54 Atl. 350 [but see Balentine v. Robinson, 46 Pa. St. 177; Henderson v. Jennings, 228 Pa. 188, 77 Atl. 453, 30 L. R. A. (N. S.) 827;] Gammage v. Alexander, 14 Tex. 414; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Rider v. Kelly, 32 Vt. 268, 76 Am. Dec. 176; American Hide & Leather Co. v. Chalkley, 101 Va. 458, 463, 4 S. E. 705; Manning Mfg. Co. v. Miller, 87 Vt. 455, 89 Atl. 479; Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807. See also Morris v. Cohn, 55 Ark. 401, 17 S. W. 342; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516, 101 N. W. 903.

⁶⁷ Thus if the buyer resells the goods to a purchaser for value without notice, the latter gets an indefeasible title. See *infra*, § 1489. So the seller may "affirm" the sale and sue for the agreed price—a remedy which proceeds upon the assumption that title is in the buyer. See *Schwartz v. McCloskey*, 156 Pa. St. 258, 264, 27 Atl. 300. But if the buyer had ac-

quired merely possession by fraud, not even a purchaser for value with out notice could get title. *Lightman v. Boyd*, 132 Ala. 618, 32 So. 714; *Baehr v. Clark*, 83 Iowa, 313 49 N. W. 840, 13 L. R. A. 717; *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. 460; *McDonald v. Humphries* (Tex. Civ. App.), 146 S. W. 712.

⁶⁸ *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700; *Moody v. Drown*, 58 N. H. 45; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550. In *Atlas Shoe Co. v. Bechard*, the action was maintained against the fraudulent buyer's assignee for creditors.

⁶⁹ *John V. Farwell Co. v. Hilton*, 84 Fed. 293; *Openhym v. Blake*, 157 Fed. 536, 87 C. C. A. 122; *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 411, 95 Pac. 1029; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hall v. Gilmore*, 40 Me. 578; *Ayers v. Farwell*, 196 Mass. 349, 82 N. E. 35; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Field v. Morse*, 54 Neb. 789, 75 N. W. 58; *Baker v. McDonald*, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

aid of a court he may do so, and thereby is revested with title.⁷⁰

The injured party is not even allowed the alternative of proceedings in equity for rescission, his legal remedy being thought adequate.⁷¹

This is nothing else than specific enforcement of the obligation of the fraudulent buyer to return the title wrongfully acquired by him. Moreover, the seller must, as a condition of recovery, return to the buyer whatever was paid for the goods.⁷² Generally the buyer will refuse to receive it, and the seller may then tender it and recover as if he had actually returned it.⁷³ Let it be supposed the price was itself in the form of a chattel. When the defrauded seller tenders back this chattel, and the tender is refused and the seller thereupon is allowed to recover what he had parted with or its full value the relief necessarily proceeds upon the assumption that the seller has restored title to the buyer in the chattel given as the price, without the buyer's assent.⁷⁴ If the property in question is land and the buyer has fraudulently acquired a conveyance, the seller must go into equity in order to get a reconveyance, but in the case of a sale of goods he can regain title to what he has parted with and revest the buyer with title to the consideration without this procedure.

§ 1371. So in cases of mistake, duress, infancy, or insanity.

The same rules of law apply where rescission of title is allowed

⁷⁰ *Wheelden v. Lowell*, 50 Me. 499. See also *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485, where on the assertion by the buyer of a warranted buggy of a right of rescission for breach of warranty, he was held entitled to take without breach of the peace from the seller's land property given by the buyer as the price of the buggy.

⁷¹ *Buzard v. Houston*, 119 U. S. 347, 30 L. Ed. 451, 7 S. C. Rep. 249; *Walter v. Garland Automobile Co.*, 164 N. Y. App. D. 183, 149 N. Y. S. 653.

⁷² Save in exceptional cases. See 21 L. R. A. 206, note, and 1 L. R. A. (N. S.) 474.

⁷³ *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168; *Porter v. Leyhe*, 67 Mo. App. 540. See also *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77.

⁷⁴ In *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572, one party to an exchange, induced by fraud, was allowed replevin to recover his goods. The court said that because of the fraud the transaction was "void," but also said the plaintiff might have "affirmed" it. To the same effect is *Porter v. Leyhe*, 67 Mo. App. 540. Compare *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168; *Haase v. Mitchell*, 58 Ind. 213, also cases of exchange.

for other reasons than for fraud—as mistake, duress, infancy, or insanity.⁷⁵ So if an infant pleads his infancy in order to prevent recovery of the price of goods, the seller may replevy the goods.⁷⁶ This necessarily means that the seller by his own election enforces specifically the obligation of the infant to return the goods which he will not pay for. To say that the infant's plea is an assent to retransfer the goods is to state a fiction. It is immaterial whether the infant assents or expressly dissents.

§ 1372. So in case of unpaid seller.

The remedies allowed to an unpaid seller after the property has passed to the buyer, other than the right to recover the price, illustrate the same principle. A seller with a lien may by his own act take title out of the buyer and revest it either in himself or in a third person to whom a resale of the goods is made. The English law formerly denied this,⁷⁷ but the Sale of Goods Act now allows at least the right of resale,⁷⁸ and the right of resale necessarily involves a transfer of title without the assent of the owner of the property. It does not help the matter to imply a fictitious agency calling the seller the agent of the buyer to resell. In this country the seller's right, not simply to resell the goods, but to rescind the transfer of title and take it himself, is well recognized.⁷⁹ The seller in thus acting is foreclosing his lien. When he chooses to resell on account of the buyer it is a foreclosure by sale. When he elects to retake title to himself it is a strict foreclosure. In the case of land a bill in equity might be necessary. In the case of goods the result is reached more summarily.

§ 1373. Rescission of title by buyer.

In the converse case, where the buyer seeks to rescind a transfer of title to him, whether for fraud,⁸⁰ mistake,⁸¹ or breach of

⁷⁵ *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609. See, however, as to infancy, *supra*, § 234.

⁷⁶ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.

⁷⁷ *Martindale v. Smith*, 1 Q. B. 389;

Page v. Cowasjee Eduljee, L. R. 1 P. C. 127.

⁷⁸ *Williston, Sales*, § 544.

⁷⁹ *Id.*, §§ 545, 555.

⁸⁰ See *infra*, § 1525.

⁸¹ See *infra*, § 1570.

warranty,⁸² the same rule again prevails. The buyer may, if he chooses, recover the price that he has paid, and is not obliged to sue for the difference in value between the goods which he has acquired and the price which he paid. He recovers the price in full if he elects to do so. This election necessarily operates as a transfer of the title back to the seller.⁸³ The doctrine which permits one whose goods have been converted to "waive the tort" and sue for the value of the goods, or the price for which the converter has sold them, is another case where a plaintiff transfers title by his own action, without any assent of the defendant.⁸⁴ Indeed, even where trover is brought for the conversion, it is impossible to justify the existing rule of damages which gives the injured party the full value of the goods except on the theory that the title to the goods is transferred to the defendant. If the plaintiff were regarded as continuing the owner of the goods, he should recover damages equal in amount only to the loss which he suffered by the deprivation of possession of the property. If the goods were destroyed, of course this would equal their value; but if they still remained in existence, it might well be a comparatively small amount.⁸⁵

§ 1374. Conditional sales.

A case which presents a still closer analogy to that primarily under discussion arises in the law of conditional sales.⁸⁶ In

⁸² See *infra*, § 1461.

⁸³ Thus if a defrauded buyer rescinds a sale and subsequently takes the goods without the seller's assent, the buyer is a converter, and the seller must sue him as such, and not as a buyer. *Teeter v. Cole Mfg. Co.*, 151 N. C. 602, 66 S. E. 582.

⁸⁴ See Keener, *Quasi-Contracts*, 159.

⁸⁵ It is actually held that the property in the goods passes to the defendant either when judgment is given for the plaintiff or when the execution upon the judgment is satisfied. See *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 25 L. R. A. 42, 42 Am. St. Rep. 424. So late a time as either of these days seems somewhat inconsistent

with the rule of damages, because in order to justify full damages it would seem on theory that the plaintiff must have had a cause of action justifying such damages at the time the action was brought, an assumption which can be sustained as a universal rule only on the theory that the property had passed to the defendant at that time. If we take the time of transfer, however, to be the later period when judgment is rendered or execution satisfied, there is still a case where the ownership is transferred from one party to the other without the assent of both parties and without the aid of a court of equity.

⁸⁶ See *supra*, § 735.

such sales the seller may recover the full price, though the title to the goods has not been transferred. It is further generally held that though the seller may sue for and recover earlier instalments of the price without thereby losing his right in the goods,⁸⁷ if he sues for the whole price or the last instalment thereof, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid.⁸⁸ Thus the seller loses a title which by

* *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467; *Schmidt v. Ackert*, 231 Mass. 330, 121 N. E. 24.

* *Hollenberg Music Co. v. Bankston*, 107 Ark. 337, 154 S. W. 1139; *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Elsom v. Moore*, 11 Cal. App. 377, 105 Pac. 271; *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446, 18 L. R. A. 187, 36 Am. St. Rep. 323; *Smith v. Gilmore*, 7 D. C. App. 192; *Pease v. Teller Corp.*, 22 Ida. 807, 128 Pac. 981; *North Robinson Dean Co. v. Strong*, 25 Ida. 721, 139 Pac. 847; *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003; *Richards v. Schreiber*, 98 Iowa, 422, 67 N. W. 569; *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Schmidt v. Ackert*, 330 Mass. 231, 121 N. E. 24; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Young v. Phillips*, 169 N. W. 822; *Alden v. Dyer*, 92 Minn. 134, 99 N. W. 784; *Frederickson v. Schmittroh*, 77 Neb. 724, 112 N. W. 564; *Orcutt v. Rickenbrodt*, 42 N. Y. App. D. 238, 59 N. Y. S. 1008; *Mathews Piano Co. v. Markle*, 86 Neb. 123, 124 N. W. 1129; *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516, 101 N. W. 903, 905; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160; *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac.

577. See also *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014. These decisions seem erroneous and are opposed to the following: *Forbes Piano Co. v. Wilson*, 144 Ala. 586, 39 So. 645; *Jones v. Snider*, 99 Ga. 276, 25 S. E. 668; *Foster v. Briggs Co.*, 6 Ind. Ty. 342, 98 S. W. 120; *Westinghouse Co. v. Auburn Co.*, 106 Me. 349, 76 Atl. 897; *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283; *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857; *Campbell Press Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 29 Atl. 681, 44 Am. St. Rep. 410. See also *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Fuller v. Byrne*, 102 Mich. 461, 60 N. W. 980; *Ratchford v. Cayuga County Cold Storage Co.*, 217 N. Y. 565, 112 N. E. 447; *Matthews v. Lucia*, 55 Vt. 308. See also *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098. The error in the decisions first cited is this—the reservation of title by the seller is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. See *supra*, §§ 734-738. Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; that is—for the purpose of endeavoring to realize from

the contract was still to remain in him, and the buyer acquires it when and because the seller elects to sue for the price. So if a seller transfers a note given as security for the price of the goods he has been held to vest title absolutely in the buyer.⁸⁰ It may be added that if the seller reclaims the goods, he is usually denied recovery thereafter of any unpaid balance of the price.⁸⁰ A further illustration is found if the seller under a conditional sale attaches or levies execution upon the property sold. Even in jurisdictions which do not regard the mere act of suing for the price a binding election, such a seizure debars the seller from thereafter reclaiming the goods. In effect it transfers the property to the buyer.⁸¹ The same rule is applied in the case of chattel mortgages. Even in jurisdictions where it is held that a mortgage vests a legal title in the mortgagee, attachment of the goods by him deprives him of all rights of ownership in the property.⁸²

§ 1375. Executory contracts.

A somewhat analogous doctrine of self-help exists in the law

it the full amount due him. Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest. If, therefore, judgment for the price is satisfied in part, this should be credited, and any excess over the amount due, which may be acquired by seizing and disposing of the goods should be returned to the buyer. Though the cases cited at the beginning of this note may be erroneous for the reason just given, the error does not relate to the matter for which the cases are here cited; namely, the power of a court of law to treat an election on the part of the plaintiff as effectual to transfer title to property to the defendant. Suing for the earlier instalments of the price would probably nowhere be held inconsistent with a subsequent claim to resume possession of the goods. *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467.

⁸⁰ *Winton Motor Carriage Co. v.*

Broadway Automobile Co., 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71.

⁸⁰ See *supra*, § 736.

⁸¹ *Tanner Engine Co. v. Hall*, 89 Ala. 628, 7 So. 187; *Montgomery Iron Works v. Smith*, 98 Ala. 664, 13 So. 525; *Fuller v. Eames*, 108 Ala. 464, 19 So. 366; *Albright v. Meredith*, 58 Ohio St. 194, 50 N. E. 719. But in *Champanois v. Tinsley*, 90 Miss. 38, 42 So. 89, it was held that the acceptance by the seller of a mortgage by the buyer of the goods conditionally sold did not waive the title reserved in a prior conditional sale. See also *Cutting v. Whittemore*, 72 N. H. 107, 110, 54 Atl. 1098; *Kirch v. La Tourette*, 91 N. J. L. 35, 102 Atl. 873.

⁸² *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Evans v. Warren*, 122 Mass. 303; *Dyckman v. Severson*, 39 Minn. 132, 39 N. W. 73; *Haynes v. Sanborn*, 45 N. H. 429. But see 7 Cyc. 55.

of executory bilateral contracts. If a party to such a contract is guilty of a material breach, the other party may elect to rescind it. Courts have sometimes endeavored to make out mutual assent by calling the breach or repudiation of the wrongdoer in such a case an offer to rescind; but this is an obvious fiction. In truth, the wrongdoer is under an obligation to permit the rescission of the contract, and the injured party is allowed to enforce the obligation by treating the contract as rescinded without the aid of a court.⁹³ Finally, the most striking analogy exists in the rule universally prevailing in the United States, that one who is under a unilateral obligation to transfer chattel property to another may by proper tender of the chattels discharge his own obligation, and in effect make the creditor the owner of them.⁹⁴

§ 1376. Summary of reasons for allowing seller to recover price.

The illustrations which have been given show that the allowance of what is in effect specific performance of an obligation, or the transfer of ownership at the election of one party without the other's assent and without resort to a court of equity, is not unusual in our law, and most persons would hesitate to say that in these illustrative cases the plaintiff should be denied the specific execution of the obligation due him. Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Indeed, it may be questioned whether the remedy of a bill in equity would be so satisfactory in the case of ordinary sales of goods as the shorter cut afforded by courts of law. If the proper equitable remedy cannot be adequately reproduced by the procedure of a court of law, it is doubtless wrong for it to invade the province of equity. Likewise the results which equity with its elastic decrees reaches in analogous cases must be taken as the standard of permissible relief, and it is only to reach such results by the judgment of a

⁹³ See *infra*, §§ 1465 *et seq.* In party brings an action in court for France and Louisiana the injured rescission of the contract.

⁹⁴ See *infra*, § 1818.

court of law or by permitting an injured person to work out his own redress, that relief in these summary ways should be allowed. But where the same result can be reached at law as in equity, the court of law not only may invade the province of equity, but it should do so if the rule of equity is more just. Especially should it do so if the court of equity for technical reasons refuses to take jurisdiction of the case, and the court of law must give the only available remedy. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, this reasoning is particularly applicable. Damages are not an adequate remedy for the seller. He does not want the goods himself and he cannot resell them readily, yet they are not without value, and if he is confined to the difference between their value and the contract price, a substantial diminution from the price would be made. Further, a court of equity will not take jurisdiction of the case. Though there is the same reason for doing so that exists in the case of a contract for the sale of land, so far at least as the seller's side of the bargain is concerned, courts of equity have been indisposed to extend their jurisdiction to such cases.⁹⁵

§ 1377. The Civil law.

It is worth noticing that in the Civil law the seller is entitled to recover the full price when the buyer is in default. By the classical Civil law the property never passed until delivery of the goods.⁹⁶ So that in any case to allow the seller to recover the full price when the buyer refused to accept delivery necessarily involved recovery of the price by one who had not transferred the property in the goods.⁹⁷ The Roman law, indeed, went fur-

⁹⁵ It should perhaps be said, in order to prevent misapprehension, that the rule contended for is applicable only where the contract has been broken by the buyer after the goods have been procured or manufactured. If the buyer repudiates his contract or countermands his order before the goods have been manufactured or procured by the seller, he ought not to be allowed,

and generally is not allowed, to enhance the damage of the buyer by manufacturing or procuring the goods. See *supra*, § 1298.

⁹⁶ Moyle, *Contract of Sale in the Civil Law*, 110.

⁹⁷ Pothier, *Contract of Sale*, § 280: "When the contract contains no provision for credit, the seller may immediately commence this action (*actio venditi*) against the buyer upon mak-

ther than this. Even though the goods had been destroyed by accident before delivery, and, therefore, before transfer of the property, the risk was thrown on the buyer, and the seller was allowed to recover the price.⁹⁸ It may, therefore, be urged that the Roman law virtually made the promises of buyer and seller independent, and that as such a doctrine is not only clearly inconsistent with our law, but also with fundamental principles of justice, no desirable suggestion or analogy can be derived from that system of jurisprudence. The rule of the classical Roman law in regard to risk is, however, generally abolished to-day in Europe;⁹⁹ and the recognition of the dependency of the promises in a bilateral contract is as completely recognized, perhaps more completely recognized, on the Continent of Europe than in England.¹ But in spite of this, the rule in regard to the recovery of the price persists. This is true in France.² So the old German Commercial Code, which was in force not simply in Germany but also in Austria, and is still in force in the latter country, provides: "If the buyer is in default in accepting the goods, the seller may deposit them, at the risk and expense of the buyer, in a public warehouse or otherwise in a safe manner."³ The new Commercial Code in force throughout the German Empire since 1897 copies this provision.⁴ Even in Scotland the same rule prevails to-day, for the rule of the Civil law is there preserved by the Sale of Goods Act.⁵

ing the offer which he ought to do to deliver the thing, provided it is not already delivered. If after the contract the thing ceases, without the fault of the seller, to be in a situation to be delivered, the seller is not thereby deprived of his right of commencing his action for the payment of the price. But while the seller is in default in delivering the thing sold, he cannot demand the price of it.

⁹⁸ See *supra*, § 947.

⁹⁹ *Supra*, § 953.

¹ *Supra*, §§ 899 *et seq.*

² Code Civil, Arts. 1138, 1652; 2 Troplong, Vante, par. 603.

³ Handelsgesetzbuch, § 343.

⁴ Handelsgesetzbuch of 1897, § 373. In commenting upon this provision

Lehmann and Ring say in their Kommentar zum Bürgerlichen Gesetzbuche und seinen Nebengesetze (Berlin, 1901), ii, 101: "Since the seller is no longer responsible for the goods, he acquires the right to the price and must only make allowance for what he saves in consequence of being freed from performance, or what he acquires or wrongfully fails to acquire through other application of his labor. He can also recover from the buyer indemnity for the necessary expenses for the care and custody of the goods. He must even be allowed a claim for storage if he is a merchant."

⁵ "Section 49. (3) Nothing in this section shall prejudice the right of the seller in Scotland to recover in-

§ 1378. Measure of damages for non-acceptance of goods.

Where a buyer of goods under an executory agreement breaks his contract by refusing to accept the title to goods which are in existence, and either the local law does not allow the virtual specific performance previously discussed,⁶ or the seller does not wish that relief, it is to be observed that if the buyer had accepted and paid for the goods as he was bound to do by his contract, the seller would have been obliged to surrender their ownership, and to incur all the expense of delivering them at the time and place agreed on, and he would on the other hand have received the price or become entitled to it. The buyer's wrong leaves him still owner of the goods and frees him from any expense of delivering them, and, on the other hand, deprives him of the price. His loss then is the difference between the value of the goods and the price which he was to receive for them; and if he is saved any expense by not being obliged to put the goods in deliverable condition or to transport them to a particular place, this also must be taken into account. But the essential element of damage is conveniently expressed by the formula—the difference between the contract price, that is, the amount of the obligation which the buyer failed to fulfill, and the market price, that is, the value of the goods which the seller has left upon his hands. As the market price varies, with time and place, it is essential to fix upon the market price at the time and place provided in the contract.⁷ The matter

terest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be." Chalmers, in his annotation of the section, quotes as the authority for this provision, *Mercantile Law Commission, 1855* (2d report), p. 47: "The seller may sue the purchaser for the price and interest, whether the goods sold are specified or not, provided goods according to the contract have been tendered to the purchaser."

⁶ *Supra*, §§ 1365-1377.

⁷ The Uniform Sales Act provides:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay

for the goods, the seller may maintain an action against him for damages for non-acceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if

may, therefore, be summarized—that the measure of damage is the difference between the contract price and the market price of the goods at the time when and the place where the contract should have been performed.⁸ If the seller, after waiting some time after the breach, resells the goods at a higher price than that which prevailed at the time of the breach, the defendant cannot have the benefit of the increase.⁹ If the market value for the goods equals or exceeds the contract price, though a legal wrong has been committed, the plaintiff has suffered no damage thereby and, though entitled to judgment, can only get nominal damages.¹⁰ As the burden is upon the plaintiff to show what damage, if any, he has suffered, it is incumbent upon him, in order to make out a case for recovery of more than nominal damages, to show that the market value of the goods is less than the contract price.¹¹

no time was fixed for acceptance, then at the time of the refusal to accept."

For decisions under this section, see *Urbansky v. Kutinsky*, 86 Conn. 22, 84 Atl. 317; *Home Pattern Co. v. W. W. Merts Co.*, 86 Conn. 494, 86 Atl. 19; *Progressive &c. Corp. v. Ansonia Foundry Co.*, (Conn. 1918), 105 Atl. 322; *Rylance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597; *Bixler v. Finkle*, 85 N. J. L. 77, 88 Atl. 846; *Varley v. Belford*, 156 N. Y. S. 597; *Mosler Safe Co. v. Brenner*, 100 N. Y. Misc. 107, 165 N. Y. S. 336; *Michael v. Florida Mfg. Co.*, 167 N. Y. S. 244. For the measure of damages in instalment contracts where the buyer is in default, see the analogous cases cited *infra*, § 1383, where the seller was in default.

⁸ *Barrow v. Arnaud*, 8 Q. B. 595, 606, per Tindal, C. J.; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 444, 42 U. S. App. 21, 20 C. C. A. 503; *Hopkinsville Mill Co. v. Gwin*, 179 Ala. 472, 60 So. 270; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Hassell Iron Works v. Cohen*, 36 Colo. 353, 85 Pac. 89; *Ridley v. Mooney*, 16 Ind. App. 362,

45 N. E. 348; *Lawrence Canning Co. v. Mercantile Co.*, 5 Kans. App. 77, 48 Pac. 749; *Bonney v. Blaisdell*, 105 Me. 121, 73 Atl. 811; *Tufts v. Bennett*, 163 Mass. 398, 47 N. E. 172; *Houghton v. Furbush*, 185 Mass. 251, 70 N. E. 49; *Stock v. Snell*, 213 Mass. 449, 100 N. E. 830; *Kellogg v. Frohlich*, 139 Mich. 612, 102 N. W. 1057; *Brown v. Trinidad Asphalt Co.*, 210 Mo. 260, 109 S. W. 22; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; *Massman v. Steiger*, 79 N. J. L. 442, 75 Atl. 746; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Jones v. Jennings*, 168 Pa. St. 493, 32 Atl. 51; *Huguenot Mills v. Jempson & Co.*, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807. But see *Diels v. Kennedy*, 88 Neb. 777, 130 N. W. 740.

⁹ *Jamal v. Dawood*, [1916] 1 A. C. 175.

¹⁰ *Wheeler v. Cleveland*, 170 Ala. 426, 54 So. 277; *Brooke v. Laurens Milling Co.*, 84 S. C. 299, 66 S. E. 294.

¹¹ *Benjamin v. Maloney*, 155 Fed.

Though the market value at the time and place where delivery should have been accepted under the contract is the exact matter to be determined, that value sometimes cannot be determined directly. There may be no available market at that place. In such a case the value at the nearest available market will be accepted, taking the expense of transportation into account.¹²

§ 1379. Seller's damages where goods have no market value.

If there is no market value for which the goods can be sold, it is impossible to lay down a narrower principle than that sellers in such a position are "entitled to the full amount of the damage which they have really sustained by a breach of the contract."¹³ It does not necessarily follow that because there is no available market in which the goods can be sold at the time, that they have no pecuniary value. In some cases, however, this may be true, and in such a case damages are the entire contract price without deduction.¹⁴

494; *Foos v. Sabin*, 84 Ill. 564; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172.

¹² In *Barry v. Cavanagh*, 127 Mass. 394, the purchaser failed to take paving stones at a specific place in Boston, Dover street bridge. The court said, speaking of the stone: "Now, if, when they were brought to Dover street bridge, where there was no market for them, it would cost all they would sell for at a market to carry them to the market, they were valueless there, and they would be entitled to recover the contract price in order to be made whole. If they (the stones) could be conveyed to a market for a part of what they would sell for, they were worth at the bridge the market price less the cost of getting them to the market, and the true rule would be the difference between what they were so worth and the contract price. Stated otherwise, if they were salable where they lay, to be delivered elsewhere at a price larger than the cost of delivery there,

the excess of such price above the cost of delivery was the market value, which should have been deducted from the contract price, in order to get at the damages." See also *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769; *Kirchman v. Tuffie Bros. Co.*, 92 Ark. 111, 122 S. W. 239; *McCormick v. Hamilton*, 23 Gratt. 561. Also if the market is controlled by the buyer, and perhaps if for any cause the local market is subject to such peculiar conditions as not fully to reflect the value of the goods, the market value at the nearest available market may be used to determine the seller's damage. *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. Rep. 444, 42 U. S. App. 21, 20 C. C. A. 503.

¹³ *Dunkirk Colliery Co. v. Lever*, 9 Ch. D. 20, 25.

¹⁴ *Allen v. Jarvis*, 20 Conn. 38; *Barry v. Cavanagh*, 127 Mass. 394. See also *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769. If the seller was under a duty to deliver, and to put on

§ 1380. Seller's damages where he has not obtained the goods.

In the preceding sections it is assumed that the seller has acquired at the time of the breach the goods to which the contract relates, but owing to the defendant's repudiation this may not be the case. None or only part of the goods may yet have been acquired. If those not yet acquired must have been bought in the market by the plaintiff, the market price still furnishes the test of the value of the plaintiff's performance which must be deducted from the contract price to determine the amount of the defendant's liability. If, however, by the terms of the contract the plaintiff was to manufacture the goods, or if the defendant had notice when the contract was made that he planned to manufacture, the cost to the plaintiff of so doing (which may be much less than the market price of the completed goods) furnishes the test.¹⁵ That the seller cannot enhance damages by unnecessarily manufacturing the goods after a total breach or repudiation has been previously considered.¹⁶ This rule based on cost of manufacture is not the less applicable because at the time of the breach the plaintiff had on hand goods of the description called for by the contract which he intended to appropriate to the contract. He had a right to change his mind, and he had a right to make sales to as many persons as would deal with him. Only where the plaintiff could not have manufactured other goods to fulfill the contract will the market value of what he has on hand be the amount to deduct from the contract price.

§ 1381. Damages for failure to deliver goods when property has passed.

As the goods belong to the buyer as soon as the property in them has passed, the amount of his recovery if the seller fails

the cars, the expense of doing so should be deducted. *Willis v. Jarrett Const. Co.*, 152 N. C. 100, 67 S. E. 265.

¹⁵ *Silkstone &c. Co. v. Joint Stock Coal Co.*, 35 L. T. Rep. (N. S.) 668; *Hinckley v. Pittsburg &c. Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Skeele Coal Co. v. Arnold*, 200 Fed. 283, 118 C. C. A. 545;

Thistle Coal Co. v. Rex &c. Co., 132 Ia. 592, 109 N. W. 1094; *Bullard v. Eames*, 219 Mass. 49, 106 N. E. 584; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Meyer Bros. Drug Co. v. McKinney*, 137 N. Y. App. D. 541.

¹⁶ See *supra*, § 1299.

to deliver, whether the action is in tort or in contract, is *prima facie* the market value of the goods at the time and place when delivery should have been rendered. And if the price has been paid, such is the recovery actually allowed.¹⁷ Where the goods have no market value at that time and place the same principles must be applied when the property has passed as are applied when the breach of contract consists of a failure to transfer the property.¹⁸ If the price has not been paid, however, the seller's breach of duty in failing to deliver the goods involves the result that the buyer is excused from his obligation to pay the price. Accordingly the contract price of the goods must be deducted from the plaintiff's recovery, and thus the measure of damages is in effect the same as if the property in the goods had not passed.¹⁹

§ 1382. Allowance of higher subsequent value.

It has often been urged that the value of the goods at the time of the wrongful conversion or refusal to deliver by the seller may not fully compensate the buyer for the wrong done him. It may be supposed that the value of the goods increases rapidly immediately after the time fixed by the contract for delivery. The circumstances of the case may be such as to make it reasonably clear that the buyer would have retained the goods until the advance in price and would thus have got the advantage of their increased value. If the buyer has not paid the price it may be urged in answer to this that on the breach of the seller's obligation the buyer should buy elsewhere with his money and that if he did so he would then get the advantage of the subsequent increase in price. This answer seems sound and is generally accepted, but if the buyer has paid the price the reasoning is inapplicable. The buyer may not have money or credit to secure a further supply of goods, and if he has it is not just to deprive him of the right to make as many profitable contracts for his own benefit as his means and credit will permit. Accordingly in some jurisdictions, especially in regard to the sale

¹⁷ *Deere v. Lewis*, 51 Ill. 254; *Winside Bank v. Lound*, 52 Neb. 469, 72 N. W. 486; *Hill v. Smith*, 32 Vt. 433. See Uniform Sales Act, Sec. 66.

¹⁸ See *supra*, § 1379.

¹⁹ *Chinery v. Viall*, 5 H. & N. 288. See also *Kennedy v. Whitwell*, 4 Pick. 466.

of stocks and other articles of rapidly fluctuating value, the rule has been suggested that the plaintiff ought to receive damages based on the highest market price up to the time of trial.²⁰

But this rule allows the plaintiff a very inequitable advantage over the defendant. Months and perhaps years may elapse before the case comes to trial, and to give the plaintiff the advantage of the highest intermediate price is to give him a speculative advantage which it is hardly conceivable he would actually have realized to the full and perhaps not in any part. Accordingly the Supreme Court of the United States, following the later New York decisions, has qualified the rule by allowing only the highest intermediate value up to the time when the plaintiff, having discovered the defendant's default, could reasonably supply himself elsewhere with similar property.²¹ The ordinary rule of confining the plaintiff's damages to the value of the goods at the time of the defendant's breach of duty has at least the merit of certainty and ease of application. It is undoubtedly the general rule everywhere, and in many jurisdictions would doubtless be applied even in the case of stock or goods of fluctuating value.²² At least where the buyer has not

²⁰ See *Markham v. Jaudon*, 41 N. Y. 235 (overruled); *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356. In *Livesley v. Krebs Hop Co.*, 57 Ore. 352, 107 Pac. 460, 112 Pac. 1, it was said that a seller who unreasonably delayed reselling goods on the buyer's account was liable for the highest value between the date when delivery was due and when the resale took place. (See also *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084, 55 Or. 227, 104 Pac. 3, 59 Or. 574, 114 Pac. 944, 118 Pac. 165). In support of this the court cited *Hamer v. Hathaway*, 33 Cal. 117; *Learock v. Paxson*, 208 Pa. 602, 57 Atl. 1097.

²¹ *Galigher v. Jones*, 129 U. S. 193, 9 S. Ct. 335, 32 L. Ed. 658 (citing many State decisions); *McKinley v.*

Williams, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749; *Wilson v. Colorado Mining Co.*, 227 Fed. 721, 142 C. C. A. 245; *Wallace v. Noble*, 203 Mich. 58 168 N. W. 984.

²² *Beaty v. Johnston*, 66 Ark. 529, 52 S. W. 129; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226, 102 Am. St. 115; *Porter v. Buckfield Branch Railroad*, 32 Me. 539; *Belden v. Krom*, 34 Wash. 184, 75 Pac. 636; *McNeil v. Fultz*, 38 Can. Supreme, 198. In *Williams v. Reynolds*, 34 L. J. Q. B. 221, and *Kennedy v. Whitwell*, 4 Pick. 466, the defendant had resold goods, subsequently to their conversion, at a higher price than the market value at the time of the defendant's breach of duty. Even in such a case, the plaintiff was held not entitled to the advantage of this enhanced price.

paid for the property contracted for, even if it is stock or goods of fluctuating value, most courts calculate the buyer's damages from the value of the property on the day of the breach.²² How far the principles stated in this section may be qualified by the allowance of consequential damages is elsewhere considered.²⁴

§ 1383. Buyer is entitled to the difference between the market and contract prices.

The application of the general principle of compensation can be summed up by the same formula where the title has not passed and the buyer is the plaintiff as in the case where the seller is the plaintiff. "The proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when, and place where, the contract is broken, because the purchaser having the money in his hands may go into the market and buy."²⁵

²² *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813; *Wilson v. London &c. Finance Corp.*, 14 T. L. R. 15; *Coffin v. State*, 144 Ind. 578, 43 N. E. 654, 55 Am. St. 188; *Sloan v. McKane*, 131 N. Y. App. D. 244, 115 N. Y. S. 648; *Patterson v. Plummer*, 10 N. Dak. 95, 86 N. W. 111. *Cf. In re Swift*, 114 Fed. 947; *Vos v. Child*, 171 Mich. 595, 137 N. W. 209, 43 L. R. A. (N. S.) 368.

²⁴ §§ 1347, 1355.

²⁵ *Barrow v. Arnaud*, 8 Q. B. 595, 609. To the same effect are *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *Capen v. Glass Co.*, 105 Ill. 185; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Bucyrus Hay Co. v. Cincinnati Grain Co.* (Ky.), 119 S. W. 182; *Kribs v. Jones*, 44 Md. 396; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; *Talcott v. Freedman*, 149 Mich. 577, 113 N. W. 13; *Pittsburgh Coal Co. v. Northy*, 158 Mich. 530, 123 N. W. 47; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125; *Hewson Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. 129;

Eaves v. W. H. Harris & Sons Co., 95 Miss. 607, 49 So. 258; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Cahen v. Pratt*, 69 N. Y. 348, 25 Am. Rep. 203; *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14; *Sharpsville Furnace Co. v. Snyder*, 223 Pa. 372, 72 Atl. 786; *Thomas Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. 468, 104 Atl. 750; *Hill v. Smith*, 32 Vt. 433; *Austin v. Langlois*, 83 Vt. 104, 74 Atl. 489; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49.

The Uniform Sale Act provides: Sec. 67 "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing prox-

The rule in regard to the difference between the market price and the contract price is applicable where the right of action is based upon repudiation as well as where based upon actual breach.²⁶ Where the goods are by terms of the contract deliverable in instalments, the same principle is to be applied. And if the value of the goods varies during the period of the contract, the plaintiff's damages must be separately calculated for each instalment.²⁷ Sometimes when the seller is unable to fulfill his obligation at the time when performance was due, by mutual consent or by the election of the buyer to continue the contract in spite of the seller's default, the time for delivery is extended. The damages are then to be calculated as of the time fixed by the later agreement.²⁸ If the seller has prepaid the price no deduction of course must be made from the market price.²⁹ And on the other hand if the market price is no greater than the contract price, the buyer though he has a right of action can recover only nominal damages.³⁰

mate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." For decisions under this section, see *Phillips Sheet & Tin Plate Co. v. Boyer*, 133 Md. 119, 105 Atl. 186; *Gruen v. Ohl & Co.*, 81 N. J. L. 626, 80 Atl. 547; *Pope v. Ferguson*, 82 N. J. L. 566, 83 Atl. 353; *Fowler v. Gress Mfg. Co.*, 94 N. Y. Misc. 650, 158 N. Y. S. 524; *Salsberg v. Spero*, 106 N. Y. Misc. 436, 175 N. Y. S. 839; *N. P. Sloan Corp. v. Linton*, 260 Pa. 569, 103 Atl. 1011; *Allen v. Wolf River Lumber Co.*, 169 Wis. 253, 172 N. W. 158.

²⁶ *Leigh v. Paterson*, 8 Taunt. 540; *Emory Mfg. Co. v. Salomon*, 178 Mass. 582, 60 N. E. 377; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50.

²⁷ *Brown v. Muller*, L. R. 7 Ex. 319; *Ex parte Llansamlet T. P. Co.*, L. R. 16 Eq. 155; *Barningham v. Smith*, 31 L. T. R. 540; *Sizer v. Melton*, 129 Ga. 143, 58 S. E. 1055;

Delaware, etc., H. C. Co. v. Mitchell, 92 Ill. App. 577; *Salsberg v. Spero*, 106 N. Y. Misc. 436, 175 N. Y. S. 839; *Sharpsville Furnace Co. v. Snyder*, 223 Pa. 372, 72 Atl. 786; *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160.

²⁸ *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Ralli v. Rockmore*, 111 Fed. 874; *Consumers' Bread Co. v. Stafford County Flour Mills Co.*, 239 Fed. 693, 152 C. C. A. 527; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364; *Schultz v. Glickstein*, (Supr. Ct. App. Term), 168 N. Y. S. 490.

²⁹ *Startup v. Cortassi*, 2 Crompt. M. & R. 165; *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. 486; *Tompkins v. Lamb*, 195 N. Y. 518, 88 N. E. 1133; *Smethurst v. Woolston*, 5 W. & S. 106; *Humphreysville Copper Co. v. Mining Co.*, 33 Vt. 92; *Hill v. Smith*, 32 Vt. 433.

³⁰ *Valpy v. Oakley*, 16 Q. B. 941; *Moses v. Rasin* (C. C.), 14 Fed. 772; *Acme Elevator Co. v. Johnson*, 141 Ky. 718, 133 S. W. 784; *Fessler v. Love*, 48 Pa. St. 407; *Wire v. Foster*,

§ 1384. Buyer's damages where there is no market price.

It may be that no market exists at the place where delivery was due. The nearest available market furnishes the basis under such circumstances; the expense of obtaining and transporting the goods from that market to the place where delivery is due being added.³¹ It will not infrequently happen that goods have no market value or none which can be determined with any exactness. Wherever goods are of a special kind or are of a peculiarly good or bad grade or quality, this is likely to occur. In such a case the court must determine the value of the goods as best it can by considering the expense to the buyer of securing similar goods, or goods which would equally well serve the purpose;³² or by the loss of profit suffered,³³ or the added expense incurred.³⁴ If the goods have no value whatever, the buyer can never be entitled to more than nominal damages;³⁵ and as the burden is on the buyer to prove his damages, if he fails

62 Iowa, 114, 17 N. W. 174; *Merriman v. Machine Co.*, 96 Wis. 600, 71 N. W. 1050; *Anderson v. Savoy*, 142 Wis. 127, 124 N. W. 1053. The result is the same if the plaintiff fails to prove a market price or that this standard is inapplicable. *Harman v. Washington Fuel Co.*, 228 Ill. 298, 81 N. E. 1017.

³¹ *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *Marshall v. Clark*, 78 Conn. 9, 60 Atl. 741; *Capen v. Glass Co.*, 105 Ill. 185; *Tuttle Chapman Coal Co. v. Coaldale Fuel Co.*, 136 Ia. 382, 113 N. W. 827; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *National Tar Co. v. Gaslight Co.*, 189 Mass. 234, 75 N. E. 625; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Nottingham Coal & Ice Co. v. Preas*, 102 Va. 820, 47 S. E. 823.

³² *Wilmoth v. Hamilton*, 127 Fed. 48, 61 C. C. A. 584; *Vulcan Iron Works v. Roquemore*, 175 Fed. 11, 99 C. C. A. 77; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl.

521; *Johnston v. Faxon*, 172 Mass. 466, 52 N. E. 539; *F. W. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 92 N. W. 788, 102 Am. St. Rep. 378; *Ideal Wrench Co. v. Garvin Machine Co.*, 92 N. Y. App. Div. 187, 87 N. Y. S. 41, 181 N. Y. 573, 74 N. E. 1118; *McHose v. Fulmer*, 73 Pa. St. 365; *Davis v. School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630. In *Hinde v. Liddell*, L. R. 10 Q. B. 265, the court took into consideration the expense of obtaining a substitute for the goods contracted for. But an unnecessarily expensive substitute can not be taken as the measure of the buyer's damages. *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117.

³³ *Talcott v. Freedman*, 149 Mich. 577, 113 N. W. 13; *Eddy v. Fay Fruit Co. (R. I.)*, 67 Atl. 586.

³⁴ *British &c. Mfg. Co. v. Underground &c. Electric Co.* [1912] A. C. 673.

³⁵ *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760.

to prove the market price, or some other appropriate measure of damages, his recovery is only nominal.³⁶

In many cases the plaintiff's damage may exceed the difference between the contract and the market price. In what cases such special or consequential damage can be recovered will be considered in other sections.³⁷

§ 1385. Limitation of the buyer's right to recover the difference between the market price and the contract price.

The test of market value is, at most, but a means of getting at the buyer's loss, and under special circumstances it may cease to be exact or may become inapplicable. The buyer may be able to get similar goods for less than the market price, and if he does buy goods against the defendant's contract his damages must be based on his actual loss; namely, the difference between the price he paid and that which he would have had to pay under the contract.³⁸

If the buyer had paid for the goods it seems clear that he would be under no obligation to put out a further sum of money in order to take advantage of a favorable offer to purchase such goods elsewhere at less than market price; and if the buyer chooses to take advantage of an exceptional chance to buy goods cheaply, and does not profess to make the purchase for the account of the defaulting seller, there seems no reason why the buyer should not be allowed to claim the benefit of the transaction for himself and not give the seller the advantage of it. Even though the buyer has not paid the price, it may be urged that he is under no duty to the defaulting seller to give him the advantage of a special opportunity to buy at a low price if only a limited amount of the goods can be obtained at that price. It seems, however, to be generally assumed that the buyer is under a duty to purchase the goods at a diminished price on the seller's account if he can do so, and even though his opportunity to purchase at a reduced price is from the de-

³⁶ *Harman v. Washington Fuel Co.*, 228 Ill. 298, 81 N. E. 1017.

³⁷ *Supra*, § 1347; *infra*, § 1393.

³⁸ *Theiss v. Weiss*, 166 Pa. St. 9,

31 Atl. 63, 45 Am. St. Rep. 638; *Morris v. Supplee*, 208 Pa. St. 253, 57 Atl. 566.

faulting seller himself, it has been held he must take advantage of the opportunity in order to minimize the damages;³⁹ for not infrequently the defaulting seller offers to sell to the buyer the goods contracted for on terms less favorable than those agreed upon in the contract, but more favorable than could be obtained by purchase in the market. Especially common is the offer of a seller, who has contracted to sell on credit and who later refuses to do so, to sell for cash. Generally such an offer is made as an offer of settlement and as the basis for an accord and satisfaction. If so the buyer clearly need not accept the offer, and this is generally recognized by the decisions.⁴⁰ Nor need he do so if his pecuniary circumstances are such as to make payment of cash an undue hardship.⁴¹ Some cases, indeed, seem broadly to deny any limitation of the buyer's damages because of such an offer.⁴² But if acceptance of the offer of the seller clearly will diminish the buyer's damages, and will subject him to no unreasonable hardship, the principle that a plaintiff cannot recover for avoidable consequences seems applicable.⁴³ In any event, should the buyer pay more than the market price, he cannot charge the excess against the seller, for not the seller's wrong but his own folly was the cause of the excessive payment.⁴⁴

§ 1386. Other cases where the buyer's damages are limited.

Owing to other special circumstances the buyer may actually suffer less damage from the seller's failure to deliver than the

³⁹ *Lawrence v. Porter*, 63 Fed. 62, 22 U. S. App. 483, 11 C. C. A. 27, 26 L. R. A. 167.

⁴⁰ *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 22 U. S. App. 483, 26 L. R. A. 167; *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837; *Coppola v. Marden, Orth & Hastings Co.*, 228 Ill. 281, 118 N. E. 489; *Plesofsky v. Kaufman*, 140 Tenn. 208, 204 S. W. 204, 1 A. L. R. 433. See also *Hirsch v. Georgia Iron & Coal Co.*, 169 Fed. 578, 95 C. C. A. 76.

⁴¹ *Ibid.* See also *Weber Implement Co. v. Acme Harvester Mach. Co.*, 268 Mo. 363, 187 S. W. 874.

⁴² *Louis Cook Mfg. Co. v. Randall*, 62 Iowa, 244, 17 N. W. 507; *Frohlich v. Independent Glass Co.*, 144 Mich. 278, 107 N. W. 889; *F. W. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 92 N. W. 788, 102 Am. St. 378; *Coxe v. Anoka Waterworks &c. Co.*, 87 Minn. 56, 91 N. W. 265. See also *Havermeyer v. Cunningham*, 35 Barb. 515; *Lakner v. Korn* (N. Y. Misc.), 164 N. Y. S. 165.

⁴³ See cases *supra*, n. 40; also *Paysu v. Saunders*, [1919] 2 K. B. 581; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117.

⁴⁴ See *Gruen v. Ohl*, 81 N. J. L. 626, 631, 80 Atl. 547.

difference between the contract price and the market price; as for instance where if the contract had been kept the buyer must have put the goods to a less advantageous use than selling them at the market price. If the plaintiff was under no obligation to put the particular goods to be furnished by the seller to this use he would have a right to change his mind and realize the market value. In such a case, putting the goods to their normal and ordinary use would be a possibility which should have been contemplated by the seller even though he knew prior to the formation of his contract of the buyer's intention. But the buyer may have been bound by a sub-contract with a third person to deliver to the latter the very goods which he expected to obtain from the defendant. Here there is authority for restricting the plaintiff to the profit which he would have obtained had he performed his contract with the third person.⁴⁵ The Uniform Sales Act,⁴⁶ however, provides that a buyer's "measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."⁴⁷ The use of the word "greater" in this passage negatives the possibility of restricting the plaintiff's damages in the case supposed, and this conclusion seems nearly if not quite always sound on principle. The extent of the wrong which the defendant has committed is measured by the difference between the market price and the contract price, and though the full amount of the reparation for this wrong would not have accrued to the profit of the plaintiff if the contract had been carried out, the profit which he would have made, added to the liability to which he exposed himself to the third person with whom he contracted, together amount to the full sum for which the defendant should be held.⁴⁸ It is only in the

⁴⁵ *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Isaacson v. Crean*, 165 N. Y. S. 218. See also *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301; *Williams v. Agius*, [1914] A. C. 510, *per Lord Haldane*;

Foss v. Heineman, 144 Wis. 146, 128 N. W. 881.

⁴⁶ See *supra*, § 1383 n. 25.

⁴⁷ Sec. 67 (subdivision 3). And see *Goldfarb v. Campe Corp.*, 164 N. Y. S. 583, 99 N. Y. Misc. 475.

⁴⁸ See *Floyd v. Mann*, 146 Mich.

exceptional case where the buyer in his sub-contract protects himself from liability by engaging to resell only in case the original seller fulfils his contract that the defendant can if ever fairly ask a restriction of the plaintiff's damages.⁴⁹ Perhaps the desirability of maintaining a uniform rule may have weight as a reason for refusing to diminish the plaintiff's damages.⁵⁰ Suppose one who had contracted to buy a race-horse worth a thousand dollars had agreed to let it for its life to a friend for five dollars a year, and the friend had agreed to hire it for that price. Does the fact the buyer has agreed to give away or to sell below cost part of the value for which he contracted absolve the defendant to that extent from the consequences of his breach of duty? This is the problem to which the law as yet can hardly be said to afford a conclusive answer. It seems immaterial on the question of limiting damages whether the defendant was aware of the sub-contract,⁵¹ or whether it is made after the original contract.⁵² If special limitation of damages is to be allowed, it is because the plaintiff gets full compensation from the smaller amount; and this reason would not be dependent on the defendant's expectations.⁵³

356, 109 N. W. 679. Consider in this connection also the right of a bailee to recover from a converter the full value of the bailed goods. *Bowen v. New York & C. R.*, 202 Mass. 263, 88 N. E. 781.

⁴⁹ A case of this sort was *Foss v. Heineman*, 144 Wis. 146, 128 N. W. 881.

⁵⁰ In *British Westinghouse Electric etc., Co. v. Underground Electric, etc., Co.*, [1912] A. C. 673, 691, Lord Haldane said, with apparent approval of the conclusion of the Court of Appeal, of the measure of damages for breach of covenant by a tenant to leave premises in repair: "In *Joyner v. Weeks*, [1891] 2 Q. B. 31, the lessor had made a lease to another lessee by way of anticipation, to commence from the expiration of the term of this lease, and the new lessee had made no claim to be reimbursed the cost which he had incurred in

repairing after the expiration of the demised lease. *Wright, J.*, held that the true test was the amount of diminution in value to the lessor, not exceeding the cost of doing the repairs. The Court of Appeal, including Lord Esher and Fry, L. J., took a different view. They thought that there had been a constant practice of laying down the measure of damages as being the cost of putting into repair, and that in the particular class of cases with which they were dealing it was a highly convenient rule which ought not to be disturbed."

⁵¹ See *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301.

⁵² *Foss v. Heineman*, 144 Wis. 146, 128 N. W. 881.

⁵³ If the argument sometimes used in regard to the rule of *Hadley v. Baxendale* and criticised, *supra*, § 1357, namely, that consequential damages are allowed because in effect con-

§ 1387. Delivery of too small a quantity.

Where a seller is under a contract to deliver a specific quantity of goods and tenders a smaller quantity, the buyer may reject the tender.⁵⁴ The buyer may, however, accept the offer though defective.⁵⁵ In so doing he enters into a new contract. The offer of a quantity not contracted for is a manifestation of the seller's willingness to sell that quantity. The terms of this new contract, if no contrary intention is indicated, are the same as those of the original bargain, except as to quantity. If, therefore, the original bargain provided for a lump price, the buyer, if he accepted the goods, would become liable for that price. If, however, the original contract provided for payment by number, weight, or measure, the buyer would become liable to pay at this rate for the quantity of goods actually received.⁵⁶

§ 1388. Deficient delivery under instalment contract.

But in case the seller's obligation is either by its terms or by the buyer's permission performable in instalments it may happen that the buyer, not supposing the seller is going to be guilty of a breach of contract, accepts one or more instalments, assuming that the rest are to follow. If the buyer had agreed to pay a lump price after all the instalments had been delivered, it is obvious that the acceptance of the early instalments could not bind him to pay the agreed price. Delivery of the later instalments would be a condition precedent to the buyer's obligation.⁵⁷ Even if the price of each instalment was payable separately, the buyer should have relief. It is true that his ac-

tracted for, it would seem to follow that in any event the damage that the defendant might normally expect would follow from a breach of his contract should be recovered even though the plaintiff actually suffered less damage.

⁵⁴ *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. Ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. Ed. 920; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. 611; *Hill v. Heller*, 27 Hun, 416; *Inman v.*

Elk Cotton Mills, 116 Tenn. 141, 92 S. W. 760.

⁵⁵ *Norrington v. Wright*, 115 U. S. 188, 205, 6 S. Ct. 12, 29 L. Ed. 366; *Bamberger v. Burrows*, 145 Iowa, 441, 124 N. W. 333.

⁵⁶ *Morgan v. Gath*, 3 H. & C. 748; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503.

⁵⁷ *Oxendale v. Wetherell*, 9 B. & C. 386, 387; *Waddington v. Oliver*, 2 B. & P. (N. S.) 61; *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138, 140.

ceptance of a part indicates an assent to take title to the goods offered, and to pay for them at the contract rate, but this assent was given in the justifiable expectation of receiving an additional quantity of goods. The buyer may, therefore, on finding out that the contract is not going to be fully performed by the seller, return the goods in his possession and refuse to pay the price, if not already paid; and, if already paid, recover it back.⁵⁸ If, however, the buyer when he accepts the partial delivery is aware that the seller proposes to make no other delivery, it is clear that the buyer should pay for the goods; and, similarly, if he retains them after he knows that no future delivery is to be made, even though at the time the partial delivery was accepted he had no reason to suppose the rest of the contract was not to be performed. If the contract is divisible and a price is, therefore, due according to the terms of the contract for what has been delivered and accepted, there can be no doubt of the seller's right to recover the price fixed by the contract.⁵⁹

§ 1389. Deficient delivery where contract is entire.

It may, however, be supposed that the contract was entire and that no part of the price was due until full performance by the seller. Even in such a case, if the buyer accepted a portion of the goods knowing that no more were to be delivered, there is no difficulty in finding a real contract to pay for them, as distinguished from a quasi-contractual obligation, since the partial delivery was in effect a new offer.⁶⁰ But if the deficient quantity of the goods were delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to

⁵⁸ Benjamin, *Sale* (5th Eng. ed.), 697; *Polhemus v. Heiman*, 45 Cal. 573; *Bamberger v. Burrows*, 145 Ia. 441, 124 N. W. 333. But see *Bigelow v. Barnes*, 121 Minn. 148, 140 N. W. 1032.

⁵⁹ *Bowker v. Hoyt*, 18 Pick. 555. The court held in this case that retention of the goods after knowledge of the seller's default made the buyer liable for the contract price;

but the buyer, it was said, might recoup the damages that he suffered from the seller's failure completely to fulfil his contract. As to the question of the seller's liability where incomplete performance has been accepted, see *supra*, §§ 701 *et seq.*

⁶⁰ See *Georgia Pine Lumber Co. v. Central Lumber Co.*, 6 Ala. App. 211, 60 So. 512.

by the buyer. Here accordingly, if the seller recovers payment for what he has furnished, it must be on principles of *quasi-contract*. It is true that it has often been laid down that a contract will not be implied by the law in favor of one who is in default under an express contract, but the injustice of allowing the seller to retain the benefit of goods without paying for them is so clear that even in England, where quasi-contractual rights are generally most strictly limited, recovery has been allowed,⁶¹ and the weight of authority in this country strongly supports this view;⁶² but in New York by a long series of decisions the seller is denied relief.⁶³ The New York view has been accepted in a few other States.⁶⁴ The measure of damages in such an action is not necessarily the contract price even if the contract fixes a price by number, weight, or measure. If the buyer retained the goods, having it in his power to redeliver them after he knew that the seller was going to make default in delivering the whole amount, it seems just that the buyer should pay the contract price. This result seems supported by the decisions which hold the buyer liable under such circumstances. It is commonly said that the retention operates as a severance of the contract.⁶⁵ The buyer, however, may in good faith have dealt

⁶¹ *Oxendale v. Wetherell*, 9 B. & C. 386. In this case the plaintiff delivered 130 bushels of wheat and though he was bound to deliver 250 bushels and failed to deliver the residue, the court held that after the expiration of the time within which delivery should by the contract have been made, recovery could be had for the 130 bushels. Parke, J., said: "If the buyer retained the part delivered after the seller had failed in performing his contract, the latter may recover the value of the goods which he so delivered."

⁶² *Richards v. Shaw*, 67 Ill. 222; *Holden Mill v. Westervelt*, 67 Me. 446; *Rodman v. Guilford*, 112 Mass. 406; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Clark v. Moore*, 3 Mich. 55; *Shaw v. Badger*, 12 S. & R. 275.

⁶³ *Champlin v. Rowley*, 13 Wend. 258, 18 Wend. 187; *Mead v. Degolyer*, 16 Wend. 632; *Baker v. Higgins*, 21 N. Y. 397; *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183; *Kein v. Tupper*, 52 N. Y. 550; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475. If there are any facts tending to show waiver or prevention of full performance, the New York court is quick to seize upon these facts as a ground of liability. *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

⁶⁴ *Haslack v. Mayers*, 26 N. J. L. 284; *Witherow v. Witherow*, 16 Ohio St. 238; *Petersburg Fire Brick Co. v. American Clay Mach. Co.*, 89 Ohio St. 365, 106 N. E. 33, L. R. A. 1915. B. 536.

⁶⁵ See cases cited *supra*, n. 61, 62.

with the goods in such a way as to make it impossible for him to return them, and yet the value of the portion received may not be so large a proportion of the total price as the goods are of the total amount of goods which should have been delivered. As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received. The seller, being a wrongdoer in failing to deliver the whole amount, can certainly claim no more than this; and so it is provided in the section of the Sales Act under consideration. Though it has been seen the buyer may accept the smaller quantity offered him, he has, it seems, no right to accept a portion only of this amount. If he does so, his action amounts to a new offer to the seller to purchase the partial quantity.

§ 1390. Damages for delay in delivery.

The seller may perform his contract otherwise but break it in regard to the time of performance. The normal measure of damages in such a case is the difference in value of the goods at the date contracted for and their value when delivered.⁶⁶ In fact, however, such damages may give the plaintiff either less than compensation or more than compensation. As to the first, the rules governing the recovery of consequential damages mark the boundary of the plaintiff's rights.⁶⁷ Thus if the goods which the defendant contracted to deliver were machines known to be intended for the buyer's use, the measure of damages then becomes the rental value of such machines for the period of delay,⁶⁸ unless the plaintiff can show that no other machines could be obtained and that the defendant knew this when he contracted with the plaintiff, in which case the damages might be greater.⁶⁹ Whether special expenses resulting from the delay are recoverable depends upon how far they were

⁶⁶ *Startup v. Cortassi*, 2 Cr. M. & R. 165; *Ramish v. Kirschbraun*, 98 Cal. 676, 33 Pac. 780, 107 Cal. 659, 40 Pac. 1045; *Clement, etc., Co. v. Mese-role*, 107 Mass. 362; *Whalon v. Aldrich*, 8 Minn. 346; *Spiers v. Halsted*, 74 N. C. 620. Where the price had been paid interest from the time of the breach was allowed in *Loomis v. Norman & Co.*, 81 Conn. 343, 71 Atl.

358; *Edwards v. Sanborn*, 6 Mich. 348.

⁶⁷ See *supra*, §§ 1347, 1355.

⁶⁸ *Maryland Ice Co. v. Arctic Ice Machine Mfg. Co.*, 79 Md. 103, 29 Atl. 69; *Tomkins Co. v. Dallas Cotton Mills*, 130 N. C. 347, 41 S. E. 938; *Standard Supply Co. v. Carter*, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155.

⁶⁹ See *supra*, § 1347.

foreseeable when the contract was entered into.⁷⁰ As to the restriction of the plaintiff's damages it has been held that if it appears that machines contracted for would not have been used during the time when the defendant was in default no damages are recoverable for the delay.⁷¹

§ 1391. Damages for defective quality—general rule.

The general measure of damage for breach of warranty of quality is the difference between the value of the article actually furnished the buyer and the value the article would have had if it possessed the warranted qualities.⁷²

Whether the action is in tort or contract is immaterial. In either form of action the buyer is seeking redress for the failure

* *Fairbanks v. Carson-Muse Lumber Co.*, 160 Ky. 346, 169 S. W. 731. Recovery of such expenses was allowed in *Canton Lumber Co. v. Liller*, 112 Md. 258, 76 Atl. 415; *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127. Recovery was denied in *Pusey & Jones Co. v. Combined Locks Paper Co.*, 255 Fed. 700; *Pennsylvania R. Co. v. Titusville &c. Co.*, 71 Pa. 350; *Billmeyer v. Wagner*, 91 Pa. 92.

⁷¹ *Eichbaum v. Caldwell Bros. Co.*, 58 Wash. 163, 108 Pac. 434. See also *supra*, §§ 1385, 1386.

⁷² *British &c. Mfg. Co. v. Underground Electric, etc., Co.*, [1912] A. C. 623; *English v. Spokane Com. Co.*, 57 Fed. 451, 15 U. S. App. 218, 6 C. C. A. 416; *McDonald v. Kansas City Bolt Co.*, 149 Fed. 360, 365, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Herring v. Skaggs*, 62 Ala. 180, 73 Ala. 446, 34 Am. Rep. 4; *Florence v. Pattillo*, 105 Ga. 577, 32 S. E. 642; *Moore Furniture Co. v. Sloane*, 166 Ill. 457, 46 N. E. 1128, 64 Ill. App. 581; *Elwood v. Harting*, 21 Ind. App. 408, 52 N. E. 621; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Davidson Bros. Co. v. Smith*, 143 Ia. 124, 121 N. W. 503; *Loomis Milling Co. v. Varter*, 8 Kans. App. 437, 57 Pac. 43; *Sharpe v. Bettis*, 17 Ky. L. Rep. 673, 32

S. W. 395; *Ponce v. Smith*, 84 Me. 266, 24 Atl. 854; *Central Trust Co. v. Arctic Ice Machine Co.*, 77 Md. 202, 238, 26 Atl. 493; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507; *Marted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Hansen v. Gaar*, 63 Minn. 94, 65 N. W. 254; *Miamisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175; *Skoog v. Mayer Bros. Co.*, 122 Minn. 209, 142 N. W. 193; *McCormick Harvesting Machine Co. v. Heath*, 65 Mo. App. 461; *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969; *Burr v. Redhead*, 52 Neb. 617, 621, 72 N. W. 1058; *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567; *Hooper v. Story*, 155 N. Y. 171, 49 N. E. 773; *Huyett & Smith Co. v. Gray*, 124 N. C. 322, 32 S. E. 718; *Aultman v. Ginn*, 1 N. Dak. 402, 48 N. W. 336; *Himes v. Kiehl*, 154 Pa. St. 190, 25 Atl. 632; *Western Twine Co. v. Wright*, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438; *Danner v. Fort Worth Implement Co.*, 18 Tex. Civ. App. 621, 45 S. W. 856; *Jacot v. Grossman, etc., Co.*, 115 Va. 90, 78 S. E. 646; *Case Flow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 52 N. W. 154.

of the article to conform to the warranty, not for the injury suffered by the purchase of an article worth less than the price paid for it. Even in an action for deceit, where fraud is part of the cause of action the great weight of authority supports the same rule.⁷³

Under this rule the fact that a defrauded buyer resold the goods at a profit will not deprive him of a right to substantial damages.⁷⁴ So the buyer's damages for breach of warranty are not lessened because he has resold the goods at an enhanced price.⁷⁵ Had the goods been as warranted, they might have

⁷³ In the following cases the rule was applied to sales of personal property: *Mayer v. Dyer*, 57 Ark. 441, 21 S. W. 1064; *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Antle & Bro. v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Van Velsor v. Seeburger*, 59 Ill. App. 322; *Smith v. Hunt*, 50 Ind. App. 592, 98 N. E. 841; *Drake v. Holbrook*, 23 Ky. L. Rep. 1941, 66 S. W. 512; *Nash v. Insurance & Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; *Whiting v. Price*, 173 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; *Bank of Atchison v. Byers*, 139 Mo. 627, 659, 41 S. W. 325; *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567; *Noyes v. Blodgett*, 58 N. H. 502; *Hubbell v. Meigs*, 50 N. Y. 480, 491; *Smith v. Appleton*, 155 N. Y. Misc. 520, 140 N. Y. S. 565; *Lunn v. Shermer*, 93 N. C. 164; *Robertson v. Halton*, 156 N. Car. 215, 72 S. E. 316, 37 L. R. A. (N. S.) 298; *Elder v. Shoffstall*, 90 Ohio, 265, 107 N. E. 530; *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 30, 80 N. W. 88, 81 N. W. 118. The same principle was applied to sales of land in *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Speed v. Hollinsworth*, 54 Kans. 436, 38 Pac. 496; *Wright v. Roach*, 57

Me. 600; *Adams v. Burton*, 107 Me. 223, 77 Atl. 835; *Stone v. Pentecost*, 210 Mass. 223, 96 N. E. 335; *Estell v. Myers*, 56 Miss. 800; *Caldwell v. Henry*, 76 Mo. 254, 257; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593; *Linerode v. Rasmussen*, 63 Ohio St. 545, 59 N. E. 220; *Beasley v. Swinton*, 46 S. C. 426, 24 S. E. 313; *Augur v. Smith*, 90 Tenn. 729, 18 S. W. 398; *Hecht v. Metaler*, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367.

⁷⁴ *Clark v. Morgan County Nat. Bank*, 196 Fed. 709. See also the following cases where the buyer resold without loss, and was allowed substantial damages: *Johnson v. Gavitt*, 114 Ia. 183, 86 N. W. 256 (land); *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726 (land); *Lunn v. Shermer*, 93 N. C. 164.

⁷⁵ *Union Selling Co. v. Jones*, 128 Fed. 672, 63 C. C. A. 224; *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942; *Brown v. Bigelow*, 10 Allen, 242; *Neil v. Cunningham S. Co.*, 160 Mo. App. 513, 140 S. W. 947; *Miamisburg &c. Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175; *McClatchey v. Anderson*, 84 Neb. 783, 122 N. W. 67; *Ellison v. Johnson*,

been resold at a still higher price. The same principle has been applied to the case of a defrauded seller. He has been held entitled to be put in the position he would have occupied had the representations been true; and so has been allowed to recover from one who fraudulently induced him to sell goods to an insolvent corporation the full price promised even though this includes a profit.⁷⁶

§ 1392. Restricted rule of damages for fraud.

The contrary view, however, confining the damages in deceit to the value of what the plaintiff parted with, less the value of what he received, has the support of the Supreme Court of the United States,⁷⁷ and of some State courts.⁷⁸ This also seems to be the law of England.⁷⁹ At first sight it may seem that the latter rule is clearly and universally correct, confining as it does the plaintiff's recovery to a restitution of what he lost by entering into the transaction. The real explanation of the broader rule, at least in cases of sales, seems to be that the defendant in deceit is not simply a fraudulent person, he is a warrantor of the truth of his statements. The injured person may, because of fraud, elect to rescind the transaction and claim restitution of what he has parted with, or he may demand that the representations be made good. Ordinary warranties where no fraud exists may be enforced by

⁷⁴ S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151.

⁷⁵ *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

⁷⁶ *Smith v. Bolles*, 132 U. S. 125, 10 S. C. 39, 33 L. Ed. 279; *Sigafus v. Porter*, 179 U. S. 116, 21 S. C. 34, 44 L. Ed. 113. These decisions have been followed in the lower Federal courts. *Wilson v. New U. S. Ranch Co.*, 73 Fed. 994, 36 U. S. App. 634, 20 C. C. A. 244; *Rockefeller v. Merritt*, 76 Fed. 909, 40 U. S. App. 666, 35 L. R. A. 633, 22 C. C. A. 608; *Nashua Savings Bank v. Burlington Electric Co.*, 100 Fed. 673.

⁷⁷ *Tedder v. Riggan*, 65 Fla. 153, 61 So. 244; *Buschman v. Codd*, 52 Md. 202, 209; *Reynolds v. Franklin*, 44

Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540; *Wallace v. Hollowell*, 56 Minn. 501, 58 N. W. 292; *Nelson v. Giestrum*, 118 Minn. 284, 136 N. W. 858; *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *High v. Berret*, 148 Pa. St. 261, 23 Atl. 1004; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; *Pickens v. Major* (Tex. Civ. App.), 139 S. W. 1040; *Weeks v. Stevens* (Tex. Civ. App.), 155 S. W. 667; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458, 482, 50 Pac. 55.

⁷⁹ *Peck v. Derry*, 37 Ch. D. 541; *McConnel v. Wright*, [1903] 1 Ch. 546. So in *Johnstone v. Hall*, 10 Manitoba, 161.

action of tort.⁸⁰ The addition of the element of deceit cannot deprive the injured person of the rights which would be his if this element were lacking, and if the representation on which he relied was a warranty and nothing more.⁸¹ A practical reason for the enforcement of the broader rule may be found in the fact that under the other rule a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterward brought to account for it; and if he is brought to account, he at least will lose nothing by his misconduct.⁸²

§ 1393. Consequential damages for breach of warranty of quality.

One who warrants goods to possess a certain quality is held to an extensive liability for consequential damages for breach of the warranty; perhaps on the ground that such a person should more readily foresee injurious consequences from a breach of his obligation than an ordinary contractor; perhaps because of the close relation of an action for breach of warranty to the law of torts.⁸³

If the consequential damages thus caused are natural consequences of the breach of warranty, the plaintiff is generally allowed to recover them.⁸⁴ If one sell an animal warranting it

⁸⁰ See *infra*, § 1505.

⁸¹ See *Barthelemy v. Foley Elevator Co.*, 141 Minn. 423, 170 N. W. 513. It may be urged that in some cases the representations on which an action of deceit may be based would not amount to a warranty if the element of deceit were lacking. Under the broad rule defended in *Williston on Sales*, §§ 197 *et seq.* (see also *supra*, § 970) this will not often be true of misrepresentations of goods sold. In any case where it is true, the allowance of the broader rule of damages in effect holds the defendant as a warrantor because of his deceit, a result not easy to support, since it involves the consequence that an alternative remedy should exist in *assumpsit*.

⁸² In *Morse v. Hutchins*, 102 Mass. 439, 440, this was stated by Mr. Justice Gray as follows: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make an advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."

⁸³ See *infra*, § 1505.

⁸⁴ *British &c. Mfg. Co. v. Underground Electric, etc., Co.* [1912] A. C. 673.

In *Borradaile v. Brunton*, 8 Taunt.

to be sound, when in fact it is infected with disease, the seller is responsible for expense incurred for medicine and medical attendance,⁸⁵ and for damages resulting from a communication of the disease to the buyer's other animals, in an action on the warranty.⁸⁶ And if a man sells hay or grain for the purpose of being fed to cattle and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury.⁸⁷ One who sells barrels with a warranty is liable for the buyer's loss of the contents owing to defects in the barrels.⁸⁸ The buyer of heating apparatus which fails to fulfill a warranty may recover for the loss caused by having the building without heat.⁸⁹ One who purchases warranted machinery which owing to breach of the warranty cannot be used may recover for the loss of time and labor before the machine can be replaced.⁹⁰ But the buyer of a warranted harvesting machine was not allowed to recover for injury to his grain caused by the inability to obtain another machine when the warranted machine broke.⁹¹ Delay due to failure to furnish goods as warranted⁹² and labor ex-

535, a chain cable was warranted to last two years, and on its breaking and letting go an anchor which was attached to it, the buyer was allowed to include in his damages the value of the anchor. In *Dushane v. Benedict*, 120 U. S. 630, 30 L. Ed. 810, 7 Sup. Ct. 696, rags were warranted as clean which were in fact infected and caused smallpox to break out in the purchaser's mill, thereby causing expense and delay. The seller was held liable.

⁸⁵ *Heenan v. Redman*, 101 Ill. App. 608; *Stearns v. Hudson*, 113 Me. 154, 93 Atl. 58; *Peak v. Frost*, 162 Mass. 208, 38 N. E. 518; *Larson v. Calder*, 16 N. Dak. 248, 113 N. W. 103.

⁸⁶ *Black v. Elliott*, 1 F. & F. 595; *Smith v. Green*, 1 C. P. D. 92; *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110; *Joy v. Bitzer*, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 184; *McKee v. Jones*, 67 Miss. 405, 7 So. 348; *Needham v. Halverson*, 22 N. Dak. 594, 135 N. W. 203; *Stranahan Co.*

v. Coit, 55 Ohio St. 398, 45 N. E. 634; *Packard v. Slack*, 32 Vt. 9.

⁸⁷ *Wilson v. Dunville*, 4 L. R. Ir. 249, 6 L. R. Ir. 210; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Coyle v. Baum*, 3 Okla. 695, 716, 41 Pac. 389.

⁸⁸ *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Tatro v. Brower*, 118 Mich. 615, 77 N. W. 274.

⁸⁹ *Tower v. Pauly*, 67 Mo. App. 632; *Laufer v. Boynton Furnace Co.*, 84 Hun, 311; 32 N. Y. S. 362; *Russell v. Corning Mfg. Co.*, 49 N. Y. App. Div. 610, 63 N. Y. S. 640.

⁹⁰ *New York Mining Co. v. Fraser*, 130 U. S. 611, 622, 9 S. Ct. 665, 32 L. Ed. 1031; *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. 341; *Aultman v. Stout*, 15 Neb. 586, 19 N. W. 464; *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508.

⁹¹ *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786.

⁹² *Canton Lumber Co. v. Liller*, 107 Md. 146, 68 Atl. 500. See also *North Baltimore Glass Co. v. Alt-*

pending in reasonable efforts to make warranted goods conform to the just requirement of the buyer may be recovered for.⁹³ Injury caused by using warranted goods in manufacturing other articles is recoverable unless the buyer was negligent or unreasonable in failing to discover the defects before using the goods.⁹⁴ Where seeds are bought with a warranty, the loss or diminished value of the crop may be included in damages recovered,⁹⁵ though in some cases where there is a total failure of the crop to germinate, a measure of damages based on the plaintiff's outlay rather than on his probable return, has been applied.⁹⁶ Where defective trees are sold, the seller, if the defect is a breach of warranty, is liable for the difference between the value of the land with such trees as were promised and with inferior trees, or no trees if the trees fail to grow.⁹⁷ On the

peter, 133 Wis. 112, 113 N. W. 435.

⁹³ *Adams Mach. Co. v. Castleberry*, 92 Ark. 310, 122 S. W. 998; *Fox v. Stockton Harvester Works*, 83 Cal. 333, 23 Pac. 295; *Whitehead Machine Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736. Cf. *Southern Gas &c. Co. v. Peveto* (Tex. Civ. App.), 150 S. W. 279.

⁹⁴ *Smith v. Johnson*, 15 T. L. R. 179; *Bagley v. Cleveland Rolling Mill*, 21 Fed. 159; *Nye v. Snyder*, 56 Neb. 754, 77 N. W. 118; *Smith v. Foote*, 81 Hun, 128, 30 N. Y. S. 679; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Griffin v. Metal Product Co.*, 264 Pa. 254, 107 Atl. 713.

⁹⁵ *Randall v. Raper, E. B. & E.* 84; *Buckbee v. P. Hohenadel, Jr., Co.*, 224 Fed. 14, 139 C. C. A. 478; *L. R. A.* 1916 C. 1001; *Crutcher v. Elliott*, 13 Ky. L. Rep. 592; *Haycroft v. Walden*, 14 Ky. L. Rep. 892; *Moorhead v. Minneapolis Seed Co.*, 139 Minn. 11, 165 N. W. 484, *L. R. A.* 1918 C. 391; *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273; *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38 N. J. L. 496, 20 Am. Rep. 425; *White*

v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; *Landreth v. Wycoff*, 67 N. Y. App. Div. 145, 73 N. Y. S. 388; *Depew v. Peck Hardware Co.*, 121 N. Y. App. D. 28, 105 N. Y. S. 390, *affd.* 197 N. Y. 528, 90 N. E. 1158; *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362. But see *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508; *Hurley v. Buchi*, 10 Lea, 346; *Hoopes v. East*, 19 Tex. Civ. App. 531; *American Warehouse Co. v. Ray* (Tex. Civ. App.), 150 S. W. 763. In *Stewart v. Sculthorp*, 25 Ont. 544, the plaintiff was not allowed recovery for damages due to impurities mixed with seed which caused noxious weeds to spring up. Cf. *McMullen v. Free*, 13 Ont. 57.

⁹⁶ See *supra*, § 1341.

⁹⁷ *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125; *Long v. Pruyn*, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443; *Sanford v. Brown Bros. Co.*, 134 N. Y. App. Div. 662, 119 N. Y. S. 333. Other cases involving the recovery of consequential damages are *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *Aultman v.*

other hand, it has been held that damages for breach of a warranty of a wagon could not include compensation for the death of a horse which was due to a defect in the wagon.⁸⁸

§ 1394. Further illustrations.

The general principle allowing consequential damages naturally resulting from a breach of warranty is not much disputed, but the question of what consequential damages are too remote is not always decided in the same way. Especially where personal injury to a third person is caused by the defect in the warranted article, and the buyer is compelled to pay damages to the person injured, it is disputed whether the buyer can recover these damages from the seller. By the weight of authority he is allowed to do so, and this result seems correct, at least if the defect in the thing sold was of a sort likely to cause the injury which in fact took place.⁸⁹ The principle does not seem essentially different where the injury is to the buyer himself.

McDonough, 110 Wis. 263, 85 N. W. 980; *Fisher v. Bertram*, 100 Ill. App. 542; *Union Bank v. Blanchard*, 65 N. H. 21, 18 Atl. 90; *Halstead Lumber Co. v. Sutton*, 46 Kans. 192, 28 Pac. 444; *Puntenev-Mitchell Mfg. Co. v. T. G. Northwall Co.*, 66 Neb. 5, 91 N. W. 863; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855. See also *Randall v. Newson*, 2 Q. B. D. 102; *McDonald v. Kansas City Bolt Co.*, 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Burr v. Redhead Co.*, 52 Neb. 617, 72 N. W. 1058.

⁸⁸ *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112. Compare this decision with *Randall v. Newson*, 2 Q. B. D. 102, where the seller of a carriage pole was held liable for injury to the buyer's horses caused by the defective condition of the pole. See further as questioning the buyer's right to consequential damages, *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; *Jones v. Ross*, 98 Ala. 448, 13 So. 319.

⁸⁹ In *Mowbray v. Merryweather*, [1895] 2 Q. B. 640, the defendant who had agreed to supply the plaintiff with apparatus for unloading a cargo from a ship belonging to the defendant, which the plaintiff had contracted to unload, furnished a defective chain which broke and injured a person in the plaintiff's employ. The plaintiff settled his liability with the injured person and was allowed to recover for the money thus paid. Similar decisions are *Vogan v. Oulton*, 81 L. T. (N. S.) 435; *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478. On the other hand, in *Rode v. Arney*, 115 Ill. App. 629, where the buyer's wife was injured owing to breach of warranty of a wagon, it was held that the buyer could not recover for loss of his wife's services, on the ground that the damage was not such as to reasonably have been anticipated.

If there is a difference, the liability of the seller seems clearer; but even in this case some courts hold that the damages are too remote.¹ It is beyond the scope of this work to consider the liability of a manufacturer in tort for negligence for injuries caused by defects in goods of his manufacture. It is enough to say that this question is one that must be separately considered.² What consequential damages are too remote is a question of degree. A few illustrations may be given of cases where the damage was held too remote. Damages due to the diminished value of patents belonging to the buyer and the loss of profits from other contracts owing to defective cement used by the buyer in a building were held too remote.³ Expected profits, unless they very plainly would have been made, are not allowable.⁴ The expense of erecting a building for ma-

¹ In *Jones v. Ross*, 98 Ala. 448, 13 So. 319, the buyer bought a horse by which he was injured. He was not allowed to recover on the theory that his injury was due to the failure of the horse to comply with the seller's warranty without proof of a *scienter*. So in *Birdsinger v. McCormick Machine Co.*, 183 N. Y. 487, 76 N. E. 611, 3 L. R. A. (N. S.) 1047, a buyer of an agricultural machine was not allowed to recover for injuries which he suffered owing to the defects in the warranted machine. Two judges dissented. This decision seems opposed to two earlier decisions of the Appellate Division of the New York Supreme Court (*Bruce v. Fiss Horse Co.*, 47 N. Y. App. Div. 273, 62 N. Y. S. 96; *Wood v. Anthony*, 79 N. Y. App. Div. 111, 79 N. Y. S. 829). It may be that the New York court would hold the injury sufficiently proximate, and the seller liable for it if the warranty were by its terms specifically aimed at the precise defect which caused the injury. On the other hand, the seller in *Tyler v. Moody*, 111 Ky. 191, 63 S. W. 433, 54 L. R. A. 417, 98 Am. St. Rep. 406, was held liable for personal injuries suffered by the buyer from the bursting of an acetylene gas

machine which was warranted to be absolutely safe and unable to generate enough gas to explode. See also cases in the preceding note which held the seller liable for injuries to a third person. *A fortiori* it may be supposed these courts would hold the seller liable for injuries to the buyer.

² See *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L. R. A. (N. S.) 1178, and note thereto.

³ *Ralph v. Rathburn Co.*, 75 Fed. 971, 39 U. S. App. 297, 21 C. C. A. 584.

⁴ *Glidden v. Pooler*, 50 Ill. App. 36; *Love v. Ross*, 89 Iowa, 400, 56 N. W. 528. See also Georgia Code, cited in *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. In *St. Louis Brewing Assn. v. McEnroe*, 80 Mo. App. 429, loss of custom owing to the bad quality of beer furnished was not allowed as an element of damage. Compare *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385, where loss of trade caused by selling ice cream in which poisonous matter bought from the defendant had been placed was allowed as an element of damage.

chinery bought with a warranty has been held not allowable as part of the damages for breach of the warranty.⁵

If the buyer's own fault or negligence contributed to the injury, as by his use of goods with knowledge of their defects, he cannot recover consequential damages, since such damages were under the circumstances not proximately due to the breach of warranty.⁶ It may be that the buyer can best repair the injury caused by the seller's breach by an expenditure which will place him in a better position than he would have been in had the seller kept his contract—as for instance where a buyer replaces defective machines with new machines of a more efficient character. In such a case the whole expense of replacement cannot be charged against the seller. Loss and gain must be balanced.⁷

§ 1395. Action for breach of warranty of title to goods.

There is no reason on principle why different rules should govern the measure of damages for breach of warranty of title and the measure of damages for breach of warranty of quality.⁸

⁵ *Huyett & Smith Co. v. Gray*, 111 N. C. 87, 15 S. E. 939. See also *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; *Jones v. Ross*, 98 Ala. 448, 13 So. 319; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112, cited *supra*, note 34.

⁶ *Nashua Steel Co. v. Brush*, 91 Fed. 213, 50 U. S. App. 461, 33 C. C. A. 456; *Rasey v. J. B. Colt Co.*, 106 N. Y. App. Div. 103, 94 N. Y. S. 50; *Cedar Rapids & Co. v. Sprague Elec. Co.*, 280 Ill. 386, 117 N. E. 461, L. R. A. 1918 B. 200; *Swift v. Redhead*, 147 Ia. 94, 122 N. W. 140; *Rice v. Friend Bros. Co.*, 179 Ia. 355, 161 N. W. 310; *Major v. Hesley-Coleman Co.* (Tex. Civ. App.), 164 S. W. 445.

⁷ *British Westinghouse, etc., Mfg. Co. v. Underground Electric, etc., Co.*, [1912] A. C. 673. The buyer having bought certain machines which failed to comply with a warranty as to the

amount of coal used, sued the seller for damages. After using the machines for a time the buyer had bought other machines to take their place. It was found as a fact that not only was the purchase of the new machines to the pecuniary advantage of the buyer, but that their superiority in efficiency and economy over those manufactured by the defendant was so great that even if the latter had delivered machines in all respects complying with the terms of the contract it would have been to the pecuniary advantage of the buyer at its own cost to have replaced them by the new machines. The House of Lords held it was error to allow in addition to the increased cost of coal while the old machines were in use, the full price of the new machines.

⁸ The Uniform Sales Act makes no distinction in regard either to the remedies or the measure of damages. No attempt is made to define what damages "directly and naturally re-

Considerable difference of decision exists in the law of this country, however, in regard to warranties of title. As has been previously stated,⁹ many jurisdictions hold that no right of action accrues to the buyer until his possession has been disturbed.¹⁰

Even jurisdictions which do not directly deny the right to an action often hold that while the buyer retains undisturbed possession, he can recover only nominal damages.¹¹ A distinction should here be observed, failure to notice which has perhaps caused confusion. If the seller has not title to the goods the buyer not only may sue upon the warranty for damages, but may also rescind the transaction for failure of consideration.¹² This latter right must certainly be allowed wherever rescission is allowed for breach of warranty of quality, and probably courts which do not allow the remedy of rescission in that case would generally do so where the title was defective, on the ground of total failure of consideration.¹³ It is obvious that such redress cannot be allowed to a buyer who still retains possession of the goods. This would be inconsistent with the principle that one who seeks rescission must return anything that he has received. Accordingly the buyer must return the goods to the seller or discharge his duty in the premises by surrendering them to the true owner. If the buyer has not already paid the price, the natural way of asserting rescission is in answer to an action for the price. Decisions which hold that the buyer has no defence while still retaining the goods¹⁴ do not necessarily involve the conclusion that the buyer has no right of ac-

sult" from breach of a warranty of title. The whole of section 69 is applicable both to warranties of quality and warranties of title except subsection (7), which is applicable to warranties of quality only.

⁹ *Supra*, § 980.

¹⁰ See *supra*, § 980.

¹¹ *Patrick, etc., v. Swinney*, 5 Bush, 421; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694 (covenant against incumbrances); *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *McGiffin v. Baird*, 62 N. Y. 329; *O'Brien v. Jones*, 91 N. Y. 193.

¹² See *infra*, § 1457.

¹³ *Eichols v. Bannister*, 17 C. B. (N. S.) 708. This was an action to recover back the price. But see *Hull v. Caldwell*, 3 S. Dak. 451, 454, 54 N. W. 100.

¹⁴ For example, *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Joelin v. Caughlin*, 27 Miss. 852; *Wanser v. Messler*, 29 N. J. L. 256; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100.

tion, though often cited as so deciding. Jurisdictions which deny the buyer more than nominal damages until eviction sometimes take fine and hardly tenable distinctions in this respect between different kinds of actions or warranties. Thus, where the seller fraudulently represents that he has title, it seems to be admitted that an immediate cause of action for substantial damages lies.¹⁵ In some jurisdictions the distinction is taken between express and implied warranties. It has been held in Kentucky that though no right of action arises immediately for breach of express warranty,¹⁶ a right of action arises immediately on the sale where there has been merely an implied warranty.¹⁷ But, this distinction has been properly disapproved.¹⁸ In Missouri with as little reason the converse of the Kentucky rule was suggested; namely, that for breach of an express warranty an action arises immediately, but for breach of an implied warranty no action arises until damage.¹⁹

§ 1396. Damages for breach of warranty of title to goods.

Not only is it disputed when the buyer's cause of action or right to substantial damages arises, but also what is the basis for calculating substantial damages when the right to them has arisen. On principle it would seem clear that the buyer's damage is the full value of the goods, irrespective of the price paid for them, and this rule finds considerable support.²⁰ In Massachusetts the value of the goods is thus allowed even though a buyer has not been dispossessed.²¹ It is sometimes said that the value is to be taken as of the time when the wrong was committed,²² which would be either the time of the sale or the time

¹⁵ *Sumner v. Gray*, 4 Ark. 467.

¹⁶ *Tipton v. Triplett*, 1 Metc. (Ky.) 570.

¹⁷ *Pusey's Trustee v. Wathen*, 90 Ky. 473, 14 S. W. 418.

¹⁸ *Gross v. Kieraki*, 41 Cal. 111; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545.

¹⁹ *Matheny v. Mason*, 73 Mo. 677, 680, 39 Am. Rep. 541.

²⁰ *Rowland's Admr. v. Shelton*, 25 Ala. 217; *Marlatt v. Clary*, 20 Ark. 251; *Dabovich v. Emeric*, 12 Cal. 171; *Grose v. Hennessey*, 13 Allen, 389;

Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57; *Hendrickson v. Back*, 74 Minn. 90, 78 N. W. 1019; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783. The earlier Massachusetts and Tennessee decisions of *Eaton v. Mellus*, 7 Gray, 566, and *Crittenden v. Posey*, 1 Head, 311, are inconsistent with the later decisions in those States cited above.

²¹ *Grose v. Hennessey*, 13 Allen, 389.

²² *Rowland's Admr. v. Shelton*, 25 Ala. 217.

of dispossession, according to the doctrine held by the court in question. But whatever the time of the wrong there seems no reason for refusing to admit evidence of subsequent circumstances, as mitigating or increasing proximately the damages. This was well brought out in a Minnesota decision.²²

The court said: "It seems that the charge to the jury was that the vendee was entitled to recover as damages the value of the property when it was taken from him, and damages were awarded on this basis, and that in passing upon the motion the court held its charge to have been erroneous, and that it should have stated that the vendee's damages were the price paid for the chattel. Unless we are to lose sight of the cardinal principle which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party, the court was right in its charge, and wrong when it concluded that an error had been committed."²⁴ In many cases following the analogy of the law governing covenants in conveyances of real estate,²⁵ it has been held that the buyer can recover only the purchase money with such expenses as he may have properly incurred in defending his title.²⁶ This rule

²² *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. 1019.

²⁴ The court continued: "It was held in *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694, in a case involving this very question, that the damages are the actual loss, which is the value of the chattel purchased. Of course, there might be circumstances which would affect any particular case. Under the rule established by the granting of the motion, the damages actually sustained might be more or might be less than the recovery, depending on the real value of the chattel when the paramount title was asserted as against the vendee; that is, whether the real value was more or less than the price paid. A good illustration of this is found in the present case. Defendant purchased in 1892, agreeing to pay \$75 for the harvester and binder in question. He gave his note for this sum to his vendor, plain-

tiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged, but no claim for possession was asserted until 1895, and it was then worth but \$25. Defendant had the possession and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for \$10 in 1892."

²⁵ See *infra*, §§ 1401, 1402.

²⁶ *Ellis v. Gosney's Heirs*, 7 J. J. Marsh. 109; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Arthur v. Moss*, 1 Or. 193; *Hudson v. Norwood*, 13 Tex. Civ. App. 662, 35 S. W. 1075; *Cranberry v. Hawpe*, 30 Tex. 409; *Goss v. Dysant*, 31 Tex. 186; *Duecker v. Goeres*, 104

virtually confines the remedy of the buyer to rescission and restitution, a remedy to which the injured buyer is undoubtedly entitled if he so elects, but it is a violation of general principles of contracts to deny him in an action on the contract such damages as will put him in as good a position as he would have occupied had the contract been kept. It is of course true that even if the value of goods furnishes the measure of damages, in the absence of evidence to the contrary the price will be regarded as fixing that value.²⁷ The buyer who has been dispossessed is also entitled to recover as consequential damages, any expense reasonably incurred in defending his right to the goods against the true owner.²⁸ Among such expenses should be included reasonable fees paid to buyer's counsel.²⁹

§ 1397. Damages for anticipatory breach.

After an anticipatory breach a defendant should not be liable for any greater damage than is naturally caused by the defendant's wrong. If the plaintiff by taking one line of conduct may secure such advantage as the contract entitles him to at less expense to the defendant than if another course is pursued, the plaintiff should be allowed only damages based on the former course.³⁰ How far this principle precludes the plaintiff from continuing performance after repudiation of a contract for the manufacture of goods or for work and labor has been considered in another section.³¹ Another application of the principle, however, has been suggested. It has been held in England that after repudiation has been accepted as a breach the injured party should at once make another contract with a third person similar to that which has been repudiated, if the market prices are clearly tending in a direction which will make

Wis. 29, 36, 80 N. W. 91; *Confederation Life Assn. v. Labatt*, 27 Ont. App. 321.

²⁷ *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783.

²⁸ *Rowland v. Shelton*, 25 Ala. 217; *Marlatt v. Clary*, 20 Ark. 251; *Johnson v. Meyers' Exr.*, 34 Mo. 255; *Armstrong v. Percy*, 5 Wend. 535.

²⁹ *Harding v. Larkin*, 41 Ill. 413; *Thurston v. Spratt*, 52 Me. 202; *Ryer-*

son v. Chapman, 66 Me. 557; *Allis v. Nininger*, 25 Minn. 525; *Balte v. Bedemiller*, 37 Or. 27, 60 Pac. 601, 82 Am. St. Rep. 737. The contrary was held, as it seems erroneously, in *Reggio v. Braggiotti*, 7 Cush. 166; *Clark v. Mumford*, 62 Tex. 531.

³⁰ *Sackville v. Storey* (Tex. Civ. App.), 149 S. W. 239. And see *supra*, § 1298.

³¹ *Supra*, § 1298.

that the more profitable course for the defendant.³² There are two reasons to be urged against the correctness of such decisions. In the first place it is always impossible to be certain whether prices are going up or down. To speak of a market "obviously falling" or "obviously rising" is to speak without due reflection. The prices at which persons will make contracts for future delivery must always be based on the estimate of well-informed persons as to the future value of the goods in question. Many things are obvious after the event which were not so previously. At least it is never so clear what turn the market price of a commodity may take that it is entirely certain that if the plaintiff at once makes a substituted contract it will turn out to be profitable for the defendant. It is not clear then that to take such a course will mitigate damage, and though for his own protection it may often be reasonable for a party to take this course, and if reasonable he should be allowed damages assessed on the basis of the expense of obtaining the new contract,³³ there seems no reason why he should adopt such a course for the defendant's benefit. Another reason against the English decisions is that the plaintiff is entitled to use such money or credit as he has for making all the forward contracts he is able to for his own benefit. He need not, even though the transaction seems likely to be profitable, give the repudiating defendant the advantage of any contract he is able to make when the making of such a contract limits his ability to make contracts for his own benefit.³⁴

At least, it is clear that even though the breach be regarded

³² *Roth v. Taysen*, 73 L. T. R. 628. See also *Re South African Trust, etc., Co.*, 74 L. T. 769; *Nickoll v. Ashton*, [1900] 2 Q. B. 298; *Central Lumber Co. v. Arkansas Valley Lumber Co.*, 86 Kans. 131, 119 Pac. 321.

³³ *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 780; *Skeele Coal Co. v. Arnold*, 200 Fed. 393, 118 C. C. A. 545. In *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463, the court, however, held that the plaintiff was not entitled to damages on the basis of a new forward contract he

had entered into after the repudiation, but could only recover damages based on the actual price at the time fixed by the contract for performance.

³⁴ In *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548, the court held plaintiff need not make a new forward contract. See also *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 S. Ct. 875, 30 L. Ed. 967; *Missouri Furnace Co. v. Cochran*, 8 Fed. 463; *J. P. Gentry Co. v. Margolius*, 110 Tenn. 669, 75 S. W. 959.

as having occurred at the time of repudiation, yet it was a breach of a contract to deliver at a later day, and, if it was not a reasonable thing under the circumstances to take some action at the earlier day the damages must be calculated on the basis of the price of the goods at the time when delivery should have been made. By no reasoning can the contract be treated as a contract to deliver goods at the date of the repudiation.³⁵ In a narrow class of cases it may be that, following the analogy of the law governing breach at the time of performance, the market value of a contract such as that which the defendant has repudiated should be taken as the basis of damages, rather than the actual value of performance as proved by the event, but it is only a limited class of contracts for future performance—such as contracts to sell wheat or cotton in the future, or to insure—which can be said to have a market value; and it is to be observed that even in the case of a breach at the time for performance, the plaintiff is not restricted to damages based on the difference between contract price and market price where injurious consequences were within the contemplation of the parties. If this principle is applied to an anticipatory breach, it can hardly be questioned that the parties when the contract was made contemplated as the natural consequences of a breach, the injury which would accrue at the time of performance, that is the difference between the contract price and the market price then—not the cost of a new forward contract at some prior date.

§ 1398. Contract to pay a sum of money in goods.

It is a not uncommon form of contract for a debtor to promise to pay a stated sum of money in goods or services. If the agreement fixes no rate at which the goods or services are to be taken the creditor's measure of damages is the amount of the debt.³⁶ If the creditor breaks such an agreement and collects his claim in money, the debtor's measure of damages is the

³⁵ *Roper v. Johnson*, L. R. 8 C. P. 167; *Rohm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Wulff v. Lindsey*, 8 Ariz. 168, 71 Pac. 963; *Gansey v. Orr*, 173 Mo. 532, 73 S. W.

477; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436.

³⁶ *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58.

profit which he would have made had he been allowed to furnish the goods or services.³⁷ In both cases it is necessary to value the performance which the debtor was to make. The two methods of valuation illustrate the difference between the standard of value which may be applied to the same performance, when it forms the basis for measuring the damages of one party or the other.³⁸ If the contract states a rate, at which the goods are to be taken, the natural measure of damages for a breach by the debtor would be based on the value of the goods or services at the time when performance was due.³⁹ Many courts, however, have put an artificial construction on such contracts and have regarded them as amounting in legal effect to a contract to pay in money, with an option to the debtor if he pays promptly at maturity to furnish goods or services.⁴⁰

§ 1399. Contracts for the sale of land.

There is no reason on principle why the measure of damages for breach of contracts for the sale of land should differ from that applied to contracts for the sale of personal property. Some courts, however, make a difference where the action is by

³⁷ See *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302, where, however, the rate was stated.

³⁸ See *supra*, §§ 1342, 1343.

³⁹ So it was held in *Cole v. Ross*, 9 B. Mon. 393, 50 Am. Dec. 517.

⁴⁰ *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *McKinnie v. Lane*, 230 Ill. 544, 82 N. E. 878, 120 Am. St. 338; *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277; *Gleason v. Pinney*, 5 Cow. 152; *Pinney v. Gleason*, 5 Wend. 393, 21 Am. Dec. 223; *Trowbridge v. Holcomb*, 4 Oh. St. 38; *Church v. Feterow*, 2 Penn. 301; *Fleming v. Potter*, 7 Watts, 380; *White v. Tompkins*, 52 Pa. 362; *Short v. Abernathy*, 42 Tex. 94; *Perry v. Smith*, 22 Vt. 301. See also *Plowman v. Riddle*, 7 Ala. 775. In *Goodwin v. Heckler*, 252 Pa. 332, 97 Atl. 475, 476, the court said: "When the payment of a debt is to be made in a specific article of property, fail-

ure to pay or offer to pay by delivery of the article, according to agreement, fixes the liability of a debtor to pay in money. *Roberts v. Beatty*, 2 Pen. & W. 63, 21 Am. Dec. 410; *Stewart v. Morrow*, 1 Grant Cas. 204; *Santee v. Santee*, 64 Pa. 473, 479; *Moore v. Kiff*, 78 Pa. 96. In delivering the opinion in the case last cited, Mr. Justice Paxson said (78 Pa., page 100):

"Nor is the fact that the interest notes were payable in pork and sugar material, unless there had been an offer to show payment in those particular commodities. The defendants had a right to pay in pork and sugar. An offer to do so would have been a sufficient answer to a demand for payment. But a failure to show either payment, or an offer of payment, in these articles, fixes the liability of the defendants to pay in money."

the purchaser. It was established in an early leading case,⁴¹ that for breach of an agreement to convey a leasehold estate because of the vendor's lack of title, the purchaser was entitled to recover merely the amount of a deposit which he had made on account of the price. Blackstone, J., said: "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." This decision has been consistently followed in England and the chief point in dispute has been whether if the vendor knew or ought to have known that his title was defective his obligation even then remained merely to restore the purchaser to his original position. It has finally been settled that even in case the vendor knew he had no title or means of getting title his liability is limited to the restitution of any deposit made by the purchaser and any expenses incurred by him in examining the title;⁴² and the opinion was expressed that if the vendor was guilty of fraud the appropriate remedy was an action for deceit. The English doctrine is followed with slight qualification in a few American States.⁴³ In most American cases, however, which purport to follow the English authorities, the rule restricting damages to those appropriate for rescission is limited to cases where the vendor has not been guilty of bad faith.⁴⁴ Another exception to the English

⁴¹ *Flureau v. Thornhill*, 2 Wm. Bl. 1078.

⁴² *Bain v. Fothergill*, L. R. 7 H. L. 158; *Rowe v. Schoolboard*, 36 Ch. Div. 619, 622.

⁴³ *Tyson v. Eyrick*, 141 Pa. 296, 311, 21 Atl. 635, 23 Am. St. Rep. 287; *Rineer v. Collins*, 156 Pa. 342, 27 Atl. 28; *Glasse v. Stewart*, 32 Pa. Super. 385; *Stuart v. Pennis*, 100 Va. 612, 42 S. E. 667; *Gerbert v. Trustees*, 59 N. J. L. 160, 180, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578 (but see *Brown v. Honiss*, 70 N. J. L. 260, 58 Atl. 86, 74 N. J. L. 501, 68 Atl. 150). In Pennsylvania in the case of actual fraud on the part of the vendor in the origin of the contract damages based on the value of the

land may be recovered. *Thompson v. Sheplar*, 72 Pa. 160. A subsequent fraudulent purpose is not enough. *Stephens v. Barnes*, 30 Pa. Super. 127.

⁴⁴ *Clark v. Yocum*, 116 Cal. 515, 48 Pac. 498; *Sanford v. Cloud*, 17 Fla. 532; *Foley v. McKeegan*, 4 Ia. 1, 66 Am. Dec. 107; *Donner v. Redenbough*, 61 Ia. 269, 16 N. W. 127; *Tracy v. Gunn*, 29 Kan. 508; *Davis v. Lewis*, 4 Bibb, 456; *Rutledge v. Lawrence*, 1 A. K. Marsh. 396; *Baltimore, etc., Society v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820; *Northridge v. Moore*, 118 N. Y. 419; 23 N. E. 570; *Empire Realty Co. v. Sayre*, 107 N. Y. App. D. 415, 422, 95 N. Y. S. 371; *Dal v. Fischer*, 20

rule is occasionally made where the vendor, though not guilty of bad faith since he expected, and perhaps reasonably, to be able to acquire title, nevertheless knew that he did not have title at the time of the contract.⁴⁵ It also seems true even where the rule of restricted damages prevails that if the purchaser has paid in advance the consideration in a form which cannot be restored to him, he may recover the value of the land, and is not restricted to the value of what he has given,⁴⁶ and the same is held in Pennsylvania whatever the nature of the consideration, if it has been paid.⁴⁷ If the defect in the vendor's title might be removed by him and he fails to perfect the title or voluntarily makes it impossible to do so, he is liable in England and in other jurisdictions where the English rule is followed, in substantial damages.⁴⁸ Under the rule generally prevailing in the United States, however, all these distinctions are unimportant, and the only rule defensible on principle, allowing the purchaser the difference between so much of the contract price as is unpaid and the market price of the land, is applied in every case where the vendor breaks his contract without legal excuse.⁴⁹ This rule is one of general jurispru-

S. Dak. 426, 107 N. W. 534; *Johnson v. Hamilton*, 36 Tex. 270; *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120; *Hahl v. West* (Tex. Civ. App.), 129 S. W. 876; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925; *Mullen v. Cook*, 69 W. Va. 456, 71 S. E. 556; *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 66 L. R. A. 973, 106 Am. St. Rep. 951.

⁴⁵ *Cullumber v. Winter*, 154 Ia. 263, 134 N. W. 601; *Tulane & Co. Adm's v. Baccich*, 129 La. 469, 56 So. 371; *Drake v. Baker*, 34 N. J. L. 358 (but see later New Jersey decisions, *infra*, n. 48); *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463. If the purchaser also knew the condition of the vendor's right, the exception allowing him substantial damages is not applied. *Cullumber v. Winter*, 154 Ia. 263, 277, 134 N. W. 601.

⁴⁶ *Wall v. London, etc., Co.*, L. R. 9 Q. B. 249. See also *Case v. Wolcott*,

33 Ind. 5; *Doty's Adm. v. Doty's Guardian*, 118 Ky. 204, 80 S. W. 803, 2 L. R. A. (N. S.) 713.

⁴⁷ *Cox v. Henry*, 32 Pa. 18.

⁴⁸ *Williams v. Glenton*, L. R. 1 Ch. 200; *Engel v. Fitch*, L. R. 3 Q. B. 314; L. R. 4 Q. B. 659; *Bain v. Fothergill*, L. R. 7 H. L. 158, 209; *Clark v. Yocum*, 116 Cal. 515, 48 Pac. 498; *Brown v. Honiss*, 70 N. J. L. 260, 58 Atl. 86, 74 N. J. L. 501, 68 Atl. 150; *Noyes v. Phillips*, 60 N. Y. 408.

⁴⁹ *Harten v. Löffler*, 212 U. S. 397, 53 L. Ed. 568, 29 Sup. Ct. 351; *Hampton Stave Co. v. Gardner*, 154 Fed. 805, 83 C. C. A. 521; *Hopkins v. Lee*, 6 Wheat. 109, 118, 5 L. Ed. 218; *Phelan v. Tomlin*, 164 Ala. 383, 51 So. 382; *Jamulewyes v. Quagliano*, 88 Conn. 60, 89 Atl. 897; *Irwin v. Askew*, 74 Ga. 581; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Dady v. Condit*, 188 Ill. 234, 58 N. E. 900, 209 Ill. 488, 70 N. E. 1088;

dence which the federal courts will apply, regardless of the rulings of state courts where the question arose.⁵⁰ Where the purchaser makes total default the general rule both in England and the United States allows recovery of the difference between the contract price and the market price as in the case of personal property.⁵¹ But, also following the analogy of actions for the price of goods, a few American courts in effect allow specific performance at law by permitting the recovery of the full price after a proper deed has been tendered.⁵² The excuse for such recovery in the case of goods⁵³ does not however exist in the case of land. The vendor does not need such relief since he can unquestionably get specific performance in equity, and furthermore neither tender of the land nor judgment for the

Puterbaugh v. Puterbaugh, 7 Ind. App. 280; *Doriocourt v. Lacroix*, 29 Ia. Ann. 286; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; *Flechten v. Spicer*, 63 Minn. 454, 65 N. W. 926; *Vallentyne v. Immigration Land Co.*, 95 Minn. 195, 103 N. W. 1028; *Turner v. Lord*, 92 Mo. 113, 4 S. W. 420; *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. 627; *Beck v. Staats*, 80 Neb. 482, 114 N. W. 633, 16 L. R. A. (N. S.) 768; *LeRoy v. Jacobsky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977; *Mackey v. Olssen*, 12 Ore. 429, 8 Pac. 357; *Barbour v. Nichols*, 3 R. I. 187; *Shaw v. Wilkins*, 8 Hump. 647, 653, 49 Am. Dec. 692; *Dunahee v. Geoghegan*, 7 Utah, 113, 25 Pac. 731; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457; *Brink v. Mitchell*, 125 Wis. 416, 116 N. W. 16.

⁵⁰ *Clark v. Belt*, 223 Fed. 573, 138 C. C. A. 1, and cases cited.

⁵¹ *Laird v. Pim*, 7 M. & W. 474; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331, 376; *Telfener v. Russ*, 145 U. S. 522, 36 L. Ed. 802, 12 Sup. Ct. 930; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; *Reed v. Dougherty*, 94 Ga. 661, 20 S. E. 965; *Cowdery v. Greenlee*, 126

Ga. 786, 55 S. E. 918, 8 L. R. A. (N. S.) 137; *Goodwine v. Kelley*, 33 Ind. App. 57, 70 N. E. 832; *Prichard v. Mulhall*, 127 Ia. 545, 103 N. W. 774; *Waters v. Pearson*, 163 Ia. 391, 144 N. W. 1026; *Allison v. Cooke's Ex'rs*, 112 Ky. 212, 65 S. W. 342, 66 S. W. 392; *Old Colony R. Co. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Stewart v. McLaughlin*, 126 Mich. 1, 85 N. W. 266; *Scudder v. Waddingham*, 7 Mo. App. 26; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Bensinger v. Erhardt*, 74 N. Y. App. Div. 169, 77 N. Y. S. 577; *Dayton & Co. v. Coy*, 13 Ohio St. 84, 90; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910.

⁵² *Gray v. Meek*, 199 Ill. 136, 64 N. E. 120; *Goodpaster v. Porter*, 11 Iowa, 161; *Oatman v. Walker*, 33 Me. 67; *Curran v. Rogers*, 35 Mich. 221; *Granchot v. Leach*, 5 Cow. 506; *Shannon v. Comstock*, 21 Wend. 457, 34 Am. Dec. 262; *Richards v. Edick*, 17 Bard. 260; *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845; *Bailey v. Clay*, 4 Rand. 346. The Iowa and New York decisions are in effect overruled by the cases cited in the previous note.

⁵³ See *supra*, §§ 1365 et seq.

full price nor payment of the judgment can operate to transfer title to real estate, as it can of chattels.

§ 1400. Delay in performing contract for sale of land.

Where a vendor delays making a conveyance beyond the agreed time, it may be assumed that those jurisdictions which hold that a vendor acting in good faith is not liable in damages for loss of the bargain where he is unable to perform his contract owing to a defect of title, would apply a similar rule where for the same reason the vendor is unable to perform on the agreed day.⁵⁴ Where the purchaser becomes liable for delay the normal rule of damages in an action at law would seem to be the rental value of the premises less any advantage which the buyer may have had by retaining the whole or part of the purchase money,⁵⁵ together with any foreseeable consequential damages.⁵⁶ Most of the decisions, however, are in equity where, as an adjunct to specific performance, damages for delay are allowed.⁵⁷ If the delay is due to the purchaser's fault he is liable for interest, though the vendor has received no rents and profits and can therefore credit him with none.⁵⁸

§ 1401. Breach of covenants in deeds.

The ordinary covenants in deeds of real estate are that the grantor is lawfully seised; that he has a right to convey; that the premises are free from encumbrances; that the grantee shall quietly enjoy; that the grantor will warrant the title against lawful claims, and sometimes that the grantor will execute any further assurances necessary to validate the title. Logically the covenants of seisin, of right to convey and of freedom from encumbrances are broken as soon as the conveyance is made if they are broken at all, since these covenants relate to a state of fact alleged to be existing at the time of conveyance. The other three covenants look to the future. Though it is generally admitted that the covenants of seisin and of right to convey

⁵⁴ *Jones v. Gardiner*, [1902] 1 Ch. 191, 195.

⁵⁵ See *Sweeney v. Brow*, 40 R. I. 281, 100 Atl. 593.

⁵⁶ *Jones v. Gardiner*, [1902] 1 Ch. 191; *Jaques v. Millar*, 6 Ch. D. 753.

⁵⁷ See *infra*, §§ 1430, 1436.

⁵⁸ *Prichard v. Mulhall*, 140 Ia. 1, 118 N. W. 43.

may be sued upon at once though the grantee's possession has not been interfered with, only nominal damages can then be recovered.⁶⁰ For breach of a covenant against encumbrances also no substantial damages can be recovered until the encumbrance has been discharged by the plaintiff,⁶⁰ or he has suffered actual damage.⁶¹ This is illogical and at variance with the rule governing covenants to remove specific encumbrances or to pay debts,⁶² but is practically convenient. A covenant of warranty as well as that of quiet enjoyment is not regarded as substantially broken until the grantee's possession has been disturbed by actual or constructive eviction.⁶³

§ 1402. Damages for breach of covenant of warranty.

Assuming that the time has arrived when the plaintiff has become entitled to substantial damages, the measure of damages logically should be the amount which would put the plaintiff in as good a position as he would have been in had the warranty been kept. In fact, however, in most States he is allowed to recover for total loss of the property only the consideration

⁶⁰ *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Reed v. Hamilton*, 18 Ind. 476; *Nozler v. Hunt*, 18 Iowa, 212; *Poshay v. Shafer*, 116 Ia. 302, 89 N. W. 1106; *O'Meara v. McDaniel*, 49 Kan. 685, 31 Pac. 303; *Sable v. Brockmeier*, 45 Minn. 248, 47 N. W. 794; *Cockrell v. Proctor*, 65 Mo. 41; *Eagan v. Martin*, 81 Mo. App. 676; *Webb v. Wheeler*, 80 Neb. 438, 114 N. W. 636, 17 L. R. A. (N. S.) 1178; *Morrison v. Underwood*, 20 N. H. 369; *Werner v. Wheeler*, 142 N. Y. App. D. 358, 127 N. Y. S. 158; *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. 336; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764. But in *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292, though the grantee's possession had not been disturbed he was allowed to recover the consideration that he had paid.

⁶¹ *Black v. Coan*, 48 Ind. 385; *Harwood v. Lee*, 85 Ia. 622, 52 N. W. 521; *Copeland v. Copeland*, 30 Me. 446; *Wilson v. Willson*, 25 N. H. 229, 57

Am. Dec. 320; *Re Hanlin's Est.*, 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, 126 Am. St. Rep. 938.

⁶² See for instance in regard to an easement *Turner v. Moon*, [1901] 2 Ch. 825; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Brantley v. Johnson*, 102 Ga. 850, 29 S. E. 486; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671.

⁶³ See *infra*, § 1408.

⁶⁴ *Oliver v. Bush*, 125 Ala. 534, 27 So. 923; *Mitchell v. Warner*, 5 Conn. 497; *McMullen v. Butler*, 117 Ga. 845, 45 S. E. 258; *Brady v. Spurck*, 27 Ill. 478; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Callahan v. Goldman*, 216 Mass. 238, 103 N. E. 689; *Allis v. Nininger*, 25 Minn. 525; *Dyer v. Britton*, 53 Miss. 270; *Merrill v. Suing*, 66 Neb. 404, 92 N. W. 618; *Kellog v. Pratt*, 33 N. J. L. 328; *Mead v. Stackpole*, 40 Hun, 473; *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777;

which he paid for it, with interest.⁶⁴ And where the action is not by the immediate vendee of the warrantor but by a subsequent purchaser the plaintiff's recovery is generally restricted to the amount received by the warrantor with interest.⁶⁵ In a few jurisdictions a plaintiff is allowed the theoretically correct damages of the value of the land including any improvements upon it at the time of the eviction.⁶⁶ Where the plaintiff has been evicted from part of the land his damages under the prevailing rule are such a proportion of the consideration as the value of the land which the plaintiff has lost bears to the total value of the premises.⁶⁷ But jurisdictions which allow

Morrow v. Baird, 114 Tenn. 552, 86 S. W. 1079; *Boyd v. Bartlett*, 36 Vt. 9; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

⁶⁴ *Irwin v. Maple*, 252 Fed. 10, 164 C. C. A. 122 (Ohio); *Prestwood v. McGowin*, 128 Ala. 287, 274, 29 So. 386, 86 Am. St. Rep. 136; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Taylor v. Allen*, 131 Ga. 416, 62 S. E. 291; *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Rhea v. Swain*, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; *Boice v. Coffeen*, 158 Ia. 705, 138 N. W. 857; *Stebbins v. Wolf*, 33 Kans. 765, 7 Pac. 542; *Arbuthnot v. Big Pine Lumber Co.*, 134 La. 529, 64 So. 401; *Crisfield v. Storr*, 36 Md. 129, 150, 11 Am. Rep. 480; *Webb v. Holt*, 113 Mich. 338, 71 N. W. 637; *Wagner v. Finnegan*, 54 Minn. 251, 55 N. W. 1129; *Allen v. Miller*, 99 Miss. 75, 54 So. 731; *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (N. S.) 934; *Diggs v. Henson*, 181 Mo. App. 34, 163 S. W. 565; *Holmes v. Seaman*, 72 Neb. 300, 100 N. W. 417, 101 N. W. 1030; *Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. 703; *Winnipiseogee P. Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Morris v. Rowan*, 17 N. J. L. 304; *Hunt v. Hay*, 156 N. Y. App. D. 138, 140 N. Y. S. 1070; *Campbell v. Bentley*, 159 N. Y. App. D. 522, 145 N. Y. S. 92; *Ramsey v. Wallace*, 100 N. C. 75,

83, 6 S. E. 638; *Wade v. Comstock*, 11 Oh. St. 71; *Wetsell v. Richcreek*, 53 Ohio St. 62, 73, 40 N. E. 1004; *Rash v. Jenne*, 26 Ore. 169, 37 Pac. 538; *Allison v. Montgomery*, 107 Pa. 455; *Lawrance v. Robertson*, 10 S. C. 8; *Mengel & Co. v. Ferguson*, 124 Tenn. 433, 137 S. W. 101; *Brown v. Hearon*, 66 Tex. 63, 17 S. W. 395; *Coleman v. Luetcke* (Tex. Civ. App.), 164 S. W. 1117; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Patterson v. Cappon*, 125 Wis. 198, 102 N. W. 1083.

⁶⁵ *Sutherland, Damages*, § 614; and see cases in the preceding note.

⁶⁶ *Jenkins v. Jones*, 9 Q. B. D. 128; *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328; *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Farwell v. Bean*, 82 Vt. 172, 72 Atl. 731.

⁶⁷ *Griffin v. Reynolds*, 17 How. 609, 15 L. Ed. 229; *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69; *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993; *Tone v. Wilson*, 81 Ill. 529; *McNally v. White*, 154 Ind. 163, 172, 54 N. E. 794, 56 N. E. 214; *Mischke v. Baughn*, 52 Ia. 528, 3 N. W. 543; *Southern W. M. & C. Co. v. Davenport*, 50 La. Ann. 505, 23 So. 448; *Dubay v. Kelly*, 137 Mich. 345, 100 N. W. 677; *Winnipiseogee P. Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Lemly v. Ellis*, 146 N. C.

for total eviction the value of the land at the time of eviction naturally allow for partial eviction the value of that part of the land of which the plaintiff has been deprived.⁶⁹

§ 1403. Landlord's right to rent.

A landlord is entitled to recover rent as it matures and not before.⁶⁹ If a landlord accepts a surrender of the lease⁷⁰ or even justifiably⁷¹ evicts the tenant, he cannot recover rent; nor can he recover damages for the loss of his lease,⁷² unless the lease contains a covenant giving that right.⁷³ Where, however, the tenant abandons the property an entry and reletting by the landlord is generally held to have been made on behalf of the tenant, to mitigate the damages which he would suffer by being held liable for each instalment of rent as it matures, and the landlord is allowed to recover rent from his original tenant subject to deduction of rent received from the new tenant.⁷⁴ The landlord is under no obligation to relet the premises,

221, 59 S. E. 683; *Johnson v. Nyce's Exec.*, 17 Oh. 66, 49 Am. Dec. 444; *Doyle v. Brundred*, 189 Pa. 113, 41 Atl. 1107; *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. 421; *Mann v. Mathews*, 82 Tex. 98, 17 S. W. 927; *Clarke v. Hargrove*, 7 Gratt. 399; *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *McLennan v. Prentice*, 85 Wis. 427, 442, 55 N. W. 764. See also *Quick v. Walker*, 125 Mo. App. 257, 102 S. W. 33.

⁶⁹ *Hubbard v. Norton*, 10 Conn. 422; *Cornell v. Jackson*, 3 Cush. 506; *Boyle v. Edwards*, 114 Mass. 373. See also *Olmstead v. Rawson*, 188 N. Y. 517, 81 N. E. 456.

⁷⁰ *Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321.

⁷¹ *Riley v. Hale*, 158 Mass. 240, 245, 33 N. E. 491; *Martin v. Mask*, 158 N. C. 436, 74 S. E. 343, 41 L. R. A. (N. S.) 641.

⁷² *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *St. Louis Billposting Co. v. Stanton*, 172

Mo. App. 40, 154 S. W. 821; *Davidson v. Harris* (Tex. Civ. App.), 154 S. W. 689. *A fortiori* if the eviction is wrongful. See *supra*, §§ 891, 892.

⁷³ *Re Ella*, 98 Fed. 967; *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797. But see *James v. Kibler's Adm.*, 94 Va. 165, 26 S. E. 417. And where the tenant was a corporation recovery was allowed in *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. 1024. See also *Lindeke v. Associates' Realty Co.*, 146 Fed. 630, 640, 77 C. C. A. 56.

⁷⁴ *Bolles v. Crescent Drug Co.*, 53 N. J. Eq. 614, 32 Atl. 1061.

⁷⁵ *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918 A. 539, 252 Fed. 667; *Marshall v. Grosse, etc., Co.*, 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; *Brown v. Cairns*, 107 Ia. 727, 77 N. W. 478; *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713; *Auer v. Pennsylvania*, 99 Pa. 370,

however; he may remain inactive and sue the tenant for the rent when it matures.⁷⁵

§ 1404. Covenants in leases.

For breach of the covenant of quiet enjoyment a few jurisdictions still apply the early rule applicable to contracts to sell real estate,⁷⁶ and if the breach of covenant is not accompanied with moral fault, but is due to a superior title, the tenant is confined to the recovery of such payments or expenses as he may have incurred. Ordinarily this will restrict him to nominal damages, unless he has already paid rent.⁷⁷ But this rule would not be followed in most jurisdictions,⁷⁸ and in any case where the landlord has actively evicted the tenant, recovery may be had at once for the value of the unexpired period of the lease; that is, the difference between the promised rent and the rental value of the term, or the difference between the contract price and the market price,⁷⁹ together with any

44 Am. Rep. 114; *Fitzgerald v. Mandas*, 21 Ont. L. R. 312; *cf. Riley v. Hale*, 158 Mass. 240, 33 N. E. 491.

⁷⁵ *Rice v. Dudley*, 65 Ala. 68; *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; *Hinde v. Mandansky*, 161 Ill. App. 216; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Milling v. Becker*, 96 Pa. 182; *Goldman v. Broyles* (Tex. Civ. App.), 141 S. W. 283. See also *Copeland v. Stephens*, 1 B. & Ald. 593; *Ex parte Houghton*, 1 Low. 554; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719.

⁷⁶ *Supra*, § 1399.

⁷⁷ *American & Co. v. Pocono & Co.*, 183 Fed. 193, 105 C. C. A. 625 (Pa.); *Jeffers v. Easton*, 113 Cal. 345, 45 Pac. 680; *Kelly v. Dutch Church*, 2 Hill, 105; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Jacobs v. Schulte*, 153 N. Y. App. D. 693, 138 N. Y. S. 768; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; *Bartman v. Hering*, 18 Pa. Super. 395.

⁷⁸ *Elliott v. Bankston*, (Ala.) 45

So. 173; *Griesheimer v. Botham*, 105 Ill. App. 585; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Raynor v. Valentin Blatz Brewing Co.*, 100 Wis. 414, 76 N. W. 343. See also *Nelson v. Goddard*, 162 Wis. 66, 155 N. W. 943.

⁷⁹ *Tyson v. Chestnut*, 118 Ala. 387, 405, 24 So. 73; *Bromberg v. Eugentotto & Co.*, 162 Ala. 359, 50 So. 314; *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Baas v. West*, 110 Ga. 698, 36 S. E. 244; *Dobbins v. Duquid*, 65 Ill. 464; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Grove v. Youell*, 110 Mich. 285, 68 N. W. 132, 33 L. R. A. 297; *Shutt v. Lockner*, 77 Neb. 397, 109 N. W. 383; *Clarkson v. Skidmore*, 46 N. Y. 297; *Williamson v. Stevens*, 84 N. Y. App. D. 518, 82 N. Y. S. 1047; *Sloan v. Hart*, 160 N. C. 269, 63 S. E. 1037, 21 L. R. A. (N. S.) 239, 134 Am. St. Rep. 911; *Rhodes v. Baird*, 16 Oh. St. 573; *Amaden v. Atwood*, 69 Vt. 527, 38 Atl. 263; *Poposkey v. Munkwits*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858.

consequential damages which fall within the general principles governing the allowance of such damages.⁸⁰ On breach of a covenant by the landlord to repair, the tenant may make the repairs himself and recover the reasonable expense of so doing.⁸¹

If the tenant does not make the repairs himself, the ordinary measure of damages is the difference in the rental value of the premises without the promised repairs and with them.⁸² If, however, the repairs involve slight expense, the measure of damages in such a case may properly be the expense of making the repairs. If a few window panes are broken in a house in a northern latitude, the rental value of the premises kept in that condition might be very slight, but the measure of a tenant's damage if his landlord broke a covenant in the lease to repair, could hardly be based on this diminished rental value, but rather on the expense of making the repairs.⁸³ And if the premises cannot be used until the repairs are made, the value for this period may also be recovered.⁸⁴ Other consequential damages may also be recovered if brought within the general principles governing such damage; but damages for injury to the tenant or his property from continued failure to make repairs cannot

⁸⁰ *Tamblyn v. Johnston*, 126 Fed. 267, 62 C. C. A. 601; *Kjelsberg v. Chilberg*, 177 Fed. 109, 100 C. C. A. 529; *Gray v. Linton*, 38 Colo. 175 88 Pac. 749; *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157. See as to breach of covenant as to part of the leased premises, *Irwin v. Noble*, 176 Pa. 504, 35 Atl. 217, 35 L. R. A. 415.

⁸¹ *Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977; *Ross v. Stockwell*, 19 Ind. App. 86, 49 N. E. 50; *Rutland v. Dayton*, 60 Ill. 58; *Reiner v. Jones*, 38 N. Y. App. Div. 441; *Ward v. Kelsey*, 42 Barb. 582; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719.

⁸² *Bien v. Hess*, 102 Fed. 436, 42 C. C. A. 421; *Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Leick v. Trits*, 94 Iowa, 322, 62 N. W. 855; *Miller v. Sullivan*, 77 Kans. 252, 94 Pac.

266, 16 L. R. A. (N. S.) 737; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466; *Godfrey v. India Wharf B. Co.*, 87 N. Y. App. Div. 123, 84 N. Y. S. 90; *Sanger v. Smith* (Tex. Civ. App.), 135 S. W. 189; *Kellogg v. Malick*, 125 Wis. 239, 103 N. W. 1116; *Brown v. Toronto General Hospital*, 23 Ont. 599.

⁸³ *Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977; *Aikin v. Perry*, 119 Ga. 263, 46 S. E. 93; *Torres v. Starke*, 132 La. 1045, 62 So. 137; *Biggs v. McCurley*, 76 Md. 409, 415, 25 Atl. 466; *Caves v. Bartek*, 85 Neb. 511, 513, 123 N. W. 1031; and cases cited *infra*, n. 85.

⁸⁴ *Birch v. Clifford*, 8 T. L. Rep. 103 (action by landlord on tenant's covenant); *Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466; *Hexter v. Knox*, 63 N. Y. 561.

ordinarily be recovered because under the rule of avoidable consequences the tenant should have made the repairs himself and recovered their cost from the landlord.⁵⁵ But where the tenant in justifiable reliance on the landlord's promise to repair has suffered consequential injury which was a natural and probable consequence of the landlord's unexpected default, damages for the injury may be recovered.⁵⁶ For breach of other covenants of landlord or tenant, the ordinary principles of the law of damages will generally furnish a sufficient guide.

§ 1405. Contract to give a lease.

Jurisdictions which deny to one who has contracted for the purchase of real estate other relief against a vendor free from moral fault than a restoration of any payments and expenses which may have been incurred,⁵⁷ would apply the same rule to a contract to give a lease;⁵⁸ but "where under such a contract the lessor has prevented the lessee from entering and occupying the leased premises, or where an owner of property has broken his agreement to give a lease thereof to a prospective tenant, the measure of damages in an action for this breach of contract, if no rent has been paid and if nothing further appears, is the difference between the actual value of the leasehold estate that should have been enjoyed and the agreed rental that was to have been paid therefor."⁵⁹ This value, as in all cases in which

⁵⁵ *Collins v. Karatovsky*, 36 Ark. 316, 329; *Reinking v. Goodell*, 161 Ia. 404, 133 N. W. 774, 143 N. W. 573; *Campbell v. Miltenberger*, 26 La. Ann. 72; *Leavitt v. Fletcher*, 10 Allen, 119; *Flynn v. Trask*, 11 Allen, 550; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 189, 13 N. E. 465; *Reiner v. Jones*, 38 N. Y. App. D. 441, 56 N. Y. S. 423; *Goldberg v. Beedine*, 76 N. Y. App. D. 451, 78 N. Y. S. 776; *Cantrell v. Fowler*, 32 S. C. 589, 10 S. E. 934; *Brown v. Toronto General Hospital*, 23 Ont. 599.

⁵⁶ *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Miller v. Sullivan*, 77 Kans. 252, 94 Pac. 266, 16 L. R. A. (N. S.) 737; *Phillips v. Ehrmann*, 8 N. Y. Misc. 39, 28 N. Y. S. 519; *Blumenthal v. Prescott*, 70 N. Y. App. Div. 560, 75

N. Y. S. 710; *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. 49.

⁵⁷ See *supra*, § 1399.

⁵⁸ *Noyes v. Anderson*, 1 Duer, 342, and see cases in the preceding section, n. 77.

⁵⁹ *Neal v. Jefferson*, 212 Mass. 517, 522, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913 D. 205, citing *Jewett v. Brooks*, 134 Mass. 505; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398; *Giles v. O'Toole*, 4 Barb. 261; *Denison v. Ford*, 10 Daly, 412; *Cilley v. Hawkins*, 48 Ill. 308; *Bernhard v. Curtis*, 75 Conn. 476, 54 Atl. 213; *Leslie E. Brooks Co. v. Long*, 67 Fla. 68, 64 So. 452; *Favar v. Riverview Park*, 144 Ill. App. 86; *Skinner v.*

the value of real estate or an interest therein is concerned, means the value for any and all uses to which the property is adapted and can readily be applied. If it is capable of being used in some particular way and has an enhanced value by reason of its availability for such use, the fact may be shown, and the value to be ascertained is the value thus enhanced; not because this is any other or greater value than the real market value of the property, but because it is the real value which is the subject of inquiry, and that value must depend much upon the nature of the property and its availability or adaptability for advantageous or profitable use. This rule generally has been applied where the value of property taken for a public use is to be determined, but it is not limited to such cases.⁹⁰ The value of a leasehold estate, like that of any interest, is to be determined with reference to the use to which it can be most advantageously put."⁹¹ For breach by the tenant of an agree-

Gibson, 86 Kan. 431, 121 Pac. 513; Shubert v. Sonheim, 138 N. Y. App. Div. 800, 123 N. Y. S. 529; Wertheimer v. Rosenbaum (N. Y. Misc.), 146 N. Y. S. 177; Sloan v. Hart, 150 N. C. 269, 63 S. E. 1037, 21 L. R. A. (N. S.) 239, 134 Am. St. Rep. 911; Gross v. Heckert, 120 Wis. 314, 97 N. W. 952.

⁹⁰ Neal v. Jefferson, 212 Mass. 517, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913 D. 205, citing Providence & Worcester Railroad v. Worcester, 155 Mass. 35, 29 N. E. 56; Maynard v. Northampton, 157 Mass. 218, 31 N. E. 1062; Blaney v. Salem, 160 Mass. 303, 35 N. E. 858; Sargent v. Merrimac, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528. (See also Hodges v. Fries, 34 Fla. 63, 15 So. 682; McCafferty v. Griswold, 99 Pa. 270.)

⁹¹ Neal v. Jefferson, 212 Mass. 517, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913 D. 205; citing Manning v. Fitch, 138 Mass. 273; Tufts v. Atlantic Telegraph Co., 151 Mass. 269, 23 N. E. 844. The court added: "In this case both parties agreed that the property could best be used as a

hotel for winter visitors, and that it was intended to be so used; and if that was so, the measure of damages was *prima facie* the value of the property for this use during the two years after June 1, 1910, over and above the rent which was to be paid therefor. That there might be some difficulty in fixing this value, or that its determination must be partly the result of an estimate rather than of an exact computation, does not affect the application of the rule. Magnolia Metal Co. v. Gale, 189 Mass. 124, 133, 75 N. E. 219; Hunt v. Boston Elevated Railway, 199 Mass. 220, 225, 85 N. E. 446; Page v. Johnston, 205 Mass. 274, 278, 91 N. E. 214. Putting the case in another way, the plaintiff has been prevented from making that use of the property which it was contemplated that he should make, and he is entitled to the damages which thus have been caused to him. Townsend v. Nickerson Wharf Co., 171 Mass. 501, 503; Kostopolos v. Pezzetti, 207 Mass. 277, 93 N. E. 571, Ann. Cas. 1912 A. 859; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Stewart v. Lanier House Co., 75 Ga. 582."

ment to hire property, the measure of damages is the difference between the agreed rent under the contract, and the rental value of the property, which may be shown by the rent which was actually obtained by a new lease, if the plaintiff used diligence in obtaining the best rent possible.⁹²

§ 1406. Negative agreements.

If the defendant's contract is to refrain from action, difficult questions often arise as to the value of his performance. Breach of a contract to forbear temporarily to sue a debtor *prima facie* gives rise merely to nominal damages, if the creditor would have been entitled to interest for the period during which he had agreed to defer his action.⁹³ A contract for permanent forbearance can ordinarily be set up as a complete defence to an action on the claim.⁹⁴ But damages for breach of such a contract if made the basis of an action are the amount of the claim with interest and costs.⁹⁵ A breach of a contract not to engage in business necessitates a valuation of the profits or increased profits the plaintiff would have made had the defendant kept his contract.⁹⁶ And the profits the defendant made by doing business may be evidence of the added profit the plaintiff would have made had the defendant refrained from business.⁹⁷ Not only the added profits the plaintiff would have made are recoverable but also compensation for any injury suffered by him

⁹² *Cleveland v. Bryant*, 16 S. C. 634; *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280, 32 S. W. 797; *James v. Kibler's Adm.*, 94 Va. 165, 26 S. E. 417; *Oldfield v. Angeles, etc., Co.*, 62 Wash. 260, 113 Pac. 630, 35 L. R. A. (N. S.) 426, Ann. Cas. 1912 C. 1050.

⁹³ See *Reid v. Johnson*, 132 Ind. 416, 31 N. E. 1107 (breach of contract not to file mechanic's lien). In *Deyo v. Waggoner*, 19 Johns. 241, the plaintiff recovered the consideration paid by him.

⁹⁴ See *supra*, § 338.

⁹⁵ *Indiana, etc., Ry. Co. v. Seearoe*, 23 Ind. 223.

⁹⁶ *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70;

Bauwens v. Goethals, 187 Ill. App. 563; *Galucha v. Naso*, 147 Ia. 309, 126 N. W. 146; *Long v. O'Bryan*, 28 Ky. L. Rep. 1062, 91 S. W. 659. See also *Moorman v. Parkerson*, 131 La. 204, 59 So. 122; *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101; *Salinger v. Salinger*, 69 N. H. 589, 45 Atl. 558; *Buckhardt v. Buckhardt*, 36 Oh. St. 261, 42 Oh. St. 474, 51 Am. Rep. 842.

⁹⁷ *Peltz v. Eichele*, 62 Mo. 171; *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155; *Whorley v. Tennessee, etc., Co. (Tenn. Ch.)*, 62 S. W. 346. But see *Montgomery, etc., Society v. Harwood*, 126 Ind. 440, 26 N. E. 182, 10 L. R. A. 532; *Dose v. Toome*, 37 Ore. 13, 60 Pac. 380.

in his remaining business.⁸⁸ On breach of a contract to give the plaintiff an exclusive agency he is entitled to recover the profits he would have made on transactions entered into by the principal through others.⁸⁹

§ 1407. Alternative contracts.

As has been seen, contracts are sometimes put in the form of alternative agreements where the intention is to compel the promisor to perform one alternative by providing as the other alternative a performance so much more onerous as to be a penalty; or an alternative sum named may be liquidated damages.¹ The interpretation of contracts made with such a purpose is that the desired performance must be rendered by a certain time, and that on default the liquidated damages or penalty shall automatically become due. The validity of such contracts has been previously considered,² and it remains here to consider only such contracts as may be interpreted as intended to give a genuine choice rather than to subject the obligor to damages for failing to perform what was understood to be his real obligation.

A promise of one of several alternative performances will give the choice of alternatives, unless the contrary is stated,³ to the person who is to render the performance.⁴ This will

⁸⁸ *Evans v. Elliott*, 20 Ind. 283, 83 Am. Dec. 319; *Galucha v. Naso*, 147 Ia. 309, 126 N. W. 146.

⁸⁹ *Cincinnati &c. Co. v. Western &c. Co.*, 152 U. S. 200, 38 L. Ed. 411, 14 Sup. Ct. 523; *Wells v. National Life Assoc.*, 99 Fed. 222, 53 L. R. A. 33, 39 C. C. A. 476; *Corbin v. Taussig*, 137 Fed. 151; *Schiffman v. Peerless M. C. Co.*, 13 Cal. App. 600, 110 Pac. 460; *Mueller v. Bethesda &c. Co.*, 88 Mich. 390, 50 N. W. 319; *Emerson v. Pacific &c. Packing Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603; *Dunham v. Hastings, etc., Co.*, 95 N. Y. App. Div. 360, 88 N. Y. S. 835; *Wakeman v. Wheeler, etc., Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Bredemeier v. Pacific Supply Co.*, 64 Ore. 576, 131

Pac. 312; *Coffield v. E. A. Jenkins Motor Co.*, 89 S. C. 419, 71 S. E. 969; *Cranmer v. Kohn*, 7 S. Dak. 247, 64 N. W. 125; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309, 53 N. W. 501. But see *Union Refining Co. v. Barton*, 77 Ala. 148; *Carlson v. Stone-Ordean-Wells Co.*, 40 Mont. 434, 107 Pac. 419.

¹ See *supra*, § 781.

² See *supra*, §§ 781, 782.

³ As in, *e. g.*, *Standard &c. Co. v. Breed*, 163 Mass. 10, 39 N. E. 346.

⁴ *Co. Litt.* 145a. "Fourthly, in case an election be given of two several things, alwaies he, which is the first agent, and which ought to do the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the

ordinarily be the promisor,⁶ but may possibly be the promisee.⁶ It should be noticed that even where a choice of performances is given to the promisor, the obligation may be so expressed as to indicate that the primary duty relates to one of them, and that unless the promisor manifests an election to perform the other his duty is single.⁷ And even under a true alternative contract the promisor's right of choice may be limited by a provision that the right to select one of the alternatives shall cease by a certain time or on a certain contingency. In such a case after the lapse of the time within which one alternative might be chosen, the obligation becomes single and the measure of damages for breach thereafter is based upon the value of the remaining alternative.⁸ The same is true after one alternative has been expressly chosen;⁹ or where all but one alternative are or have become impossible of performance,¹⁰ or illegal.¹¹ Where, however, no choice has been made either expressly by the promisor or automatically by the terms of the contract, or by law, the measure of damages for breach of such

election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causa qua supra*. And with this agree the bookes in the margent, 2 H. 7. 23. a. But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hasill or twentie loads of maple to be taken in his wood of D. there the grantee shall have election; for he ought to do the first act, *scil.* to fell and take the same."

⁶ Co. Lit. 145a; *Foster v. Goldschmidt*, 21 Fed. 70; *Galloway v. Legan*, 4 Mart. (N. S.) 167; *Barker v. Jones*, 8 N. H. 413; *McNitt v. Clark*, 7 Johns. 465; *Smith v. Sanborn*, 11 Johns. 59; *Mayer v. Dwinell*, 29 Vt. 298.

⁷ See example, *supra*, n. 4.

⁷ For example, the right commonly given an insurer against fire to restore the injured or destroyed property does not prevent the sole obligation of the insurer from being one for the payment of money until an election is made to substitute an obligation to restore.

⁸ *Deverill v. Burnell*, L. R. 8 C. P. 475; *Russell v. Wright*, 23 S. Dak. 338, 347, 121 N. W. 842; *Wilson v. Graham*, 14 Tex. 222; *Levy v. Goldsoll* (Tex. Civ. App.), 131 S. W. 420. See also *Walton v. Coulson*, 1 McLean, 120 (affd. 9 Pet. 62, 9 L. Ed. 51); *Wolfe v. Parham*, 18 Ala. 441.

⁹ *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396; *Dimmick v. Banning*, 256 Pa. 295, 100 Atl. 871.

¹⁰ *Bute v. Thompson*, 13 M. & W. 487; *Drake v. White*, 117 Mass. 10; *State v. Worthington's Ex'rs*, 7 Ohio, 171. But see *Laughter's Case*, 5 Co. 22.

¹¹ *Erie R. Co. v. Union, etc., Co.*, 35 N. J. L. 240.

a contract is the value of the alternative least onerous to the defendant.¹² An inconsistent and, it seems, erroneous rule has been laid down in a few cases, which, relying on a passage from Coke relating to grants rather than contracts,¹³ hold that if the promisor fails to make an election the promisee thereupon has the option.¹⁴ Such a rule would entitle the promisee after breach to recover damages based on the performance most onerous to the defendant. Doubtless it is possible for the parties to make a contract that until a certain time the promisor may choose but that thereafter the promisee shall have the choice. There seems no propriety, however, where the parties have not made such a contract in the court making it for them.

An exception to the general rule is made if one of the alternatives is to pay a certain sum of money. As has been seen,¹⁵ a contract for the payment of a certain amount of money in goods to be taken at a certain value has been generally construed as amounting in effect to a promise to pay the money unless goods are tendered at the maturity of the contract. Somewhat similarly where an alternative contract provides as one alternative for the payment of a sum of money the damage for breach of the obligation is the sum of money promised, though that conceivably may have been the alternative more onerous to the defendant.¹⁶ Such promises are in effect con-

¹² *Holliday v. Highland, etc., Co.*, 43 Ind. App. 342, 87 N. E. 249; *Kimball v. Deere*, 108 Ia. 676, 77 N. W. 1041; *Pope v. Campbell*, Hardin (Ky.), 31, 3 Am. Dec. 722; *White v. Green*, 3 T. B. Mon. (Ky.) 155; *Hixon v. Hixon*, 7 Humph. (Tenn.) 33.

¹³ *Co. Litt.* 145a. "The feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee."

¹⁴ *Coles v. Peck*, 96 Ind. 333, 49

Am. Rep. 161; *Phillips v. Cornelius* (Miss.), 28 So. 871; *Patchin v. Swift*, 21 Vt. 292; *Corbin v. Fairbanks*, 56 Vt. 538. The same doctrine is stated in suits for specific performance in *Amanda Gold Min. Co. v. People's, etc.*, Min. Co., 28 Colo. 251, 64 Pac. 218; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161. The correct procedure in such a suit is suggested in *Taylor v. Mathews*, 53 Fla. 776, 787, 44 So. 146, namely, that if the contract is one suitable for equitable intervention, the defendant should be compelled to elect. See also *Allender v. Evans-Smith Drug Co.*, 3 Ind. Ty. 628.

¹⁵ *Supra*, § 1398.

¹⁶ *Layton v. Pearce*, 1 Doug. 15; *Pennsylvania Ry. v. Reichert*, 58

strued as binding the promisor to a certain performance by a certain day or in default thereof to make a money payment in the nature of liquidated damages, and unless the sum fixed is penal the agreed sum is recoverable.

§ 1408. Damages for failure to pay a promisee's debt.

The measure of damages for breach of a contract to discharge an obligation of the promisee to a third person is the amount of the debt. Thus where a principal violates a promise to a surety to pay the creditor, the surety may recover (without paying the debt) from the principal as damages the full amount of the debt.¹⁷ And one who has assumed a mortgage if he fails to pay it at maturity, is liable to his promisee for its full amount.¹⁸ This doctrine has been criticized,¹⁹ and it is obvious that there is possible hardship to the defendant, for the creditor may never collect his claim from the plaintiff, but may collect it from the defendant, or, in the case of the mortgage, from security belonging to the defendant. It has been suggested in several cases to meet this difficulty, that the defendant may have an equity, that the money he pays to the plaintiff shall be applied in dis-

Md. 261; *Slosson v. Beadle*, 7 Johns. 72; *Corbin v. Fairbanks*, 56 Vt. 538

¹⁷ *Loosemore v. Radford*, 9 M. & W. 657; *Robinson v. Robinson*, 24 L. T. 112; *Banfield v. Marks*, 56 Cal. 185; *Lathrop v. Atwood*, 21 Conn. 117; *Gage v. Lewis*, 68 Ill. 604; *Devol v. McIntosh*, 23 Ind. 529; *Helms v. Appleton*, 43 Ind. App. 482, 85 N. E. 733, 86 N. E. 1023; *Lee v. Burrell*, 51 Mich. 132, 16 N. W. 309; *Furnas v. Durgin*, 119 Mass. 500, 508, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 96, 41 Am. Rep. 199; *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88; *Ham v. Hill*, 29 Mo. 275; *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Fairfield v. Day*, 71 N. H. 63, 51 Atl. 263; *Sparkman v. Gove*, 44 N. J. L. 252, 255-256; *Port v. Jackson*, 17 Johns. 239, 479; *Berry v. Schaad*, 50 N. Y. App. D. 132, 63 N. Y. S. 349; *Klauck v. Federal*

Ins. Co., 131 N. Y. App. D. 519, 115 N. Y. S. 1049; *Beier v. Snitzer*, 167 N. Y. S. 303; *Wilson v. Stilwell*, 9 Oh. St. 467; *Oriental Lumber Co. v. Blades Lumber Co.*, 103 Va. 730, 50 S. E. 270; *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794.

¹⁸ *Foster v. Atwater*, 42 Conn. 244; *Malott v. Goff*, 96 Ind. 496; *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Stout v. Folger*, 34 Ia. 71, 11 Am. Rep. 138; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804; *Sparkman v. Gove*, 44 N. J. L. 252. See also *McAbee v. Cribbs*, 194 Pa. 94, 44 Atl. 1066.

¹⁹ *Sedgwick on Damages*, § 790.

charge of the debt;²⁰ and it is to be observed that the defendant after suit has begun against him, may reduce damages in the action to a nominal amount by keeping his promise to pay the plaintiff's creditor. In the analogous case of breach of a covenant by a grantor of land to remove an existing encumbrance, the amount of the encumbrance, though not discharged, fixes the measure of damages.²¹ Here also in most jurisdictions of the United States the creditor might sue the promisor, and thereby subject him to double liability for the debt.

§ 1409. Promises to indemnify.

A distinction, sound in principle, though often difficult to draw in fact, must be taken between a contract on the one hand to assume or pay or indemnify against a debt or liability of the promisee and a promise on the other hand to indemnify only against damage caused by such liability. The cases cited in the preceding section relate to promises to assume or pay an indebtedness. Similarly a promise to indemnify against the existence of a liability is broken as soon as the liability is incurred, and the promisee is entitled to recover damages based on the amount of his liability although he has not satisfied it.²² On the other hand, a promisor who has undertaken merely to indemnify against damage is liable only when actual payment has been made by the promisee, or damage suffered by him; and then only to the extent of such payment or damage.²³

²⁰ *Loosemore v. Radford*, 9 M. & W. 657.

²¹ *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Wetmore v. Green*, 11 Pick. 462; *Cady v. Allen*, 22 Barb. 388; *Manahan v. Smith*, 19 Ohio St. 384. Cf. the damages for breach of a general covenant against encumbrance, *supra*, § 1401.

²² *McBeth v. McIntyre*, 57 Cal. 49; *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686; *Anoka Lumber Co. v. Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *Gilbert v. Wiman*, 1 N. Y.

550, 49 Am. Dec. 359; *Fenton v. Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Pickett v. Casualty Co.*, 60 S. C. 477, 38 S. E. 160, 629; *Hoven v. Assurance Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. See also *supra*, § 1274.

²³ *Lott v. Mitchell*, 32 Cal. 23; *Spencer Savings Bank v. Cooley*, 177 Mass. 49, 58 N. E. 276; *Conner v. Bean*, 43 N. H. 202; *Rector, etc. of Trinity Church v. Higgins*, 48 N. Y. 532, 537. As to equitable relief on such promises, see *supra*, § 1274 *ad fin.*

§ 1410. Contract to pay money.

Where the defendant's obligation to pay money is dependent on an obligation of the plaintiff, still at least partially unperformed, to furnish property or services, the measure of damages has been considered in connection with contracts of employment,²⁴ or of sale.²⁵ Where the defendant is under a unilateral or independent obligation to pay a liquidated sum of money, the ordinary measure of damages for non-performance is the sum of money itself with interest at the legal rate from the time when it was due.²⁶ In an action by a creditor against his debtor for the non-payment of the debt, no other damages are ever allowed.²⁷ When a large order of goods is bought on credit from a seller known to have but little capital, it may be plainly foreseeable by the buyer when he enters into the transaction that failure to pay the price when it is due may ruin the seller financially, and such a consequence is both proximate and natural. The universality of the rule limiting damages to interest is therefore based on the policy of having a measure of damages of easy and certain application, even though occasionally leading to results at variance with the general principle of compensation. Where, however, there is an obligation to pay an indebtedness not to the promisee himself but on his behalf to a third person, consequential damages are frequently recoverable for breach of the contract. The commonest illustration of such damages occurs where a bank violates its contract with a depositor by failing to pay without legal excuse one of the latter's checks. If the depositor was a trader substantial damages may be allowed without proof of special damage;²⁸ and

²⁴ *Supra*, §§ 1358 *et seq.*

²⁵ *Supra*, §§ 1378 *et seq.*

²⁶ *Federal Lumber Co. v. Reece* (Ky.), 116 S. W. 783; *Bethel v. Salem Imp. Co.*, 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063.

²⁷ *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923; *Board v. Roach*, 174 Fed. 949, 99 C. C. A. 453; *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 52 So. 843, 29

L. R. A. (N. S.) 194, 140 Am. St. Rep. 47; *Mutual Ins. Co. v. Chambliss*, 131 Ga. 60, 61 S. E. 1034; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *Morrill v. Weeks*, 70 N. H. 178, 180, 46 Atl. 32.

²⁸ *Wiley v. Bunker Hill Bank*, 183 Mass. 495, 67 N. E. 655; *James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255. See also *Davis v. Standard Nat. Bank*, 50 N. Y. App. D. 210, 63 N. Y. S. 764.

special damages if alleged and proved may be recovered by non-traders.²⁹ And in any case the failure of one bound to make a payment of money to a third person may give a right to such consequential damages as can be brought within the ordinary rules governing such damages.³⁰ Damages for breach of an obligation to pay foreign money are the same as for breach of an obligation to furnish a commodity, and the rules governing the enforcement of contracts for the sale of goods are applicable,³¹ except that by statute the rate of exchange, that is the value in the place of the forum of foreign money due abroad, is fixed.

§ 1411. Contracts to lend money.

Breach of a contract to lend money for whatever period at the current rate of interest, or at whatever rate of interest for no definite time, involves no legal damage,³² unless consequential damages are recoverable. It will frequently happen that the borrower is unable to get money elsewhere and if the defendant had notice of the purpose for which the money was desired he will be liable for damages caused by the plaintiff's inability to carry out his purpose if performance of the promise would have enabled him to do so.³³ In any event the defendant

²⁹ *Rolin v. Steward*, 14 C. B. 595; *Third Nat. Bank v. Ober*, 178 Fed. 678, 102 C. C. A. 178; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; *Spearing v. Whitney Central Nat. Bank*, 129 La. 607, 56 So. 548; *Peabody v. Citizens' State Bank*, 98 Minn. 302, 108 N. W. 272; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; *Lorick v. Palmetto, etc., Trust Co.*, 74 S. C. 185, 54 S. E. 206; *Dean v. Melbourne, etc., Co.*, 16 Vict. L. R. 403. See also *Fleming v. Bank*, [1900] A. C. 577.

³⁰ See *Page v. Franklin*, 214 Mass. 552, 101 N. E. 1084; *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.

³¹ *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Nickerson v. Soesman*, 98 Mass. 364; *Sheehan v. Dalrymple*, 19 Mich. 239; *Fabbri v. Kalbfleisch*,

52 N. Y. 28; *Benners v. Clemens*, 58 Pa. 24. Foreign money is not for every purpose an ordinary chattel. It may possess the quality of negotiability even by a thief. *Brown v. Perera*, 183 N. Y. App. D. 892, 176 N. Y. S. 215; cf. *Reisfeld v. Jacobs*, 107 N. Y. Misc. 1, 176 N. Y. S. 223.

³² *Kelly v. Fahrney*, 97 Fed. 176, 38 C. C. A. 103; *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 435, 52 So. 843, 29 L. R. A. (N. S.) 194; 140 Am. St. Rep. 47; *Savings Bank v. Asbury*, 117 Cal. 96, 48 Pac. 1081; *Turpie v. Lowe*, 114 Ind. 37, 15 N. E. 834; *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Bradford, etc., R. v. New York, etc., R.*, 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116.

³³ *Manchester & Oldham Bank v. Cook*, 49 L. T. (N. S.) 674; *Banewur*

is liable in consequential damages, for any reasonable expense incurred in getting another loan.³⁴

Where a purchaser of goods promises to give a negotiable instrument payable in the future for them, though aside from the doctrine of anticipatory breach the seller has not generally been allowed to sue for the price of the goods immediately if the buyer failed to give the negotiable instrument as agreed,³⁵ an action will lie for breach of the special promise to give the negotiable instrument, and in such an action the damages are fixed by the amount of the agreed instrument.³⁶ It would seem that interest should be rebated from this amount if the agreed maturity of the instrument was fixed for a later day than that on which the trial occurs.³⁷ Where as part of an executory contract there is a promise to give security and breach of this promise involves breach of the entire contract, the measure of damages is properly the value of the security to the promisee, and this is *prima facie* the amount of the sum to be secured.³⁸ Where the failure to give a negotiable instrument, or security of

v. Levenson, 171 Mass. 1, 50 N. E. 10; *Holt v. United Security L. Ins. Co.*, 76 N. J. L. 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691; *Treanor v. New York Breweries Co.*, 51 N. Y. Misc. 607, 101 N. Y. S. 189; *Goldsmith v. Holland Trust Co.*, 5 N. Y. App. Div. 104, 38 N. Y. S. 1032; *Doushkess v. Burger Brewing Co.*, 20 N. Y. App. Div. 375, 47 N. Y. S. 312; *Murphy v. Hanna*, 37 N. Dak. 156, 164 N. W. 32; *Equitable Mortgage Co. v. Thorn* (Tex. Civ. App.), 26 S. W. 276; *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235; *cf. Levinsky v. Middlesex, etc., Co.*, 92 Fed. 449, 34 C. C. A. 452; *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 52 So. 843, 29 L. R. A. (N. S.) 194; *Towles v. Cincinnati, etc., Co.*, 146 Ky. 301, 142 S. W. 401; *Spies v. Mutual Trust Co.*, 258 Pa. 414, 102 Atl. 119.

³⁴ *Prehn v. Royal Bank*, L. R. 5 Ex. 92; *Bohemian-American Assoc. v. Northern Bank*, 120 N. Y. S. 134;

Hoch v. Braxmar, 109 N. Y. App. Div. 209, 95 N. Y. S. 647.

³⁵ See *infra*, § 1471.

³⁶ *American Manufacturing Co. v. Klarquist*, 47 Minn. 344, 50 N. W. 243; *Deering v. Johnson*, 86 Minn. 172, 90 N. W. 363; *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634; *Hanna v. Mills*, 21 Wend. 90, 34 Am. Dec. 216; *Rinehart v. Olwine*, 5 Watts & S. 157; *Standard Lumber Co. v. Deer Park Lumber Co.*, 104 Wash. 24, 175 Pac. 578, 176 Pac. 332.

³⁷ It was so held in *Hanna v. Mills*, 21 Wend. 90, 34 Am. Dec. 216, but the contrary was held in *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634.

³⁸ *Barron v. Mullin*, 21 Minn. 374; *Dye v. Forbes*, 34 Minn. 13, 24 N. W. 309; *Schmaltz v. Weed*, 27 N. Y. App. D. 309, 50 N. Y. S. 168, and the same measure was applied where a third person broke a promise to give security for a promised loan to another, in consequence of which the loan was not made. *Rider v. Pond*, 19 N. Y. 262.

a different sort, involves the entire breach of a contract which would ultimately require payment of the sum for which the instrument was given or the security pledged this measure of damages seems accurate, but though laid down broadly in the cases, the correctness of the rule seems open to question unless judgment in the case will merge not only the obligation primarily sued upon, but also all right upon the contract or debt to which the security relates.

§ 1412. Nature of interest.

Interest may be reserved by the terms of a contract between the parties, and is then called conventional interest, or it may be awarded by the law as damages though no agreement for interest has been made by the parties. Even where interest is reserved by contract a distinction is to be observed between cases where the provision for interest is properly to be construed (1) as involving an agreement for the continuance of an indebtedness, and a price therefor, and (2), as liquidated damages or penalty for violation of an agreement to pay an indebtedness at maturity.

§ 1413. On what claims interest is allowed as damages.

In discussing the measure of damages for breach of an obligation the endeavor must first be to determine the extent of the injury at the time of the breach, and then to consider whether added damages must be awarded for the delay which necessarily elapses between the time of the breach and the time of the beginning of the action or the time of the trial. Except where special consequential damages arising after the breach are recoverable the only additional element of damage recoverable is interest, and the inquiry therefore must be made, when is interest recoverable as well as the main element of damages? In England the question is settled by a statute,³⁹ which

³⁹ By 3 & 4 Wm. 4, c. 42, s. 28, it is enacted "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at

a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums certain be payable, by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when

enumerates the cases in which interest is recoverable, and this enumeration is held to be exhaustive.⁴⁰ In the United States, however, the governing rules must be sought in judicial decisions, not always harmonious. In a few jurisdictions, the allowance of interest seems never to be an absolute right, but to be allowed by the jury in appropriate cases in their discretion.^{40a} Generally, however, there are some definite rules of law. On a unilateral or independent contractual obligation to pay a liquidated sum of money at a certain time interest is almost universally allowed from the time when payment was due.⁴¹ And the fact that the contract provides that interest shall be paid to the date of maturity does not exclude the allowance by way of damages of interest after maturity.⁴²

Wherever payment is to be made on demand either by the terms of the contract or because credit is given but no time of payment is stated, interest runs from the time when demand is made.⁴³ There may, however, be an implication that payment

demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

⁴⁰ *London, C. & D. Ry. Co. v. South Eastern Ry. Co.*, [1893] A. C. 429, 430.

^{40a} *District of Columbia v. Camden Works*, 15 D. C. App. 198, 222; *Shoop v. Fidelity &c. Co.*, 124 Md. 180, 139, 91 Atl. 753.

⁴¹ *Armstrong v. American Exchange Bank*, 133 U. S. 433, 470, 10 Sup. Ct. 450, 33 L. Ed. 747; *Herman H. Hettler Lumber Co. v. Olds*, 242 Fed. 456, 155 C. C. A. 232 (Mich.); *New York Trust Co. v. Detroit &c. Ry. Co.*, 251 Fed. 514, 518, 163 C. C. A. 508; *Park v. Wiley*, 67 Ala. 310; *Pacific Mutual Life Ins. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Braun v. Hess*, 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221; *Henderson, etc., Mfg. Co. v. Lowell*

Mach. Shops, 86 Ky. 668, 7 S. W. 142; *Maine Central Institute v. Haskell*, 73 Me. 140; *Bassett v. Sanborn*, 9 Cush. 58; *Beardslee v. Horton*, 3 Mich. 560; *Judd v. Dike*, 30 Minn. 380, 15 N. W. 672; *Bussell v. Snell*, 25 N. H. 474; *People v. New York*, 5 Cow. 331; *West Republic Mining Co. v. Jones*, 108 Pa. 55; *Fleming's Est.*, 184 Pa. 80, 88, 39 Atl. 27, 29; *Spencer v. Pierce*, 5 R. I. 63; *Martin Bros. Co. v. Peterson*, 38 S. Dak. 494, 162 N. W. 154; *Sampson v. Warner*, 48 Vt. 247; *Butler v. Kirby*, 53 Wis. 188, 10 N. W. 373.

⁴² *Thorndike v. United States*, 2 Mason, 1; *Spaulding v. Lord*, 19 Wis. 533.

⁴³ *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176; *Andrus v. Bradley*, 102 Fed. 54, 107 Fed. 196, 46 C. C. A. 238, 53 L. R. A. 432, on appeal, *sub nom.* *Parker v. Gaines* (Ark.), 11 S. W. 693; *Anderson v. Pacific Bank*, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Nye v. Lothrop*, 94 Mich.

is immediately due though no agreement was made in regard to the precise time of payment. Thus where goods are sold and delivered for cash,⁴⁴ or with no agreement for credit,⁴⁵ interest is allowed from the time when the goods were delivered; and such is the rule in actions for work or services which were furnished under an agreement for a liquidated price, or where market prices furnish an exact standard of value,⁴⁶ or where there has been an account stated.⁴⁷ An exception to this rule exists in regard to a running account. It may be supposed in such an account that there was no intention that each item was to be paid separately and that, therefore, credit was intended. For this reason, interest will not run until demand is made.⁴⁸ When, however, a balance of account has been struck, interest then begins to run.⁴⁹ And the fact that several

411, 54 N. W. 178; *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; *York v. Farmers' Bank*, 105 Mo. App. 127, 79 S. W. 968; *Irlbacker v. Roth*, 25 N. Y. App. Div. 290, 49 N. Y. S. 538.

⁴⁴ *Atlantic Phosphate Co. v. Grafflin*, 114 U. S. 492, 5 Sup. Ct. 967, 26 L. Ed. 221; *Yellow Poplar Lumber Co. v. Daniel*, 109 Fed. 39, 48 C. C. A. 204; *Waring v. Henry*, 30 Ala. 721; *District of Columbia v. Camden Iron Works*, 15 D. C. App. Cas. 198, 222; *Wyandotte & K. C. G. Co. v. Schliefer*, 22 Kans. 468; *Henderson C. M. Co. v. Lowell Machine Shops*, 86 Ky. 668, 7 S. W. 142; *Foote v. Blanchard*, 6 Allen, 221, 83 Am. Dec. 624.

⁴⁵ *Shields v. Henry*, 31 Ala. 53; *Roberts v. Wilcoxson*, 36 Ark. 355; *Sturges v. Green*, 27 Kans. 235; *McAfee v. Dix*, 101 N. Y. App. D. 69, 91 N. Y. S. 464.

⁴⁶ *Richmond & Co. v. Richmond*, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625; *Mix v. Miller*, 57 Cal. 356; *Fairchild v. Bay Point & Co. R.*, 22 Cal. App. 328, 134 Pac. 338; *Loomis v. Gillett*, 75 Conn. 298, 53 Atl. 581; *Sullivan v. Nicoulin*, 113 Ia. 76, 83, 84 N. W. 978; *McCreery v. Green*, 38 Mich. 172; *Mullally v. Dingman*, 62

Neb. 702, 87 N. W. 543; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Martin v. Silliman*, 53 N. Y. 615; *Bradley v. McDonald*, 157 N. Y. App. D. 572, 142 N. Y. S. 702; *Faber v. New York*, 222 N. Y. 255, 118 N. E. 609; *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

⁴⁷ *Switsler Advertising Co. v. Orr*, 196 Ill. App. 98.

⁴⁸ *South Carolina v. Port Royal, etc.*, R. Co., 89 Fed. 565; *Tyree v. Parham's Ex.*, 66 Ala. 424; *Rogers v. Yarnell*, 51 Ark. 198, 10 S. W. 622; *Heald v. Hendy*, 89 Cal. 632, 27 Pac. 67; *Crosby v. Mason*, 32 Conn. 482; *Phillips v. Rehm*, 64 Ill. App. 477; *Marrone v. Ehrat*, 175 Ill. App. 649; *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616; *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32; *Ledyard v. Bull*, 119 N. Y. 62, 23 N. E. 444; *Miles v. Bowers*, 49 Ore. 429, 90 Pac. 905; *Gibson's Est.*, 228 Pa. 409, 77 Atl. 627.

⁴⁹ *Young v. Godbe*, 15 Wall. 562, 21 L. Ed. 250; *Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. 622 (affirming 45 Ill. App. 250); *Luetgert v. Volker*, 153 Ill. 385, 39 N. E. 113; *Crosby v. Otis*, 32 Me. 256; *Walden v. Sherburne*, 15 Johns. 409.

sales have been made at different times by the plaintiff to the defendant does not necessarily prove that there was a continuing account; and, if there was not, interest runs from the dates when each item fell due.⁵⁰ Interest is not generally allowed until action has been brought on claims which are unliquidated and where market rates or prices furnish no definite or exact test of the amount due,⁵¹ unless the defendant's obligation was unilateral and performance was due at a fixed time. In such a case as, for instance, where goods or services have been paid for in advance, the plaintiff is entitled to interest from the time when the goods or services should have been rendered.⁵² In any event interest is ordinarily given from the date of the writ;⁵³ but in case of damages based on anticipated profits of uncertain amount, in some jurisdictions at least, interest is not allowed until verdict,⁵⁴ or judgment.⁵⁵ The disinclination to allow interest on claim of uncertain amount seems based on practice rather than theoretical grounds.

⁵⁰ *Martin Bros. Co. v. Peterson*, 38 S. Dak. 494, 162 N. W. 154.

⁵¹ *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Macomber v. Bigelow*, 123 Cal. 532, 56 Pac. 449, 126 Cal. 9, 58 Pac. 312; *Dexter v. Collins*, 21 Col. 455, 42 Pac. 664; *Coburn v. Muskegon Booming Co.*, 72 Mich. 134, 40 N. W. 198; *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. 465; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; *Underwood Typewriter Co. v. Century &c. Co.*, 165 Mo. App. 131, 146 S. W. 448; *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824; *Carricart v. Blanco*, 121 N. Y. 230, 24 N. E. 284; *Faber v. New York*, 222 N. Y. 255, 262, 118 N. E. 609; *Anthony v. Moore, etc., Co.*, 136 N. Y. App. Div. 933, 120 N. Y. S. 402; *Hoisting Machinery Co. v. Federal Terra Cotta Co.*, 179 N. Y. App. D. 653, 167 N. Y. S. 85. (See also *Tusseo v. American Bonding Co.*, 226 N. Y. 171, 123 N. E. 142.) Interest was allowed on the market value of a vessel as fixed by the jury, in *Rederiaktiebolaget Amie v.*

Universal Transp. Co., 250 Fed. 400, 162 C. C. A. 470. See also *Babayan v. Reed*, 257 Pa. 206, 101 Atl. 339.

⁵² *Kinston Mfg. Co. v. Freeman*, 247 Fed. 54, 159 C. C. A. 272; *Pujo v. McKinlay*, 42 Cal. 559; *Garrard v. Dawson*, 49 Ga. 424; *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429; *Bickell v. Colton*, 41 Miss. 368; *Van Rensselaer v. Jewett*, 5 Denio, 135, 2 N. Y. (Comst.) 135, 51 Am. Dec. 275; *Bicknell v. Waterman*, 5 R. I. 43.

⁵³ *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 604, 43 So. 687; *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081; *Mercer v. Vose*, 67 N. Y. 56; *Charman v. Tatum*, 54 N. Y. App. D. 61, 66 N. Y. S. 275; *Tucker v. Grover*, 60 Wis. 240, 19 N. W. 62.

⁵⁴ *Swanson v. Andrews*, 83 Minn. 505, 86 N. W. 465. See also *Great Northern R. Co. v. Philadelphia &c. Co.*, 242 Fed. 799, 155 C. C. A. 387 (Minn.).

⁵⁵ *Welsbach Street Lighting Co. v. Wichita*, 101 Kan. 452, 168 Pac. 1090, 102 Kan. 4, 160 Pac. 193.

§ 1414. Interest on a penal bond.

As said by the Supreme Court of the United States,⁵⁶ "There has been much contrariety of opinion upon the question whether, in any case, the obligee in a penal bond can recover interest in addition to the penalty. The weight of authority in England is adverse to the recovery.⁵⁷ In this country the tendency of the decisions in the state courts seems to be in favor of the allowance of such interest."⁵⁸ The court added, "In this court, although the question seems not to have frequently arisen, the English rule has usually but not invariably been followed.⁵⁹ In the state of the decisions, we may safely apply the rule followed by Mr. Justice Clifford in a case at the circuit, and we need go no further in order to overrule the contention raised by the Government at the trial of the present case: 'Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal.'"⁶⁰ But in a later decision the Court followed the law of the State where the contract was made and allowed interest in excess of the penalty

⁵⁶ *United States v. United States Fidelity & Co.*, 236 U. S. 512, 530, 59 L. Ed. 606, 35 Sup. Ct. 298.

⁵⁷ Citing 1 Wms. Saunders, 58, Note; *White v. Sealy*, 1 Doug. 49; *Wilde v. Clarkson*, 6 Term. Rep. 303 (disapproving *Ld. Lonsdale v. Church*, 2 Term. Rep. 388); *Tew v. Winterton*, 3 Bro. Ch. 480; 29 Eng. Reprint, 660, 663, note.

⁵⁸ Citing *Perit v. Wallis* (Pa. Sup. Ct.), 2 Dall. 252, 255, 1 L. Ed. 370; *Williams v. Willson*, 1 Vt. 266, 273; *Judge of Probate v. Heydock*, 8 N. H. 491, 494; *Wyman v. Robinson*, 73 Me. 384, 387, 40 Am. Rep. 360; *Carter v. Thorn*, 18 B. Mon. 613, 619, to which may be added *Holmes v. Standard Oil Co.*, 183 Ill. 70, 55 N. E. 647.

⁵⁹ Citing, *M'Gill v. Bank of United*

States, 12 Wheat. 511, 515, 6 L. Ed. 711; *Farrar v. United States*, 5 Pet. 373, 385, 8 L. Ed. 159; *Ives v. Merchants' Bank*, 12 How. 159, 164, 165, 13 L. Ed. 936; *United States v. Broadhead*, 127 U. S. 212, 32 L. ed. 147.

⁶⁰ *United States v. Hills*, 4 Cliff. 618; Fed. Cas. No. 15,369. This is in effect the same rule applied in *Ives v. Merchants' Bank*, 12 How. 159, 13 L. Ed. 936. See also *United States v. Quinn*, 122 Fed. 65, 58 C. C. A. 401. This rule was followed in *Tusseo v. American Bonding Co.*, 226 N. Y. 171, 123 N. E. 142, the court holding the defendant liable for interest on the penal sum only from "the time when he could have safely paid the same, providing he then unjustly withholds it."

of the bond and against a surety from the date when the liability on the bond accrued.⁶¹

§ 1415. Interest on quasi-contractual obligations.

Interest is allowed not simply when an express contract is broken but also where money is wrongly withheld by the defendant and the plaintiff's right is based on quasi-contract; as for instance where money has been acquired or retained fraudulently,⁶² or by duress,⁶³ or is held by the defendant under a constructive trust imposed upon him *ex maleficio*.⁶⁴ Where money has been expended properly by the plaintiff for the use of the defendant, interest is chargeable from the time when repayment was due, which will ordinarily be from the time when the plaintiff made his payment.⁶⁵ Thus a surety's claim for contribution bears interest from the time when the claim arises.⁶⁶ Money lent also bears interest from the time of the loan,⁶⁷ unless the circumstances of the case indicate a contrary intention.⁶⁸ Where, however, the defendant has rightfully received money which he is holding as agent for the plaintiff no interest can be allowed until demand, or violation of instructions as to the disposition of the money.⁶⁹ So where money was

⁶¹ *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. Ed. 1206, 37 Sup. Ct. 614.

⁶² *Manufacturers' Nat. Bank v. Perry*, 114 Mass. 313, 11 N. E. 81; *McLain v. Parker*, 229 Mo. 68, 129 S. W. 500; *Reynolds Elev. Co. v. Merchants' Nat. Bank*, 55 N. Y. App. D. 1, 67 N. Y. S. 397; *Silver V. M. Co. v. Batlimore, etc., Co.*, 99 N. C. 445, 6 S. E. 735.

⁶³ *Mee v. Montclair*, 83 N. J. L. 274, 83 Atl. 764.

⁶⁴ *London Bank v. White*, L. R. 4 A. C. 413; *Harrison v. Perea*, 168 U. S. 311, 324, 42 L. Ed. 478, 18 Sup. Ct. 129; *Brown v. First Nat. Bank*, 49 Col. 393, 113 Pac. 483; *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; *Walker v. Montgomery*, 249 Ill. 378, 94 N. E.

527; *Tucker v. State*, 163 Ind. 403, 71 N. E. 140; *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429; *Moors v. Washburn*, 159 Mass. 172, 34 N. E. 182; *Mayor, etc., of New York v. Sands*, 39 Hun, 519.

⁶⁵ *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336, 9 Am. St. Rep. 571; *Goodnow v. Plumbe*, 64 Ia. 672, 21 N. W. 133; *French v. French*, 126 Mass. 360; *Ashuelot R. R. v. Elliot*, 57 N. H. 397; *Wertz v. Schumacher*, 161 N. Y. 530, 56 N. E. 72; *Fisk v. Brunette*, 30 Wis. 102.

⁶⁶ *Allen v. Fairbanks*, 45 Fed. 445; *Breckinridge v. Taylor*, 5 Dana, 110.

⁶⁷ *Butler v. Butler*, 10 R. I. 501.

⁶⁸ *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Sprague v. Sprague*, 30 Vt. 483.

⁶⁹ *United States v. Curtis*, 100 U. S.

received by mistake,⁷⁰ and presumably in any case where recovery involves the rescission of a previous transaction in entering into which the defendant was innocent of conduct which he should have known was wrongful. For instance, a donee who received in good faith trust money, would only be liable for such profit as he actually obtained from the use of the money. Where a quasi-contractual claim is unliquidated, the limitations on the right to recover interest on unliquidated contractual claims must also be considered.⁷¹

§ 1416. Rate of interest.

Where the contract between the parties makes no provision for interest, if any is allowed it must be given at the legal rate;⁷² and the same is true where the contract provides for interest at the legal rate or without mention of any rate. Where, however, the contract provides a rate of interest different from the legal rate, there has been much difference of opinion, especially in the case of interest-bearing commercial paper, on the question whether the legal rate or the conventional rate should be enforced after the maturity of the instrument. Logically it seems clear that unless the contract can be understood as impliedly providing that interest shall be at the conventional rate after maturity as well as before, or a renewed contract can be inferred from subsequent acts of the parties, the legal rate must be given as damages for the non-performance of the agreement.⁷³ Many courts, however, interpret such contracts either

119, 25 L. Ed. 571; *United States v. Butler*, 114 Fed. 582; *Wood v. Claiborne*, 82 Ark. 514, 102 S. W. 219, 11 L. R. A. (N. S.) 913, 118 Am. St. Rep. 89; *Talbot v. Commercial Nat. Bank*, 129 Mass. 67, 37 Am. Rep. 302.

⁷⁰ *Florence Cotton, etc., Co. v. Louisville Banking Co.*, 138 Ala. 583, 36 So. 456, 100 Am. St. Rep. 50; *Arapahoe County v. Denver*, 30 Colo. 13, 69 Pac. 586; *Georgia R. R. & B. Co. v. Smith*, 83 Ga. 626, 10 S. E. 235; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353; *Corse v. Minnesota &c. Co.*, 94 Minn. 331, 102 N. W. 729; *Second & T. S. P. Ry. v. Philadelphia*,

51 Pa. 465; *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421; *Hall v. Graham*, 112 Va. 560, 72 S. E. 105; *Ann. Cas.* 1913 B. 1257; *O'Herrin v. Milwaukee County*, 67 Wis. 142, 30 N. W. 239.

⁷¹ See *supra*, § 1413.

⁷² Thus a savings bank has been held liable for interest at the legal rate for wrongful detention of a bank book although the rate which the bank paid on its deposits was less. *Wegner v. Second Ward Savings Bank*, 76 Wis. 242, 44 N. W. 1096.

⁷³ In the following cases the statutory rate only was held allowable

as meaning that the conventional rate shall be paid until the obligation is discharged, or hold that rate to be the just measure of compensatory damages.⁷⁴ Of course, if it is clearly expressed that the conventional rate is to be paid after maturity as well as before, there can be no doubt of its allowance.⁷⁵

after maturity. *Cook v. Fowler*, L. R. 7 H. L. 27; *Goodchap v. Roberts*, 14 Ch. D. 49; *Equitable Trust Co. v. Western Pacific R.*, 244 Fed. 485; *Kitchen v. Branch Bank*, 14 Ala. 233; *Harbison v. Hammons*, 113 Ark. 120, 167 S. W. 849; *Casey v. Gibbons*, 138 Cal. 368, 68 Pac. 1082; *First Ecclesiastical Society v. Loomis*, 42 Conn. 570; *Jefferson County v. Lewis*, 20 Fla. 980; *Tripp v. Wynne*, 76 Ga. 200; *White's Adm'r, v. Curd*, 86 Ky. 191, 5 S. W. 553; *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52; *Brown v. Hardcastle*, 63 Md. 484; *Holbrook v. Sims*, 39 Minn. 122, 39 N. W. 74, 140; *Ashuelot R. R. v. Elliott*, 57 N. H. 397; *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129; *Pryor v. Buffalo*, 197 N. Y. 123, 90 N. E. 423; *Delaney v. Canadian Pac. R. Co.*, 21 Ont. 11; *Pearce v. Hennessy*, 10 R. I. 223 (but see *Silverman v. Shattuck*, 33 R. I. 67, 80 Atl. 184); *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980.

⁷⁴*Farmers' L. & T. Co. v. Northern Pac. R.*, 94 Fed. 454; *Greenhaw v. Holmes*, 8 Ariz. 94, 68 Pac. 537; *Crockett v. Mitchell*, 88 Ga. 166, 14 S. E. 118; *People v. Getsendaner*, 137 Ill. 234, 34 N. E. 297; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96; *Hand v. Armstrong*, 18 Ia. 324; *Rew v. Independent School Dist.*, 125 Ia. 28, 98 N. W. 802, 106 Am. St. 282; *Forster v. Forster*, 129 Mass. 559; *Downer v. Whittier*, 144 Mass. 448, 11 N. E. 585; *Warner v. Juif*, 38 Mich. 662; *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Macon Co. v. Rodgers*, 84 Mo. 66; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W.

560; *Monnett v. Sturges*, 25 Oh. St. 384; *Overton v. Bolton*, 9 Heisk. 762, 24 Am. Rep. 367; *Wade v. Pratt*, 12 Heisk. 231; *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104; *Gage v. McSweeney*, 74 Vt. 370, 52 Atl. 969; *Evans v. Rice*, 96 Va. 50, 30 S. E. 463; *Morris v. Baird*, 72 W. Va. 1, 78 S. E. 371; *Thorn v. Smith*, 71 Wis. 18, 36 N. W. 407; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 53 Pac. 291. The Federal courts apply the rule locally prevalent. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *United States Mtge. Co. v. Sperry*, 138 U. S. 313, 34 L. Ed. 969, 11 Sup. Ct. 321; *Equitable Trust Co. v. Western Pacific R.*, 244 Fed. 485 (aff'd 250 Fed. 327, 162 C. C. A. 397, 246 U. S. 672, 62 L. Ed. 932, 38 S. Ct. Rep. 423). But where no local rule to the contrary exists, they allow the statutory rate. *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Holden v. Freeman's, etc., Trust Co.*, 100 U. S. 72, 25 L. Ed. 567; *Massachusetts Benefit Association v. Miles*, 137 U. S. 699, 34 L. Ed. 834, 11 Sup. Ct. 234. See also *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628.

⁷⁵*Ex parte Fewings*, 25 Ch. Div. 338; *New Orleans v. Warner*, 175 U. S. 120, 147, 44 L. Ed. 96, 20 Sup. Ct. 44; *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Winsted Sav. Bank v. New Hartford*, 78 Conn. 319, 62 Atl. 81; *Augusta Nat. Bank v. Hewins*, 90 Me. 255, 38 Atl. 156; *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. 350; *Hamer v. Rigby*, 65

In many States usury statutes limit the rate of interest which may be contracted for before maturity. And though a provision for interest after maturity in excess of the rate permitted by a usury statute is held not to be usurious since the debtor may by payment of the debt avoid payment of interest after maturity,⁷⁶ the question nevertheless remains, in view of the invalidity of penalties, how far a provision that after maturity the rate of interest shall be increased is enforceable. Unless the increased rate is extreme the provision is held not penal,⁷⁷ except in a few States.⁷⁸ A provision, however, that in case of default a higher rate shall be paid from the creation of the obligation, not merely from its maturity, has generally been held penal.⁷⁹ The case has been distinguished where the agreement provided for a rebate of interest in case of prompt payment at maturity instead of an increase of interest from the creation of the obligation in case of default at maturity. The former provision has been held not penal.⁸⁰

§ 1417. Compound interest.

The general rule is that compound interest is not allowed as damages. Logically it would seem that if a note or other pecuniary obligation is payable with interest annually or at other stated periods, and there is default extending over several

Miss. 41, 3 So. 137; *Taylor v. Wing*, 84 N. Y. 471; *Miller v. Hall*, 18 S. C. 141.

⁷⁶ See *infra*, § 1696.

⁷⁷ *Herbert v. Salisbury, etc., R. Co.*, L. R. 2 Eq. 221; *Vermont L. & T. Co. v. Dygert*, 89 Fed. 123; *Miller v. Kempner*, 32 Ark. 573; *Thompson v. Gorner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564; *Hennessey v. Walsh*, 142 Ill. App. 237; *Holmes v. Dewey*, 66 Kan. 441, 71 Pac. 836; *Denton v. Reading*, 22 La. Ann. 607; *Capeen v. Crowell*, 66 Me. 282; *Flanders v. Chamberlain*, 24 Mich. 305; *Sanford v. Litchenberger*, 62 Neb. 501, 87 N. W. 305; *Ritter v. Phillips*, 53 N. Y. 586; *Pass v. Shine*, 113 N. C. 284,

18 S. E. 251; *Haywood v. Miller*, 14 Wash. 660, 45 Pac. 307.

⁷⁸ *Talcott v. Marston*, 3 Minn. 339; *White v. Iltis*, 24 Minn. 43; *National Life Ins. Co. v. Hall*, 34 Okla. 395, 125 Pac. 1108.

⁷⁹ *Herbert v. Salisbury, etc., R. Co.*, L. R. 2 Eq. 221; *Holmes v. Dewey*, 66 Kans. 441, 442, 71 Pac. 836; *Daggett v. Pratt*, 15 Mass. 177; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560. But see *contra* *Scottish-American Mortg. Co. v. Wilson*, 24 Fed. 310; *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004; *Bailey v. McClure*, 73 Ind. 275; *Lalande v. Breaux*, 5 La. Ann. 505.

⁸⁰ *Herbert v. Salisbury, etc., R. Co.*, L. R. 2 Eq. 221; *Ely v. Witherspoon*, 2 Ala. 131. As to the propriety of this distinction, see *infra*, § 782.

interest periods the promisee should recover interest not only on the principal sum but on the various broken obligations to pay interest. Such, however is not the general rule of law. Simple interest only will be allowed for the whole period,⁸¹ except in a few States.⁸² This has been carried so far in some jurisdictions that even though the obligation in terms provides that if the defendant fails to pay interest when due the interest shall be compounded, enforcement of the agreement is denied, sometimes on the construction of local statutes, sometimes as matter of common law.⁸³ There seems no reasonable ground for holding that such an agreement of the parties is penal in character, at least unless the agreed rate of interest is excessive; and the contract is by many courts held enforceable.⁸⁴

Where a separate obligation for interest is entered into, interest is more readily allowed for breach of the subsidiary separate obligation, than where there is no such separate

⁸¹ *Doe v. Warren*, 7 Me. 48; *Lewin v. Folsom*, 171 Mass. 188, 50 N. E. 523; *Ward v. Brandon*, 1 Heisk. 490; *Fultz v. Davis*, 26 Gratt. 903; *Genin v. Ingersoll*, 11 W. Va. 549, and see cases in this section *passim*.

⁸² *Yndart v. Den*, 116 Cal. 533, 48 Pac. 618, 58 Am. St. 200 (statutory); *Preston v. Walker*, 26 Ia. 205, 96 Am. Dec. 140; *Newell v. Somerset Nat. Bank*, 12 Bush, 57; *Hall v. Scott*, 90 Ky. 340, 344, 13 S. W. 249; *Foley v. Hook* (Ky.), 113 S. W. 105; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642; *O'Neill v. Bookman*, 9 Rich. L. 80 (cf. *Carolina Sav. Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199; *Plyler v. McGee*, 76 S. C. 450, 57 S. E. 180, 121 Am. St. 950); *Roane v. Ross*, 84 Tex. 46, 19 S. W. 339; *Geisberg v. Mutual Bg. &c. Assoc.* (Tex. Civ. App.), 60 S. W. 478.

⁸³ *Esalava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Hochmark v. Ruchler*, 16 Colo. 263, 26 Pac. 818; *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840; *Gay v. Berkley*, 137 Mich. 658, 100 N. W. 920; *Lee v. Melby*, 93 Minn. 4, 100 N. W. 379; *Sanford v. Lundquist*, 80 Neb. 408, 414, 118 N. W. 129; *Young v.*

Hill, 67 N. Y. 162, 23 Am. Rep. 99; *Reusens v. Arkenburgh*, 135 N. Y. App. Div. 75, 119 N. Y. S. 821; *Levens v. Briggs*, 21 Ore. 333, 28 Pac. 15, 14 L. R. A. 188; *Brown v. Crow* (Tex. Civ. App.), 29 S. W. 653; *Jarrett v. Nickell*, 9 W. Va. 345; *Tallman v. Truesdell*, 3 Wis. 443; *Ogden v. Bradshaw*, 161 Wis. 49, 150 N. W. 399, 152 N. W. 654. See also *Kimbrough v. Lukins*, 70 Ind. 373; *Whitworth v. Davey* (Mo. App.), 185 S. W. 241; *Mathews v. Toogood*, 23 Neb. 536, 37 N. W. 265, 8 Am. St. 131, 25 Neb. 99, 41 N. W. 130.

⁸⁴ *Vaughan v. Kennan*, 38 Ark. 114; *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594; *Merck v. American, etc., Mtge. Co.*, 79 Ga. 213, 7 S. E. 265; *Ellard v. Scottish-American Mtge. Co.*, 97 Ga. 329, 22 S. E. 893; *Bradley v. Merrill*, 91 Me. 340, 40 Atl. 132. Sometimes a distinction is taken between compounding interest maturing prior to the maturity of the principal and interest due after the principal obligation has matured. *Aspinwall v. Blake*, 25 Iowa, 319; *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. 138, but the distinction seems untenable.

contract.⁸⁵ This principle is especially applicable to overdue coupons;⁸⁶ but it has also been extended in many jurisdictions to cover a case where by the agreement of the parties a fixed sum is payable on a stated day as interest. Often, interest on this amount is recoverable.⁸⁷ For breach of a fiduciary obligation compound interest is often allowed in the discretion of the court if the breach was fraudulent or wilful as distinguished from negligent, or if the fiduciary has had the use of trust money or property in such a way that he has or may be supposed to have received compounded profits upon it.⁸⁸ In

* *Stickney v. Moore*, 108 Ala. 590, 19 So. 76; *Lee v. Melby*, 93 Minn. 4, 100 N. W. 379; *Graeme v. Cullum*, 23 Gratt. 266. See also *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615; *Goodale v. Wallace*, 19 S. Dak. 405, 103 N. W. 651, 117 Am. St. 962.

* *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 343, 11 Sup. Ct. 321, 330, 34 L. Ed. 969; *Skinner v. Franklin Co.*, 179 Fed. 862; *Drexel State Bank v. La Moure*, 207 Fed. 702; *Stickney v. Moore*, 108 Ala. 590, 19 So. 76; *Lake County v. Linn*, 29 Colo. 446, 68 Pac. 839; *Fox v. Hartford, etc., Co.*, 70 Conn. 1, 38 Atl. 871; *Humphreys v. Morton*, 100 Ill. 592; *Kentucky Title Co. v. English*, 20 Ky. L. Rep. 2024, 50 S. W. 968; *Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 So. 291; *Philadelphia & Reading R. v. Knight*, 124 Pa. 58, 16 Atl. 492; *Rice v. Shealy*, 71 S. C. 161, 50 S. E. 868. But see *contra Shaw v. Norfolk County R.*, 16 Gray, 407; *Force v. Elizabeth*, 27 N. J. Eq. 408, and in New York interest is not given on overdue coupons if still held by the owner of the bonds. *Bailey v. Buchanan County*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; *Williamsburg Savings Bank v. Solon*, 136 N. Y. 465, 32 N. E. 1058.

* *Vaughan v. Kennan*, 38 Ark. 114; *Wofford v. Wyly*, 72 Ga. 863; *Hall v. Scott*, 90 Ky. 340, 13 S. W. 249, 11 Ky. L. Rep. 819; *Greenleaf v. Kellogg*, 2 Mass. 568; *Hayward v. Cain*, 110

Mass. 273; *Rix v. Strauts*, 59 Mich. 364, 26 N. W. 638; *Townsend v. Riley*, 46 N. H. 300; *Cook v. Courtright*, 40 Oh. St. 248, 48 Am. Rep. 681; *Stokely v. Thompson*, 34 Pa. 210; *Angel v. Miller*, 90 Tex. 505, 39 S. W. 916; *Cullen v. Whitham*, 33 Wash. 366, 74 Pac. 581; *Genin v. Ingersoll*, 11 W. Va. 549. But see *contra Broughton v. Mitchell*, 64 Ala. 210; *Doe v. Vallejo*, 29 Cal. 385; *Denver B. & M. Co. v. McAllister*, 6 Colo. 261; *Rose v. Bridgeport*, 17 Conn. 243; *Grimes v. Blake*, 16 Ind. 160; *Stone v. Locke*, 46 Me. 445; *Lee v. Melby*, 93 Minn. 4, 100 N. W. 379; *Stoner v. Evans*, 38 Mo. 461. See also *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502.

* See *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047; *McIntire v. McIntire*, 192 U. S. 116, 48 L. Ed. 369; *Primeau v. Granfield*, 184 Fed. 480; *Silver King Consol. Min. Co. v. Silver King Coalition Min. Co.*, 204 Fed. 166, 122 C. C. A. 402; *Price v. Peterson*, 38 Ark. 494; *Miller v. Laux*, 100 Cal. 609, 35 Pac. 345, 639; *Arnold v. Maxwell*, 230 Mass. 441, 119 N. E. 776; *Dissenger's Case*, 39 N. J. Eq. 227; *Watts v. Watts Ex'x*, 104 Va. 269, 51 S. E. 359; *Speiser v. Merchants' Exch. Bank*, 110 Wis. 507, 86 N. W. 243. In England compound interest is not thus allowed unless the fiduciary has used the money in his private affairs, and has presumably made a mercantile profit.

Vermont compound interest is allowed upon an ordinary running account.³⁰

Burdick v. Garrick, L. R. 5 Ch. App. 233; *cf. Davis v. Davis* [1902] 2 Ch. 314, where the defendants having acted in good faith, the plaintiffs were said to have the alternative of

reclaiming the actual profits or of charging the defendants with simple interest.

³⁰ *Tudor v. Tudor's Est.*, (Vt. 1919), 107 Atl. 132, and cases cited.

CHAPTER XXXIX

SPECIFIC PERFORMANCE

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§ 1418. General principles of specific performance.

The remedy of specific performance enables a court having equitable powers to compel a party to a contract to perform, if not exactly at least substantially, what he has undertaken to do. Save where a defendant's obligation is negative a threatened breach of contract rarely affords ground for judicial action,¹ so that affirmative performance enforced by the court must almost invariably take place at a later day than the contract required. From comparatively early times the English chancellors gave this redress.² Equity requires generally that a contract in order to be specifically enforceable shall be capable of enforcement in a court of law. That is, the requisites of a contract are the same in equity as at law. Where an exception is made to this principle, as in enforcing contracts for the sale of land where the Statute of Frauds has not been satisfied,³ or in enforcing voluntary promises to convey land on which the promisee has made improvements,⁴ the interposition of equity is said to be due to its desire to prevent a fraud. It may be observed, however, that there are many cases where a plaintiff who has relied to his injury on a gratuitous promise of the defendant, even though it be one relating to land, can get no relief. If it be assumed, then, that a valid contract exists and has been broken, the general rule defining the instances where specific performance will be granted is—where damages are an inadequate remedy and the nature of the contract is such that specific enforcement of it will not involve too great practical difficulties, equity will grant a decree of specific performance. The fact that there is a remedy at law does not preclude the equitable remedy.⁵ The applications of this prin-

¹ Bills for instructions by trustees prior to any action taken by or against them have been common, but similar relief though in the nature of the case equally possible has not been common with regards to contracts; but now by statute in England a person interested in a contract may not only seek its interpretation from the court, but may seek a binding declaration of his right. This useful extension of remedial justice will

doubtless become more common in the United States.

² With one exception (*Cokayn v. Hurst*, 10 Selden Soc. No. 142) the earliest clear instances discovered by Ames are reported in the reign of Elizabeth. See *Lectures on Legal History*, 248; 1 Green Bag, 26; *Case. Eq. Jur.* 37, n.

³ See *supra*, § 404.

⁴ See *supra*, § 139.

⁵ "In order to deny one the relief

ciple are not, however, always free from technicality. In the course of centuries, rules of equity tend to become rigid, and like rules of law do not always yield readily when reason makes it desirable. There is, however, a distinct tendency in modern times to extend the remedy where justice requires it. The converse statement, that any contract which is valid at law is also enforceable in equity if its subject-matter is appropriate for that jurisdiction, is generally true, but subject to the exception that equity reserves a discretion in granting its relief;⁶ and to one rule that is laid down perhaps too positively, namely, that equity will not grant specific performance of a contract unsupported by valuable consideration even though under seal.⁷

§ 1419. Specific performance of contracts to buy and sell.

Partly because a specific piece of land is in its nature different from every other piece, and presumably partly because of the overshadowing social and economic importance of land when the doctrines of equity were developed, a contract to convey land is always specifically enforceable by the purchaser whatever may be the form of contract, whether an ordinary contract to purchase, or an agreement to exchange lands,⁸ to re-convey on the mortgagor finding a purchaser,⁹ to partition land held in common, or to make a conveyance by way of compromise.¹⁰ A contract to convey any interest in land is as fully enforceable as a contract to convey a fee.¹¹ On the other hand,

which a court of equity can give, it is not in all cases sufficient that there be a remedy at law. The remedy must be plain and adequate, and as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity." *Dailey v. City of New York*, 170 N. Y. App. Div. 267, 274, 156 N. Y. S. 124, citing *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 114 C. C. A. 21, and cases cited; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. 77; *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82, 12 Sup. Ct. 340; *Kilbourn v. Sunder-*

land, 130 U. S. 505, 32 L. Ed. 1005, 9 Sup. Ct. 594; *Erie Railroad Co. v. City of Buffalo*, 180 N. Y. 192, 73 N. E. 26.

⁶ See *infra*, § 1425.

⁷ *Jefferys v. Jefferys*, Cr. & Ph. 138; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755. See also *supra*, § 217.

⁸ *Dixon v. Anderson*, 252 Fed. 694, 164 C. C. A. 534; *Bowman v. Gork*, 106 Mich. 106, 163, 63 N. W. 998.

⁹ *Porter v. Farmers' Savings Bank*, 143 Iowa, 629, 120 N. W. 633.

¹⁰ *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694; *Sumner v. Early*, 134 N. C. 233, 46 S. E. 492.

¹¹ *Lever v. Koeffler*, [1901] 1 Ch.

contracts for the sale of personal property are not generally enforced specifically, and a clear case of the inadequacy of damages is necessary in order to obtain equitable relief.¹² Such a case is established, where a chattel which is the subject of the contract is unique, or not purchasable in the market.¹³ The modern disposition is to be less technical in the application of this principle and where a special need on the part of the plaintiff, and at least a temporary monopoly on the part of the defendant justify its application, the remedy is allowed for breach of contracts for the sale of personal property for which damages might otherwise be adequate.¹⁴ Contracts to sell ships,¹⁵

543 (contract to lease); *Boarders v. Murphy*, 78 Ill. 81 (contract by owner of an equitable interest to transfer an interest); *Coy v. Minneapolis, etc., R. Co.*, 116 Ia. 558, 90 N. W. 344 (contract to give right of way); *Read Drug & Chemical Co. v. Nattans*, 130 Md. 465, 100 Atl. 736 (contract to renew a lease); *Gorder v. Pankonin*, 83 Neb. 204, 119 N. W. 449, 131 Am. St. Rep. 629 (contract to renew a lease); *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967 (contract to sell standing timber).

¹² *Buxton v. Lister*, 3 Ark. 383; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Javierre v. Central Altigracia*, 217 U. S. 502, 54 L. Ed. 859, 30 Sup. Ct. 598; *Kane v. Luckman*, 131 Fed. 609; *A. G. Lehman Co. v. Island City Pickle Co.*, 208 Fed. 1014; *Blue Point Oyster Co. v. Haagenonson*, 209 Fed. 278; *Consolidated Fuel Co. v. St. Louis &c. R.*, 250 Fed. 395, 162 C. C. A. 465; *Southern Iron &c. Co. v. Vaughan* (Ala. 1919), 78 So. 212; *Blook v. Shaw*, 78 Ark. 511, 95 S. W. 806; *Elliott v. Jones* (Del. Ch.), 101 Atl. 872; *Carolee v. Handelis*, 103 Ga. 299, 29 S. E. 935; *Neal v. Parker*, 98 Md. 254, 57 Atl. 213; *Cole v. Cole Realty Co.*, 169 Mich. 347, 135, 135 N. W. 329; *Meehan v. Owens*, 196 Pa. 69, 46 Atl. 263; *Glassbrenner v. Groulik*, 110 Wis. 402, 85 N. W. 962.

¹³ *Pusey v. Pusey*, 1 Vernon Ch. 273 (an ancient horn which was an heirloom); *Somerset v. Cookson*, 2 Eq. Cas. Abr. 164, 3 Peere Wms. 390 (a silver altar piece); *Fells v. Read*, 3 Ves. 70 (silver tobacco box); *Lowther v. Lowther*, 13 Ves. 95 (a painting by Titian); *Falcke v. Gray*, 4 Drew, 651 (two china jars); *Elliott v. Jones* (Del. Ch.), 101 Atl. 872 (a race horse); *Sloane v. Clauss*, 64 Ohio St. 125, 59 N. E. 884 (family heirlooms); *Beasley v. Allyn*, 15 Phila. 97 (a bowl belonging to a college society); *Skrine v. Walker*, 3 Rich. Eq. 262 (with which cf. *Mallery v. Dudley*, 4 Ga. 66; *Summers v. Bean*, 13 Gratt. 404, all of which relate to slaves).

¹⁴ *Buxton v. Lister*, 3 Atk. 383; *Equitable Gaslight Co. v. Baltimore, etc. Co.*, 63 Md. 285; *Gloucester Isinglass Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1006, 12 L. R. A. 563, 26 Am. St. Rep. 214; *Curtice Bros. Co. v. Catta*, 72 N. J. Eq. 831, 66 Atl. 935; *Rector of St. David's Parish v. Wood*, 24 Or. 396, 34 Pac. 18, 41 Am. St. Rep. 860; *Strause v. Berger*, 220 Pa. St. 367, 60 Atl. 818; *Farwell v. Walbridge*, 6 Grant's Ch. (Can.) 634; cf. *Southern Iron &c. Co. v. Vaughan*, (Ala. 1918), 78 So. 212, L. R. A. 1918 E. 594.

¹⁵ *Hart v. Herwig*, L. R. 8 Ch. 860; *Hurd v. Groch* (N. J. Eq.), 51 Atl. 278;

to transfer documents of any kind,¹⁶ as well as the intangible right of the owner of a patent or invention,¹⁷ or copyright,¹⁸ or annuity¹⁹ are also specifically enforced. Many decisions relate to contracts for the sale of stock. Contracts for the sale of government bonds (called stock in England) it is conceded will not be specifically enforced since they are readily bought and sold on the market;²⁰ and for the same reason American courts deny specific performance to one who has contracted to purchase stock of a kind which can easily be bought in the market,²¹ though allowing the remedy if the stock is thus not readily obtainable in the market.²² Furthermore, where the

Menier v. Donald, 98 N. Y. Misc. 684, 165 N. Y. S. 50.

¹⁶ *Jackson v. Butler*, 2 Atk. 306 (deeds); *Gibson v. Ingo*, 6 Hare, 112 (certificate of ship's registration); *Doloret v. Rothschild*, 1 Simon & S. 580 (certificate of title to government bond); *O'Donnell v. Chamberlain*, 36 Col. 395, 91 Pac. 39 (contract); *McMullen v. Vansant*, 73 Ill. 190 (promissory note); *Pattison v. Skillman*, 34 N. J. Eq. 344 (letters important as evidence); *Dock v. Dock*, 180 Pa. 14, 36 Atl. 411 (letters).

¹⁷ *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462; *Pressed Steel Car Co. v. Hansen*, 128 Fed. 444, 137 Fed. 403, 71 C. C. A. 207; *Fairchild v. Dement*, 164 Fed. 200; *Wege v. Safe Cabinet Co.*, 249 Fed. 606, 161 C. C. A. 606; *Blackmer v. Stone*, 51 Ark. 489, 11 S. W. 693; *Whitney v. Burr*, 115 Ill. 289; *Telegraphphone Corp. v. Canadian Telegraphphone Co.*, 103 Me. 444, 69 Atl. 767; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Detroit Lubricator Co. v. Lavigne*, 151 Mich. 650, 115 N. W. 988; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Hepworth v. Henshall*, 153 Pa. 592, 25 Atl. 1103; *McRae v. Smart*, 120 Tenn. 413, 114 S. W. 729; *Valley Iron Manfg. Co. v. Goodrick*, 103 Wis. 436, 78 N. W. 1096.

¹⁸ *Thombleson v. Black*, 1 Jur. 198.

¹⁹ *Withy v. Cottle*, 1 Sim. & St. 174.

²⁰ *Cud v. Rutter*, 1 Peere. Wil. 570; *Nuthrown v. Thornton*, 10 Ves. 159, 161; *Rollins Investment Co. v. George*, 48 Fed. 776; *Frue v. Houghton*, 6 Colo. 318, 320; *Paddock v. Davenport*, 107 N. C. 710, 717, 12 S. E. 464; *Goodwin's App.*, 117 Pa. 514, 534, 12 Atl. 736.

²¹ *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 488, 42 L. Ed. 547, 18 Sup. Ct. 114; *Berimer v. Griscom-Spencer Co.*, 161 Fed. 438; *Eckley v. Daniel*, 193 Fed. 279; *Graham v. Herlong*, 50 Fla. 521, 39 So. 111; *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438; *Toles v. Duplex Power Co.*, 202 Mich. 224, 168 N. W. 495; *Harle v. Brenning*, 131 N. Y. App. Div. 742, 116 N. Y. S. 51; *Kennedy v. Thompson*, 97 N. Y. App. Div. 296, 89 N. Y. S. 963; *Rawll v. Baker Vawter Co.*, 187 N. Y. App. D. 330, 176 N. Y. S. 189; *Deits v. Stephenson*, 51 Or. 596, 95 Pac. 803; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

²² *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 488, 42 L. Ed. 547, 18 Sup. Ct. 114; *Newton v. Wooley*, 105 Fed. 541; *Altoona, etc., Co. v. Kittanning, etc., Co.*, 126 Fed. 559; *Mutual Oil Co. v. Hills*, 248 Fed. 257, 160 C. C. A. 335; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Wait v. Kern River Min., etc., Co.*, 157 Cal. 161, 106 Pac. 98; *Gilfillan v. Gilfillan*, 168 Cal. 23,

plaintiff desires the stock contracted for in order to obtain control of a corporation, specific performance has been allowed,²³ unless the court deems the plaintiff's desire for control opposed to public policy.²⁴ In England, although shares of the stock in question may be obtainable on the market, specific performance nevertheless is allowed of a contract to buy them.²⁵ Where the plaintiff has agreed to resell for a stated price the subject-matter of his contract with the defendant, damages will be held to afford him adequate relief though the contract would otherwise have been specifically enforced.²⁶ Probably the fu-

141 Pac. 623, Ann. Cas. 1915 D. 784; *Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963; *Schmidt v. Pritchard*, 135 Ia. 240, 112 N. W. 801; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329; *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W. 344; *First Nat. Bank v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084; *Nason v. Barrett*, 140 Minn. 366, 168 N. W. 581; *Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546; *Baumbach v. St. Louis, etc., R.*, 205 Mo. 248, 104 S. W. 5, 120 Am. St. Rep. 745; *Wood v. Kansas City, etc., Tel. Co.*, 233 Mo. 537, 123 S. W. 6; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002; *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054; *Deitz v. Stephenson*, 51 Oreg. 596, 95 Pac. 803; *Northern Central R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683; *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; *Amsler v. Cavitt* (Tex. Civ. App.), 210 S. W. 766; *Hogg v. McGriffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491; *Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E.

1001, 1915 D. L. R. A. 300. But see *Barton v. DeWolf*, 108 Ill. 195.

²³ *Perin v. Megibben*, 53 Fed. 86, 3 C. C. A. 443; *Nason v. Barrett*, 140 Minn. 366, 168 N. W. 581; *Cape Girardeau-Jackson R. Co. v. Light & Development Co. (Mo.)*, 210 S. W. 361; *Rumsey v. New York, etc., Co.*, 203 Pa. 579, 53 Atl. 495; *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Bumgardner v. Leavitt*, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776; *Lathrop v. Columbia Collieries Co.*, 70 W. Va. 58, 73 S. E. 299. See also *Greenwell v. Porter*, [1902] 1 Ch. 530; *Smith v. San Francisco &c. R.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. 119.

²⁴ An attempt to control a public service corporation was held unenforceable in equity on this ground in *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. Rep. 438; *Foll's Appeal*, 91 Pa. 434, 36 Am. Rep. 671, as was an attempt to obtain control of a bank in *Gleason v. Earles*, 78 Wash. 491, 139 Pac. 213, 51 L. R. A. (N. S.) 785. See also *Cowles v. Miller*, 74 Conn. 287, 50 Atl. 728; *McLaughlin v. Leonard*, 113 Md. 261, 77 Atl. 647; *Fremont v. Stone*, 42 Barb. 169.

²⁵ *Duncuft v. Albrecht*, 12 Sim. 189.

²⁶ *Marthinson v. King*, 150 Fed. 48, 82 C. C. A. 360. See also *Southern Iron &c. Co. v. Vaughan* (Ala.),

ture tendency of courts will be towards a freer allowance of the remedy in the case of contracts to sell personalty than might be inferred from the earlier precedents.²⁷

§ 1419a. Specified and unspecified goods.

In a leading English case,²⁸ Lord Westbury said: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person." This statement certainly goes far beyond rules of equity as generally understood.²⁹

The enforcement of contracts to mortgage after-acquired property on the theory that the mortgagee acquires an equitable right to the goods described, as soon as they are acquired by the mortgagor, has been the subject of much litigation, and the equitable right has been recognized in many jurisdictions.³⁰ It is, however, a prerequisite that the mortgagee shall actually have advanced his money, no jurisdiction being taken of a contract executory on both sides;³¹ and it is of course requisite that the contract shall describe the goods with sufficient exactness to enable them to be identified.

78 So. 212, L. R. A. 1918 E. 594; *Dowling v. Betjemann*, 2 Johns. & H. 544; *Ryan v. McLane*, 91 Md 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. 438.

²⁷ See *Ridenbaugh v. Thayer*, 10 Ida. 662, 80 Pac. 229; *Livesley v. Johnson*, 45 Ore. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Livesley v. Heise*, 45 Ore. 143, 76 Pac. 952.

²⁸ *Holroyd v. Marshall*, 10 H. L. C. 191, 209.

²⁹ The statement is criticised by

Fry on Specific Performance (5th ed.), § 82, and an examination of the cases cited *supra*, n. 12 and 13, will show that not only where unspecified goods were in question, but also where the subject-matter of the contract was specific, jurisdiction has been made to depend on the unique character of the goods or the special circumstances of the case.

³⁰ See 19 Harv. L. Rev. 557.

³¹ *Tailby v. Official Receiver*, 18 A. C. 523, 543, 546.

Many jurisdictions either deny or qualify the mortgagee's equitable interest; and unless recording statutes distinguish between the two no reason can be given why a contract to mortgage existing specified goods should be dealt with differently from an agreement to mortgage future goods as soon as they become specified.³²

It has been assumed not infrequently that an attempted transfer by way of sale of future goods would give a similar equitable property right to the buyer.³³ The analogy between mortgages and sales, however, is imperfect. It is generally recognized that equity will not give specific performance of a contract for the sale of ordinary personal property, and while damages may be an inadequate remedy in case of an agreement to mortgage such property because it is impossible to estimate accurately the amount of the damage, this is not true of a contract to sell it; and there is weighty authority denying the application of any such principle to a contract to sell.³⁴ As in the case of mortgages, it seems impossible to distinguish, so far as

³² See *infra*, § 1421, authorities sustaining the jurisdiction of equity to enforce a mortgage of the latter kind.

³³ It is so stated by Benjamin on Sale and the statement is left unchanged in the latest edition (5th Eng. ed. 134), which has been the subject of careful revision by the editors and in which not a few hasty statements of the author have been corrected. See also *Hamilton v. Nat. Loan Bank*, 3 Dill. 230; *Post v. Corbin*, 5 Nat. Bkcy. Reg. 11; *Block v. Shaw*, 78 Ark. 511, 95 S. W. 806; *Cloze v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81; *Godwin v. Murchison Nat. Bank*, 145 N. C. 320, 59 S. E. 154; *Scammon v. Bowers*, 1 Hask. 496.

³⁴ In *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.*, 175 Fed. 335, 338, 99 C. C. A. 123, Mr. Justice Lurton of the Supreme Court of the United States, said: "It must be conceded that although the

sale included the entire cut of this particular sort of lumber for the season of 1907, and although there had been a payment made on account of the contract of a sum largely in excess of the lumber which had been shipped and nearly equal to the price of the entire cut up to August 31, 1907, the title to the lumber cut to fill this order had not passed prior to August 31st, because the contract provided for delivery free on board cars at Bogardus, the railway station nearest the mill. If before that had been done bankruptcy had ensued, the title would have passed to the bankrupt's trustee, and the buyers remitted to their rights as creditors by reason of this advance payment. So if the lumber had been seized under execution, the execution creditor would have at law the better claim. So, also, if the lumber had been destroyed by fire or flood, the loss would have fallen upon the vendor."

the matter under discussion is concerned, a contract to sell future goods which afterwards become identified and a contract to sell existing specified goods.

It may be urged that equity has in either case jurisdiction to enforce the agreement of the parties, but that it will refrain from exercising its jurisdiction unless damages are inadequate and that in this event (as in case of insolvency) the jurisdiction will be exercised. Though as appears from the following section insolvency will not be generally a proper ground for specific enforcement, the argument may otherwise be conceded, if the validity of the criticism elsewhere made,³⁵ of throwing the risk on one who has contracted to buy real estate be accepted. If it be contended that the mere jurisdiction of a court of equity over a contract to buy and sell makes the contracting purchaser owner in equity and subject to the risk of loss, an assertion of such jurisdiction over all contracts to buy and sell specific chattels would be inconsistent with the well-established rule that in the sale of chattel property risk attends title.³⁶

In dealing with the matter now, either in England or in such jurisdictions of the United States as have enacted the Uniform Sales Act, a provision of the latter statute copied from the English Sale of Goods Act must be taken into account. The American statute provides,—“Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.”³⁷

³⁵ See *supra*, §§ 928-954.

³⁶ See *supra*, §§ 961-967.

It is true that cases on this point are in actions at law, but this should not affect the question in any jurisdiction where equitable defences are allowed at law.

³⁷ Section 68. A list of jurisdictions where the Uniform Sales Act has been

enacted may be found *supra*, § 506, n. 2. These sections of the English and American statutes have not hitherto been much relied on by the courts in making decisions but they seem to afford a clear warrant for an extension of previously existing rules. See *Jones v. Tankerville*, [1909], 2 Ch. 440, 445.

§ 1420. Insolvency as a ground for specific performance.

It has been held or stated in a number of cases that insolvency of the defendant affords a sufficient reason of itself or in connection with other facts for the specific enforcement of a contract to transfer personal property though apart from the defendant's insolvency no right to specific enforcement exists.³⁸ Such cases are often qualified however, by a statement in effect that if "insolvency stands alone as the only real danger urged in plaintiff's complaint for equitable relief, then he must fail."³⁹ There seems to have been little discussion in these decisions of the effect upon such a doctrine of equity of a bankruptcy act which forbids preference in the American sense of the word.⁴⁰ As an insolvent is not precluded by the Bank-

³⁸ *Doloret v. Rothschild*, 1 S. & S. 590, 598; *Dowling v. Betjemann*, 2 J. & H. 544; *Hamilton v. National Bank*, 3 Dill. 230; *McNamara v. Home Land &c. Co.*, 105 Fed. 202 (rev'd on other grounds in 111 Fed. 822, 49 C. C. A. 642); *Dilburn v. Youngblood*, 85 Ala. 449, 451, 5 So. 175; *Southern Iron &c. Co. v. Vaughan*, (Ala. 1918), 78 So. 212, L. R. A. 1918 E. 594; *Treasurer v. Commercial Mining Co.*, 23 Cal. 390, 393; *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558; *Crawford v. Williams*, (Ga. 1918), 99 S. E. 378; *Parker v. Garrison*, 61 Ill. 250; *Ames v. Witbeck*, 179 Ill. 458, 475, 53 N. E. 969; *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. 409; *Zeiger v. Stephenson*, 153 N. C. 528, 69 S. E. 611; *Doty v. Doty*, 171 N. Y. S. 852; *Corn Bank v. Solicitors Co.*, 188 Pa. 330, 41 Atl. 536, 68 Am. St. Rep. 872; *Allen v. Freeland*, 3 Rand. 170, 174; *Avery v. Ryan*, 74 Wis. 591, 600, 43 N. W. 317; *Glassbrenner v. Groulik*, 110 Wis. 402, 85 N. W. 962. See also *Neal v. Parker*, 98 Md. 254, 57 Atl. 213.

³⁹ *Ridenbaugh v. Thayer*, 10 Idaho, 662, 671, 80 Pac. 229, citing 26

Am. & Eng. Encyc. of Law (2d. ed.), 19; *Strang v. Richmond*, F. & C. R. Co., 93 Fed. 71, 75; *Lasar v. Baldridge*, 32 Mo. App. 362, 366; *Townsend v. Fenton*, 32 Minn. 482, 484, 485, 21 N. W. 726; *Miller v. Lorents*, 39 W. Va. 160, 174, 19 N. E. 391; *McLaughlin v. Piatti*, 27 Cal. 451, 463; *Crawford v. Bradford*, 23 Fla. 404, 406, 2 So. 782, 783; *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Cincinnati, etc., R. Co. v. Washburn*, 25 Ind. 259, 261; *McConnel v. Dickson*, 43 Ill. 99. See also *Hendry v. Whidden*, 48 Fla. 268, 37 So. 571; *Union Coop. Co. v. Adolfson* (Neb.), 171 N. W. 902; *Gillett v. Warren*, 10 N. Mex. 523, 62 Pac. 975; *Livesley v. Johnson*, 45 Oreg. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647.

⁴⁰ The English Bankruptcy Law does not forbid transfers by an insolvent debtor to his creditor unless the dominant motive of the debtor was to give the creditor an advantage. *Williston, Cases on Bankruptcy* (2d ed.), 245. The American statute seeks to prevent any transfer by insolvent debtors on account of pre-existing obligations, by making it an act of bankruptcy; and if bankruptcy supervenes within four months, mak-

ruptcy Act from making a transfer for any return, other than a preëxisting debt, if honestly bargained for as an equivalent, there is no objection to the performance by him of a fair contract wholly executory on both sides, if made in good faith,⁴¹ (and therefore no objection to the enforcement of it by a court of equity); but if the insolvent prior to performance on his part has already received the whole or part of the consideration for his own promised performance, so that a debt or obligation is due him, the situation is different. In that event insolvency can never properly be a make-weight for the decision of a court. In the law of bankruptcy an insolvent debtor's obligations by way of mere contract must be sharply distinguished from his obligations to surrender specific property because the legal or equitable ownership is in another. If under the facts of the case apart from the defendant's insolvency equity regards the plaintiff as having an interest in the property in question, specific enforcement of the obligation to transfer to him that interest should be granted,⁴² and if the defendant becomes bankrupt, the court of bankruptcy should recognize the plaintiff's interest in the property. Whatever the character of specific personal property, however readily purchasable for a money equivalent, the distinction is always vital in bankruptcy between a right to the return of specific property from the bankrupt estate and a claim for its money value. Therefore bankruptcy courts, as they have equity powers, always give in specie to a claimant of personal property of any kind the property itself, if he has an equitable property right, and do not relegate him to a claim for damages.⁴³ But if a bankrupt had contracted to sell ordinary chattels, and still retained title and possession, they are assets of the estate, and if the bankrupt had been

ing the transaction voidable, if the creditor had reasonable cause to believe that a preference would be effected. The motive of the debtor is immaterial.

⁴¹ *Tiffany v. Lucas*, 8 Bky. Reg. 49; *In re Strenz*, 8 Fed. 311; *Remington on Bankruptcy* (2d ed.), § 1316.

⁴² As in *Crawford v. Williams*, (Ga. 1919), 99, S. E. 378, where the contract in question was an option on land.

⁴³ This commonly occurs when the bankrupt has acquired property by fraud. See, e. g., *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 97 C. C. A. 486; *Gillespie v. Piles*, 178 Fed. 886, 102 C. C. A. 120; *In re Appel Suit & Cloak Co.*, 198 Fed. 322; *In re Gold*, 210 Fed. 410, 127 C. C. A. 142; *Remington on Bankruptcy*, § 1879.

paid in advance before the bankruptcy and had subsequently delivered the goods within four months prior to the filing of the bankruptcy petition he would have given a preference.⁴⁴ For a court to decree specific performance of such a contract because of insolvency is not only a violation of the maxim that equality is equity but is nothing less than ordering the debtor to do something which the Bankruptcy Statute has forbidden him to do. Unless the situation is such that a court of bankruptcy would recognize and enforce a right on the part of the claimant to the property, if it should come into the hands of the court, it will always be improper for an insolvent debtor to transfer it without receiving a contemporaneous equivalent, and *a fortiori* it will be improper for a court of equity to decree the transfer.⁴⁵ Moreover, as has been pointed out,⁴⁶ an insolvent debtor is not necessarily execution proof, and on the other hand a solvent debtor, possibly may be. If the defendant's financial condition may properly have a bearing on the plaintiff's right to specific performance, not insolvency, but lack of property which can be seized should be the test. The conclusion, therefore, is:

1. Unless a contract for specific chattel property gives an equitable property right in the chattel, or unless the decree requires the plaintiff to make a full contemporaneous exchange for the property in question equity should not enforce the contract specifically because of insolvency. To do so is inconsistent with bankruptcy legislation, which is based on a system of law itself built up by courts of equity.

2. Cases in bankruptcy and on risk of loss indicate that a

⁴⁴ See quotation from Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co., 175 Fed. 335, 338, 99 C. C. A. 123, *supra*, § 1419a, n. 34. It is true that Templeton v. Kehler, 173 Fed. 575; Mills v. Virginia Carolina Lumber Co., 164 Fed. 168, 90 C. C. A. 154, seem contrary authorities, but of these cases it is well said in Remington on Bankruptcy (2d ed.), § 1316, that in order to prevent such a transfer from being preferential "It must always appear that title to the goods

has already passed or that an equitable lien exists or that the money paid in advance is to be kept intact as a distinct fund to become the bankrupt's only on delivery of the things purchased."

⁴⁵ See as supporting the argument of the text, Roundtree v. McLain, 4 Hempst. 245; City Fire Ins. Co. v. Olmsted, 33 Conn. 476; Chafee v. Sprague, 16 R. I. 189, 13 Atl. 121.

⁴⁶ G. L. Clark, 31 Harv. L. Rev. 275.

contract for the purchase of a chattel, whether paid for in advance or not, does not ordinarily give the buyer such a property right.

3. In the unusual case where owing to the nature of the chattel the buyer does by force of the contract acquire a property right, here only equity may doubtless in the exercise of its discretion decline to take jurisdiction in the absence of insolvency of the debtor on the ground that the wrong can be compensated in damages.

§ 1421. Miscellaneous contracts.

Not only because of inherent difficulties in granting the relief, but often also because the agreement was regarded in any court as opposed to public policy,⁴⁷ equity will neither enforce an agreement to appoint an arbitrator or valuer, nor compel such a person to act,⁴⁸ unless the stipulation for arbitration or valuation is subordinate to the main purpose of the contract and is of slight importance as compared with the remainder of it, and the failure to perform the contract was owing to the defendant's fault. In such a case the court may enforce that portion of the contract to which the stipulation for arbitration or valuation is inapplicable or may itself determine by a master the matter which the contract provided should be submitted to arbitration or valuation.⁴⁹ An award actually made

⁴⁷ See *infra*, § 1720.

⁴⁸ *Vickers v. Vickers*, L. R. 4 Eq. 529; *Agar v. Macklew*, 2 Sim. & Stew. 418; *Street v. Rigby*, 6 Ves. 815; *Milnes v. Gery*, 14 Ves. 400; *Gourlay v. Somerset*, 19 Ves. 429; *Tobey v. County of Bristol*, 3 Story, 800; *Oregon, etc., Bank v. American Mtge. Co.*, 35 Fed. 22; *Caldwell v. Caldwell*, 157 Ala. 119, 47 So. 268; *Kennedy v. Monarch Mfg. Co.*, 123 Ia. 344, 98 N. W. 796; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *King v. Howard*, 27 Mo. 21; *Hug v. Van Burkleo*, 58 Mo. 202, 203; *Smith v. Boston, Concord & M. Railroad*, 36 N. H. 458; *McKibbin v. Brown*, 14 N. J. Eq. 13, 15 N. J. Eq. 496; *Van*

Doren v. Robinson, 16 N. J. Eq. 256; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Davila v. United Fruit Co.*, 88 N. J. Eq. 602, 103 Atl. 519; *Greason v. Keteltas*, 17 N. Y. 491, 496; *Lowe v. Brown*, 22 Oh. St. 463; *Grosvenor v. Flint*, 20 R. I. 21, 24, 37 Atl. 304; *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682.

⁴⁹ *Richardson v. Smith*, L. R. 5 Ch. 648; *Union Pacific R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 285; *Castle Creek Water Co. v. Aspen*, 146 Fed. 8, 78 C. C. A. 516; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. 176, 1126; *St.*

by arbitrators will be specifically enforced if its nature renders such relief appropriate.⁵⁰ Equity will enforce a contract to indemnify,⁵¹ or to exonerate a surety⁵² or property⁵³ from liability. Damages are an inadequate remedy where there is no basis on which a court of law could give substantial redress, and yet the defendant's promise is of value.⁵⁴ It is on this ground that not only a promise to give a mortgage of land,⁵⁵ but also to give a mortgage or pledge of personal property, though of a kind not ordinarily the subject of equity jurisdiction, is enforced by equity.⁵⁶ The probable value of the secu-

Louis v. St. Louis Gaslight Co., 70 Mo. 69; *Black v. Rogers*, 75 Mo. 441, 449; *Mutual L. Ins. Co. v. Stephens*, 214 N. Y. 488, 495, 108 N. E. 856; *Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988; *Grosvonor v. Flint*, 20 R. I. 21, 37 Atl. 304; *Burton v. Landon*, 66 Vt. 361, 29 Atl. 374; *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9.

⁵⁰ *Hall v. Hardy*, 3 Peere. Wms. 187; *Blackett v. Bates*, L. R. 1 Ch. App. 117; *Tobey v. County of Bristol*, 3 Story, 800, 823; *Jones v. Blalock*, 31 Ala. 180; *Whitney v. Stone*, 23 Cal. 275; *Story v. Norwich & W. Railroad Co.*, 24 Conn. 94; *Overby v. Thrasher*, 47 Ga. 10; *Caldwell v. Dickinson*, 13 Gray, 365; *Memphis & C. Railroad v. Scruggs*, 50 Miss. 284; *Bouck v. Wilber*, 4 Johns. Ch. 405; *Maury v. Post*, 55 Hun, 454; *Thompson v. Deans*, 6 Jones Eq. 22; *Backus's App.*, 58 Pa. 186.

⁵¹ *Ranelagh v. Hayes*, 1 Vern. 189; *Anglo-Australian Co. v. British Soc.*, 3 Giff. 521, 4 De G. F. & J. 341; *Chamberlain v. Blue*, 6 Blackf. 491; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 243; and see cases cited *supra*, § 1274, *ad fin.*

⁵² See *supra*, § 1276.

⁵³ *Reiley v. Roberts*, 34 N. J. Eq. 299; *Malins v. Brown*, 4 N. Y. 403; *Barkley v. Barkley*, 14 Rich. Eq. 12.

But see *Blood v. Crew Levick Co.*, 171 Pa. 339, 33 Atl. 348.

⁵⁴ Thus in *Schmidt v. Schmidt Bros. Co.*, 272 Ill. 340, 111 N. E. 1025. Where the damages caused by the breach of a contract to wind up the affairs of a contracting corporation and not to use its name for any new work were so uncertain and difficult of definite proof that an action at law would not furnish an adequate remedy, equity took jurisdiction.

⁵⁵ *Hermann v. Hodges*, L. R. 16 Eq. 18; *Lowe v. Walker*, 77 Ark. 103, 91 S. W. 22; *Fletcher v. Hagerman*, 120 Mich. 466, 79 N. W. 690; *Dean v. Anderson*, 34 N. J. Eq. 496; *Morris v. McCutcheon*, 213 Pa. 349, 62 Atl. 982.

⁵⁶ *Morris v. McCutcheon*, 213 Pa. 349, 62 Atl. 982. See 19 Harv. L. Rev. 557; *Williston, Cas. Bkcy.* (2d ed.) 315 n. The question generally involved in the cases is not whether the promisee's right is enforceable specifically against the promisor himself, but what is often but erroneously assumed to be the same question in principle, whether an equitable lien on the property arises which is valid against the promisor's creditors. A jurisdiction which denies, as many jurisdictions do, validity as against creditors to transfers of the legal title unless recorded or accompanied with a transfer of possession

ity and the probable solvency of the debtor when the debt shall mature, are factors too indeterminate to make the legal remedy satisfactory, and generally where a contract is aleatory, this principle seems applicable.⁵⁷ Under this principle a contract to insure will be specifically enforced.⁵⁸ But if the contract were absolutely renounced by the insurer so that the promisee was under no misapprehension regarding the promisor's attitude, the cost of getting another insurance policy seems to furnish an exact and adequate measure of the plaintiff's injury, unless under the particular circumstances other insurance is not readily obtainable.

Equity will not specifically enforce contracts to lend money;⁵⁹ nor, in the promisor's lifetime, a contract to leave property by will, since there has not been a breach until the promisor's death;⁶⁰ and even after the promisor's death, compensation in damages will usually be adequate.⁶¹ Where, how-

can hardly be more lenient to a transfer confessedly only equitable.

⁵⁷ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967.

⁵⁸ *Mead v. Davidson*, 3 A. & E. 303, 308; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Insurance Co. v. Colt*, 20 Wall. 460, 568, 22 L. Ed. 423; *Hughes v. Piedmont, etc.*, L. Ins. Co., 55 Ga. 111; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; *Quinn-Shepherdson Co. v. United States Fidelity & Co.*, (Minn. 1919), 172 N. W. 693; *Palm v. Medina & Co.*, N. Ins. Co., 20 Ohio, 529; *Haden v. Farmers' & Co. Ins. Assoc.*, 80 Va. 683; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

⁵⁹ *Sichel v. Mosenthal*, 30 Beav. 371; *Western Wagon Co. v. West*, [1892] 1 Ch. 271, 275; *South African Territories v. Wallington* [1898] A. C. 309; *Leach v. Fuller*, (Colo. 1918), 173 Pac. 427; *Conklin v. People's Ass'n*, 41 N. J. Eq. 20, 2 Atl. 615; *Bradford, etc.*, R. Co. v. New York,

etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116; *Norwood v. Crowder* (N. C.), 99 S. E. 345. In commenting upon the case last cited, Professor Pound says in 33 Harv. L. Rev. 432, "The real question is as to mutuality of performance. If the lender is required to advance the money, can the court assure him that he will get back his money years hence when it is due? Where this difficulty is out of the way under the peculiar circumstances of the case (*e. g.*, *Caplin v. Penn. L. Ins. Co.*, 82 N. Y. App. D. 269, 169 N. Y. S. 756) or the contract amounts in substance to a purchase of an issue of securities, the courts do not tell us that the legal remedy is adequate."

⁶⁰ *Bolman v. Overall*, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107; *Manning v. Phippen*, 86 Ala. 357, 362, 5 So. 572, 11 Am. St. Rep. 46; *Chapland v. Sherman*, 148 Ia. 352, 358, 125 N. W. 871; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

⁶¹ *Christin v. Clark* (Cal. App.), 173 Pac. 109.

ever, the promise relates to specific property of such a kind as to make legal relief inadequate, equity may prevent such a disposition of the property during the life of the promisor as might deprive the promisee of redress after the promisor's death;⁶² and after his death equity will enforce an obligation against those to whom the property descends by devise or inheritance (if as is usual they are volunteers) to fulfil the testator's contract.⁶³ Breach of a contract based on sufficient consideration to adopt another as the promisor's child and give him the rights of an heir has been similarly dealt with.⁶⁴

Where a contract is not simply to make a specified devise or bequest, but not to revoke a specific will already drawn, as where parties agree upon mutual wills, the contract will in effect be enforced specifically by denying validity to any attempt made to revoke the will by later testamentary acts.⁶⁵

⁶² *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440.

⁶³ *Goilmere v. Battison*, 1 Vern. 48; *Ridley v. Ridley*, 34 Beav. 478; *Allen v. Bromberg*, 147 Ala. 317, 41 So. 771; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Redford v. Lloyd*, 147 Ga. 145, 93 S. E. 296; *Kluseman v. Weasling*, 238 Ill. 568, 571, 87 N. E. 544; *Evans v. Moore*, 247 Ill. 60, 93 N. E. 118; 139 Am. St. Rep. 302; *Baker v. Syfritt*, 147 Ia. 49, 125 N. W. 998; *Taylor v. Taylor*, 79 Kans. 161, 99 Pac. 814; *Taylor v. Holyfield*, 104 Kans. 587, 180 Pac. 208; *Eastman v. Eastman*, 117 Me. 276, 104 Atl. 1; *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741, L. R. A. 1916 D. 421; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921; *Phalen v. United States Trust Co.*, 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N. S.) 734; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696; *Earnhardt v.*

Clement, 137 N. C. 91, 49 S. E. 49; *Torgerson v. Hauge*, 34 N. Dak. 646, 159 N. W. 6; *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715; *In re McGinley's Est.*, 257 Pa. 478, 101 Atl. 807; *Spencer v. Spencer*, 25 R. I. 239, 55 Atl. 637; *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 590; *Starnes v. Hatcher*, 121 Tenn. 330, 117 S. W. 219; *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *Fitzgerald v. Fitzgerald*, 20 Grant's Ch. (U. C.) 410, and see cases in the two preceding notes. So where a testator had contracted with his heirs, not to make a will. *Taylor v. Mitchell*, 87 Pa. 518, 30 Am. Rep. 383.

⁶⁴ *Chehak v. Battles*, 133 Ia. 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130; *Barney v. Hutchinson*, (N. Mex. 1918), 177 Pac. 890. But see *Pair v. Pair*, 147 Ga. 754, 95 S. E. 295; *Davis v. Jones' Adm.*, 94 Ky. 320, 22 S. W. 331, 42 Am. St. Rep. 360; *Erlanger v. Erlanger*, 102 N. Y. Misc. 236, 168 N. Y. S. 928, *affd.* 171 N. Y. S. 1084.

⁶⁵ *Frazier v. Patterson*, 243 Ill. 80,

§ 1422. Equity will not make a decree impossible of performance.

Even though the impossibility of performing his contract is due to the defendant's own fault, equity will not decree that he shall do what obviously is beyond his power.⁶⁶ For this reason if a vendor has no title,⁶⁷ or if the subject-matter of a contract has been destroyed, or does not exist, a court of equity, though it may award damages if the plaintiff had proper grounds for bringing a bill, will not decree specific performance.⁶⁸ Nor will equity decree the performance of an act which requires the assent or action of a third person, where it does not appear that the third person will give the required assent or performance.⁶⁹ This principle finds frequent application where the transfer of a valid title to real estate requires the vendor's wife to join in the conveyance. Though it was originally held in England that a vendor would be ordered to procure his wife's signature, if necessary to complete his title,⁷⁰ the law is now settled to the contrary in England as well as in the United States.⁷¹

90 N. E. 216, 27 L. R. A. (N. S.) 508; *In re McGinley's Est.*, 257 Pa. 478, 101 Atl. 807, and earlier Pennsylvania cases therein cited.

⁶⁶ *Lamb v. General Film Co.*, 130 La. 1026, 58 So. 867; *Whalen v. Baltimore, etc., R. Co.*, 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130, 129 Am. St. Rep. 423; *Kelsey v. Distler*, 141 N. Y. App. Div. 78, 125 N. Y. S. 602; *Glaesser v. Loughran*, 103 N. Y. Misc. 20, 170 N. Y. S. 190; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

⁶⁷ *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. Ed. 576, 9 Sup. Ct. 202; *Enslin v. Allen*, 160 Ala. 529, 49 So. 430; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; *Ormsby v. Gra-Graham*, 123 Ia. 202, 98 N. W. 724; *Walshe v. Endom*, 124 La. 697, 50 So. 656; *Public Service Corp. v. Hackensack Meadows Co.*, 72 N. J. Eq. 285, 64 Atl. 976; *Bannerot v. Davidson*, 226 Pa. 287, 75 Atl. 417; *Wright v.*

Suydam, 59 Wash. 530, 108 Pac. 610, 110 Pac. 8.

⁶⁸ *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550; *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184; *Burton v. Shotwell*, 13 Bush, 271; *Roanoke St. R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295.

⁶⁹ *Birmingham v. Sheridan*, 33 Beav. 660; *Roundtree v. McLain*, 20 Fed. Cas. No. 12,084a; *Mackey Wall Plaster Co. v. United States Gypsum Co.*, 244 Fed. 275; *Hurlbut v. Kantaler*, 112 Ill. 482; *Caper-ton v. Forrey*, 49 La. Ann. 872, 21 So. 600; *Cuban Production Co. v. Rodriguez*, 124 N. Y. App. 363, 108 N. Y. S. 785; *Doctor v. Reiss*, 180 N. Y. App. D. 62, 167 N. Y. S. 193; *Langford v. Taylor*, 99 Va. 577, 39 S. E. 223; *Martin v. South Bluefield Land Co.*, 81 W. Va. 62, 94 S. E. 493.

⁷⁰ *Winter v. D'Evreux*, 3 P. Wms. 189 n.; *Morris v. Stephenson*, 7 Ves. 474.

⁷¹ *Martin v. Mitchell*, 2 Jac. & W.

The authorities on the right of the purchaser against a vendor who is unable to obtain a release of inchoate dower are thus summarized in a decision of the Supreme Court of Missouri.⁷² "The cases are in much confusion and irreconcilable contrariety. Three views prevail: (1) the purchaser is entitled as against inchoate dower to have the purchase price diminished by such sum as represents the present value of the wife's contingent interest, estimated by the tables of mortality and by the statute of present values of estates less than a fee;⁷³ (2) the view that the decree of the court may permit the vendee to retain one-third of the purchase price as an indemnity until the

413, 425; *Frederick v. Coxwell*, 3 Y. & J. 514, 517; *Barbour v. Hickey*, 2 App. Cas. D. C. 207, 213; *Richmond v. Robinson*, 12 Mich. 193; *Tebeau v. Ridge*, 261 Mo. 547, 568, 170 S. W. 871, L. R. A. 1915 C. 367; *Peeler v. Levy*, 26 N. J. Eq. 330; *Martin v. Dwelly*, 6 Wend. 9, 15, 21 Am. Dec. 245; *Clark v. Seirer*, 7 Watts, 107, 32 Am. Dec. 745; *Ries's App.*, 73 Pa. 485. See also *Kuratli v. Jackson*, 60 Oreg. 203, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195, Ann. Cas. 1914 A. 203. In *Ferrell v. Bork*, 79 Atl. 897 (decision without opinion in 76 N. J. Eq. 615), the court being convinced that the refusal of the wife was induced by the husband ordered him to give a bond to protect the purchaser from the enforcement of the wife's interest; and in *Dixon v. Anderson*, 252 Fed. 694, 696, 164 C. C. A. 534, the court said: "The wife is not a necessary party, and her willingness to join in the conveyance need not be affirmatively shown. *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747. In a case like this the law presumes that the wife will be willing to unite with her husband in conveying the land which he has agreed to sell. If the fact turns out otherwise by answer and proof, the court may, nevertheless, require the husband to execute a deed in accordance with his contract. *Rodman v.*

Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; *Brown v. Eaton*, 21 Minn. 409. And so it is distinctly held by the Supreme Court of Appeals of Virginia in *Steadman v. Handy*, 102 Va. 382, 46 S. E. 380."

⁷² *Tebeau v. Ridge*, 261 Mo. 547, 568, 170 S. W. 871, L. R. A. 1915 C. 367.

⁷³ Citing: *Springle v. Shields*, 17 Ala. 295; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Noecker v. Wallingford*, 133 Iowa, 605, 111 N. W. 37; *Davis v. Parker*, 14 Allen, 94; *Woodbury v. Luddy*, 96 Mass. 1, 92 Am. Dec. 731; *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934; *Sanborn v. Nockin*, 20 Minn. 178; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. 41; *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453. *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915 C. 367 itself adopts this rule. The right of the purchaser to such a decree is often made to depend on his ignorance when the contract was made, of the fact that the vendor was married. See *infra*, § 1436, n. 88. If aware of the fact it is said that purchaser should have required the signature of the wife to the contract. This is the rule in New Jersey when refusal of the wife to convey is fraudulently brought about. *Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456.

wife die or convey,⁷⁴ and (3) the view that the vendee shall have no abatement of the agreed purchase price on account of the wife's refusal to relinquish her inchoate dower (on the ground usually that such abatement would serve to put upon the wife unfair coercion to relinquish a right given to her by law).⁷⁵ A reason sometimes given for the refusal of equity to decree performance where the defendant is unable to perform, is lack of mutuality;—the vendor could not have compelled performance, therefore the purchaser cannot.⁷⁶ If this argument is sound the fact that the vendor's lack of title is remediable, because he can procure a good title by purchase, should afford no reason for a decree of specific performance against the vendor;⁷⁷ but the invalidity of the argument is shown by the numerous decisions which award a purchaser specific performance with compensation,⁷⁸ and generally where a third person on whose consent the defendant's ability to perform depends, is shown to be willing to give the necessary consent, a decree will not be denied.⁷⁹ Moreover, a purchaser has been allowed in some cases to take a decree if he so wished which gave him all the vendor had, but left the full right for which he had contracted dependent on a third person's action.⁸⁰ Pe-

⁷⁴ Citing: *Springle v. Shields*, 17 Ala. 295; *Bradford v. Smith*, 123 Iowa, 41, 98 N. W. 377.

⁷⁵ *Barbour v. Hickey*, 2 App. D. C. 207, 24 L. R. A. 763; *Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480 (overruled by *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871); *McCormick v. Stephany*, 57 N. J. Eq. 257; 41 Atl. 840 (unless wife's refusal was fraudulently collusive with husband, in which case the rule in New Jersey is *contra*); *Roos v. Lockwood*, 13 N. Y. S. 128; *Riess's Appeal*, 73 Pa. St. 485; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894. See also *Kurati v. Jackson*, 60 Oreg. 203, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195, and cases cited.

⁷⁶ *Forrer v. Nash*, 35 Beav. 167;

Public Service Corp. v. Hackensack Meadows Co., 72 N. J. Eq. 285, 64 Atl. 976.

⁷⁷ So held in *Public Service Corp. v. Hackensack Meadows Co.*, 72 N. J. Eq. 285, 64 Atl. 976.

⁷⁸ See *infra*, § 1436.

⁷⁹ *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; *Jacobson v. Rechnitz*, 46 N. Y. Misc. 135, 98 N. Y. S. 173; *Kelsey v. Distler*, 141 N. Y. App. D. 78, 125 N. Y. S. 602. See also *Roquemore v. Mitchell*, 167 Ala. 475, 52 So. 423, 140 Am. St. Rep. 52; *Ellis v. Small*, 209 Mass. 147, 95 N. E. 79; *Arnold v. Hull*, 7 Grant Ch. (Can.) 47.

⁸⁰ Thus the vendor of a liquor license has been required to transfer it subject to the possibility that license commissioners may not issue a license to him. *In re Fisher*, 98 Fed. 89; *Fisher v. Cushman*,

cuniary inability of the defendant will not, however, preclude a decree for payment where such a decree is appropriate.⁸¹

§ 1423. Equity will not make a decree involving excessive difficulty to execute.

Damages are frequently a wholly inadequate remedy for breach of a promise to render personal services, but two analogous difficulties stand in the way of specific enforcement. (1) Long and minute supervision might be needed to secure the proper execution of the decree; (2) the proper performance of the services to the best of the defendant's ability is uncertain and difficult to gauge. And any attempt to overcome these difficulties might involve too serious an infringement of personal liberty to be tolerable. Therefore such promises are not enforceable by affirmative decree;⁸² and while they are still executory, counter promises for the conveyance of land, or for other performance within the jurisdiction of equity, are equally unenforceable⁸³ because of lack of mutuality.⁸⁴ And in contracts besides those ordinarily designated as contracts of service, it is generally true so far as affirmative relief is concerned, that "Equity will not award specific performance where the duty to be enforced is continuous and reaches over a long period of time, requiring constant supervision by the court."⁸⁵ There-

103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *In re McArdle*, 126 Fed. 442; *Ellis v. Small*, 209 Mass. 147, 95 N. E. 79, 81. An agent who agreed to transfer his agency may be required to do so subject to the consent of the principal to accepting the transferee. *Kelsey v. Distler*, 141 N. Y. App. D. 78, 125 N. Y. S. 602.

⁸¹ *Hopper v. Hopper*, 16 N. J. Eq. 147.

⁸² *Clarke v. Price*, 2 Wils. Ch. 157; *Johnson v. Shrewsbury, etc., R. Co.*, 3 De G. M. & G. 914; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Blue Point Oyster Co. v. Haagen-*

son, 209 Fed. 278; *Life Preserver Suit Co. v. National Life Preserver Co.*, 252 Fed. 139, 164 C. C. A. 251; *Roque-*

more v. Mitchell, 167 Ala. 475, 52 So. 423, 140 Am. St. Rep. 52; *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115; *Sims v. VanMeter Lumber Co.*, 96 Miss. 449, 51 So. 459. *Cf. infra*, § 1450.

⁸³ *Cooper v. Pena*, 21 Cal. 403;

Pacific El. R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623; *Deits v. Stephenson*, 51 Oreg. 596, 95 Pac. 803.

⁸⁴ See *infra*, § 1440.

⁸⁵ *Pantages v. Grauman*, 191 Fed. 317, 112 C. C. A. 61. See also *Dominion Coal Co. v. Dominion &c. Steel Co.*, [1909] A. C. 293; *Warmack v. Major Stave Co.*, 132 Ark. 173, 200 S. W. 799; *Pacific, etc., R. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac.

fore, "There is no doubt that as a general rule the Court will not enforce specific performance of a building contract."⁸⁶ The basis of equity's disinclination to enforce building contracts specifically is the difficulty of enforcing a decree without the expenditure of effort disproportionate to the value of the result. But where the inadequacy of damages is great, and the difficulties not extreme, specific performance will be granted and the tendency in modern times has been increasingly towards granting relief, where under the particular circumstances of the case damages are not an adequate remedy.⁸⁷ In an Eng-

623; *Rosenkrantz v. Chattahoochee Brick Co.*, 147 Ga. 730, 95 S. E. 225; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749, and cases in the following notes.

⁸⁶ *Romer, L. J.*, in *Wolverhampton v. Emmons*, [1901] 1 K. B. 515, 524. See also *South Wales R. Co. v. Wythes*, 1 K. & J. 186; *Oregonian R. Co. v. Oregon R., etc., Co.*, 37 Fed. 733; *Bromberg v. Eugenotto Constr. Co.*, 158 Ala. 323, 48 So. 60, 19 L. R. A. (N. S.) 1175; *Pacific Electric R. Co. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623; *Robinson v. Luther*, 134 Ia. 463, 109 N. W. 775; *Madison Athletic Assoc. v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *Cartwright v. Oregon Elec. R. Co.*, 88 Ore. 596, 171 Pac. 1055.

⁸⁷ In the following cases specific performance was granted: *Storer v. Great Western Ry. Co.*, 2 Y. & C. (C. C.) 48 (building and maintaining an archway); *Sanderson v. Cockermouth Co.*, 11 Beav. 497 (making roads and accommodations for cattle); *Wolverhampton v. Emmons*, [1901] 1 K. B. 515 (building structures on land owned by the defendant of a certain height in consideration of a conveyance which had been made by the plaintiff); *American Smelting & Co. v. Bunker Hill & Co. Min. Co.*, 248 Fed. 172 (disposing of ore which

required operation of mines); *Wheeling Traction Co. v. Board of Commissioners*, 248 Fed. 205, 160 C. C. A. 283 (paving streets); *Hooker v. Savannah, etc., R. Co.*, 69 Ala. 529 (grading streets); *Ross v. Purse*, 17 Col. 24, 28 Pac. 473 (digging a well); *Flege v. Covington, etc., Railroad Co.*, 122 Ky. 348, 91 S. W. 738, 121 Amer. St. Rep. 463 (building a retaining wall); *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485 (installing apparatus for heating and lighting leased premises); *Hubbard v. Kansas City, etc., R. Co.*, 63 Mo. 68 (building a depot); *Gregory v. Ingwersen*, 32 N. J. Eq. 199 (building steps); *Post v. West Shore Co.*, 123 N. Y. 580, 26 N. E. 7 (building a road. Cf. *Conger v. New York, etc., Co.*, 120 N. Y. 29, 23 N. E. 983); *Strauss v. Estates of Long Beach*, 187 N. Y. App. D. 876, 176 N. Y. S. 447 (constructing a sewer, where defendant controlled the land on which it was contracted to be built, *Chambersburg v. Chambersburg & Co. R.* 258 Pa. 57, 101 Atl. 922 (repairing road); *Grubb v. Starkey*, 90 Va. 831, 20 S. E. 784 (laying a water pipe). But see the following cases where equitable relief was denied: *Robinson v. Luther*, 134 Ia. 463, 107 N. W. 775 (building a drain); *Cincinnati, etc., R. Co. v. Washburn*, 25 Ind. 259 (fencing a railroad); *Columbus, etc., R. Co. v. Watson*, 26 Ind. 50 ((fencing a railroad); *McCarter*

lish case the requirements for specific performance of such contracts have been thus stated: "The first is that the building work, of which [the plaintiff] seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done."⁸⁸ But not all American decisions where relief has been granted fulfil the third requisite, which seems merely one illustration of a situation where the second requisite is fulfilled. The indisposition of equity to grant specific performance of acts which require time for their performance, such as building contracts, is increased where a continuous series of acts must be performed according to the terms of the contract for an indefinite period of time. Thus contracts which call for the operation of a railroad in a particular way for a considerable or indefinite time have not generally been enforced.⁸⁹ But con-

v. Armstrong, 32 S. C. 203, 601, 10 S. E. 953, 11 S. E. 634, 8 L. R. A. 625 (building and maintaining a drain).

In *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679, the court enforced specifically a contract by which the defendant had agreed to furnish and deliver certain patented injectors. It was assumed that they were yet to be made when the contract was entered into but that no skill peculiar to the defendant was required to construct them, and that they could be made by any intelligent artificer in the metals of which they were composed. The court said: "The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been

experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court."

⁸⁸ *Romer*, L. J., in *Wolverhampton v. Emmons*, [1901] 1 K. B. 515, 525, paraphrasing *Fry on Specific Performance* (3d ed.), 44, 45. Substantially the same statement is made in *Wheeling Traction Co. v. Board of Commissioners*, 248 Fed. 205, 212, 180 C. C. A. 283.

⁸⁹ *Blackett v. Bates*, L. R. 1 Ch.

tracts involving such oversight by equity will be enforced if justice makes it imperative. Therefore where the plaintiff has conveyed land or parted with valuable consideration in return for the promise of a railroad to maintain stations or switching tracks or to stop trains, such contracts have been enforced.⁹⁰ And in recent years a recognition by the courts of the interests of the public in the performance by public service companies of some of their obligations, has established the principle that where public interests require, equity will decree specific performance of contracts, though they involve a long continued series of acts.⁹¹ Even though no public interest is involved, if

117 (furnishing power to draw cars for a period which might extend to twenty-one years); *Powell, etc., Coal Co. v. Taffvale Ry. Co.*, L. R. 9 Ch. 331 (moving switches and signals necessary to enable the plaintiff to run its cars); *Texas & P. R. Co. v. Marshall, etc., Co.*, 136 U. S. 393, 34 L. Ed. 385, 10 Sup. Ct. 846 (maintaining permanently railway offices as agreed. *Cf. Tyler v. St. Louis, etc., Ry. Co.*, 99 Tex. 491, 91 S. W. 1); *Louisville, etc., Ry. Co. v. Bodenschatz-Bedford Stone Co.*, 141 Ind. 251, 39 N. E. 703 (furnishing shipping facilities); *Richmond v. Dubuque & Sioux City, etc., R. Co.*, 33 Ia. 422 (giving the handling of all through grain); *Jones v. Mississippi Farms Co.*, 116 Miss. 295, 76 So. 880 (operating a railroad); *Fort Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Oh. St. 544 (operating a railroad).

* *Phillips v. Great Western R. Co.*, L. R. 7 Ch. 409; *Taylor v. Florida East Coast R. Co.*, 54 Fla. 635, 45 So. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155; *Brown v. Western Maryland Ry. Co.*, (W. Va. 1919), 99 S. E. 457.

⁹¹ The leading case is *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. 243. See also the following cases where the operation of railroads was enforced: *Union Pac. R. Co. v. Chicago, etc. R. Co.*, 163

U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265 [affirming 51 Fed. 309, 2 C. C. A. 174, 47 Fed. 15]; *In re Lennon*, 166 U. S. 548, 41 L. Ed. 1110, 17 Sup. Ct. 658; *Donovan v. Pennsylvania R.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192; *Grand Trunk Western R. Co. v. Chicago, etc., R. Co.*, 141 Fed. 785, 73 C. C. A. 43; *Schmidt v. Louisville, etc., R. Co.*, 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809; *Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Cumberland Valley R. Co. v. Gettysburg, etc., R. Co.*, 177 Pa. St. 519, 35 Atl. 952; *Southern R. Co. v. Franklin, etc., R. Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297. In *La Follette v. La Follette Water Co.*, 252 Fed. 762, 164 C. C. A. 602, a contract for furnishing the water supply of a city was specifically enforced at suit of the water company, though it had a number of years to run. In *Chambersburg v. Chambersburg & C. R. Co.*, 258 Pa. 57, 101 Atl. 922, the obligation of a street railway to keep a portion of the highway in repair was specifically enforced. In *Baltimore & O. R. Co. v. Western Union Telegraph Co.*, 241 Fed. 162, it was held that a complaint by a railroad company against a telegraph company for the specific performance of a provision of a contract be-

the legal remedy under the particular circumstances of the case is clearly inadequate, in recent years some courts at least are disposed to grant relief if possible, though the contract calls for long continued performance, as an instalment contract,⁹² or a covenant in a lease to heat and light demised premises.⁹³ A disposition has existed, where the court was prepared to give relief calling for continuous performance to do so by a decree, in form negative, though in effect requiring affirmative action; but since the defendant must act, and not simply forbear there seems no reason why the decree should not so state.⁹⁴

tween them that the telegraph company should transmit free messages pertaining to railroad business on lines not located along the railroad up to a certain amount each year, and thereafter should transmit such messages at one-half its regular rates, stated a case for equity; there being no adequate remedy at law. See also cases where contracts involving various forms of public service were enforced. *Montgomery L. & P. Co. v. Montgomery Traction Co.*, 191 Fed. 657; *Armour v. Texas R. Co.*, 258 Fed. 185 (C. C. A.); *Mobile Electric Co. v. Mobile (Ala.)*, 79 So. 39; *Dailey v. New York*, 170 N. Y. App. D. 267, 156 N. Y. S. 124, aff'd without opinion 218 N. Y. 665, 113 N. E. 1053; *Larchmont v. Larchmont Park*, 185 N. Y. App. D. 330, 173 N. Y. S. 32; *Great Northern R. v. Shyenenne Tel. Co.*, 27 N. Dak. 256, 145 N. W. 1062. But see *Loan Star Salt Co. v. Texas Short Line R. Co.*, 99 Tex 434, 90 S. W. 663, 3 L. R. A. (N. S.) 828; *Oconto Electric Co. v. City*, 168 Wis. 91, 169 N. W. 293.

⁹² *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967; *Dells Paper & Pulp Co. v. Willow Lumber Co. (Wis.)*, 173 N. W. 317. See also *Buxton v. Lister*, 3 Atk. 383. But see *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Dominion Coal Co. v. Dominion &c.*

Steel Co., [1909] A. C. 293; *Davison Chemical Co. v. Baugh Chemical Co.*, 133 Md. 203, 104 Atl. 404.

⁹³ *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485. See also *New York &c. R. Co. v. Stoneman (Mass.)*, 123 N. E. 679.

⁹⁴ This practice seems to have started with Lord Eldon. In *Lane v. Newdigate*, 10 Ves. 192, the plaintiff sought the enforcement of a covenant in a lease by which he was entitled to the unimpaired use of a canal and to have it kept in repair. Lord Eldon enjoined the defendant from impeding the plaintiff in his use of the canal, by continuing to keep it out of repair. Lords Lyndhurst and Brougham in *Blakemore v. Glamorganshire Canal Navigation Co.*, 1 Mylne & K. 154, 184, expressed the opinion that it would be better if the jurisdiction were exercised to do so directly rather than in a "roundabout mode," but it was not until *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438, that the change in practice was actually made. See also in support of the direct rather than the roundabout decree, *Fortescue v. Lostwithiel R. Co.*, [1894] 3 Ch. 621, 640; *Brown v. Western R. Co. (W. Va.)*, 99 S. E. 457. Cf. *Keith v. National Tel. Co.*, [1894] 2 Ch. 147; *Prospect Park R. Co. v. Coney Island R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610.

§ 1424. The contract must be certain.

A court of equity cannot grant specific performance unless a decree can be framed which states with some exactness what the defendant must do. This necessity makes a degree of certainty necessary for equitable enforcement of a contract which is not always requisite for its enforcement at law.⁹⁵ It is necessary not only that the defendant's duty under the contract shall be certain, but the plaintiff's also, since the decree must provide for that performance as well as the defendant's.⁹⁶ But if there is sufficient expressed to make a legally valid contract, a court of equity can make certain by its decree, within reasonable limits, subordinate details of performance which the contract itself did not state. Thus where no time of performance is stated in the contract, the court may by its decree fix a reasonable time.⁹⁷ In cases where specific performance of only part of an agreement is in question, it should also be observed that such uncertainty in another portion of the contract as would preclude specific performance of the latter portion will not destroy the plaintiff's claim for specific performance

*For the degree of certainty necessary for the creation of a contract at law, see *supra*, §§ 37 *et seq.* For statements of the equitable doctrine see *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, 27 C. C. A. 542; *Rushton v. McKee*, (Ala. 1917), 77 So. 343; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Winter v. Goebner*, 21 Colo. 279, 40 Pac. 570; *Barnes v. Cowan*, 147 Ga. 478, 94 S. E. 564; *Dreiske v. Eisendrath Co.*, 214 Ill. 199, 73 N. E. 379; *Waite v. Consigny*, 183 Iowa, 259, 167 N. W. 200; *Jones v. Wells*, 31 Mich. 170; *Gates v. McLaulin*, 199 Mich. 438, 165 N. W. 614; *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233; *Davila v. United Fruit Co.*, 88 N. J. Eq. 602, 103 Atl. 519; *H. M. Weill Co. v. Creveling*, 181 N. Y. App. D. 282, 166 N. Y. S. 385, *affd.* 223 N. Y. 672, 119 N. E. 1048; *Soloman v. Wilmington Sewerage Co.*, 142 N. C. 439, 55,

S. E. 300, 6 L. R. A. (N. S.) 391; *Feenaughty v. Beall*, 91 Ore. 654, 178 Pac. 600; *Anthony v. Eve*, (S. Car.) 95 S. E. 513; *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164.

**Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

**Inglis v. Fohey*, 136 Wis. 28, 116 N. W. 857. See also *Penney v. Norton* (Ala.), 81 So. 616. So a provision in a contract for a deed in the "usual" form may be enforced if from parol evidence it appears that the main provisions of a conveyance are usually in substance the same in the locality in question. *Hebert v. Mutual L. Ins. Co.*, 12 Fed. 807; *Cochrane v. Justice Min. Co.*, 16 Colo. 415, 26 Pac. 780; *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889. See also *Noyes v. Bragg*, 220 Mass. 106, 107 N. E. 669.

of the former part, if partial enforcement is otherwise allowable.⁹⁸ It seems probable that the difficulty regarding uncertainty has been overemphasized.⁹⁹ It should not be allowed to hamper equitable relief further than necessity requires.¹

§ 1425. Discretionary character of the remedy.

As has been said, wherever a contract is unenforceable at law, ordinarily it is unenforceable in equity.² Such defences, as fraud, duress, mistake, illegality, which would be ground for a defence, either legal or equitable, to an action at law are *a fortiori* ground for refusing the equitable relief of specific performance. But conversely there are some contracts which though they may be enforceable at law, and may relate to a subject-matter of which equity ordinarily takes jurisdiction are denied equitable relief. For this reason the jurisdiction of equity is generally called discretionary.³ More exactly it may be said that wherever a contract though legally valid is grossly unfair, or its enforcement opposed to good policy for any reason, equity will refuse to enforce it, and though certain kinds of unfairness may be classified, equity declines to make an exact inventory of what amounts to such unfairness or impropriety as will preclude relief, but leaves a borderland where the court can consider the particular facts of each case and deal with it on its

⁹⁸ Price v. McKay, 53 N. J. Eq. 588, 32 Atl. 130.

⁹⁹ See the comments of Professor Pound in 33 Harv. Law Rev. 433.

¹ In Jones v. Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485, the obligation enforced was to heat and light certain premises. This involved the installation of proper apparatus and a determination of what was suitable. Holmes, J. met the objection of lack of certainty by saying "If the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We

do not doubt that an expert would find it as easy to frame a scheme for doing the work."

² *Supra*, § 1418.

³ Hess v. Bowen, 241 Fed. 659, 154 C. C. A. 417; Thackaberry v. Kibbe, 284 Ill. 199, 119 N. E. 897; Origer v. Kuyper, 183 Iowa, 1395, 168 N. W. 119; Darnell v. Alexander, 178 Ky. 404, 199 S. W. 17; Lake Erie Land Co. v. Chilinski, 197 Mich. 214, 163 N. W. 929; *In re Kutz's Est.*, 259 Pa. 548, 103 Atl. 293; Bull v. Fallaw, 109 S. Car. 306, 96 S. E. 147; Woldenberg v. Riphon, 166 Wis. 433, 166 N. W. 21; Hoster's Committee v. Zollman, 122 Va. 41, 94 S. E. 164, and cases in the following notes.

merits. Specific performance will be denied if opposed to public policy, though the contract may not be so clearly illegal that a remedy at law would be denied.⁴ So if the contract is unconscionable in its terms, equity will not enforce it.⁵

A contract by which the defendant contracts to part with his future means of livelihood is looked upon with disfavor and will not be specifically enforced.⁶ Not only where performance of the plaintiff's contract would involve a breach by the defendant of a contract with a third person, as the plaintiff was aware when he entered into the contract, but even where the

⁴ *Beasley v. Texas & Pacific R. Co.*, 191 U. S. 492, 48 L. Ed. 274, 24 Sup. Ct. Rep. 164.

⁵ *Chesterfield v. Jansen*, 2 Ves. Sr. 125; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643, 23 L. Ed. 367; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200, 10 Sup. Ct. Rep. 655; *Dalsell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 323, 37 L. Ed. 749, 13 Sup. Ct. 886; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. 133; *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317; *Clark v. Rosario &c. Co.*, 176 Fed. 180, 99 C. C. A. 534; *Alabama Central R. Co. v. Long*, 158 Ala. 301, 48 So. 363; *Agard v. Valencia*, 39 Cal. 292, 302; *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Godwin v. Springer*, 233 Ill. 229, 84 N. E. 234; *Shoop v. Burnside*, 78 Kans. 871, 98 Pac. 202; *Jones v. Prewitt*, 128 Ky. 496, 108 S. W. 867, 33 Ken. L. Rep. 358; *Banaghan v. Malaney*, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378; *Van Nordsall v. Smith*, 141 Mich. 355, 104 N. W. 660; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Bartley v. Lindabury*, 89 N. J. Eq. 8, 104 Atl. 333; *Melton v. Cherokee Oil & Gas Co.*, (Okla. 1917), 170 Pac. 691, cert. denied 247 U. S. 507, 38 S. Ct. 427. In *Weegham v. Killefer*, 215

Fed. 168, 171 (aff'd *sub nom.* *Weegham v. Killifer*, 215 Fed. 289, 131 C. C. A. 558), the court quoted with approval the following extracts: "In *Deweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757, Mr. Justice Brewer, speaking for the court, said: 'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.' In *Larscheid v. Kittell*, 142 Wis. 172, 175, 125 N. W. 442, 443 (20 Ann. Cas. 576) the Supreme Court of Wisconsin said: 'The exclusion of a plaintiff from the peculiar favors of courts of equity results equally where his conduct has been unconscionable by reason of a bad motive, or where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others.'"

⁶ *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317; *Marks v. Gates*, 2 Alaska, 519; *Bates Mach. Co. v. Bates*, 87 Ill. App. 225; *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903; *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647. See also *McCarty v. Kyle*, 4 Coldw. 348.

agreement of the defendant with the third person was invalid as a contract both at law and in equity for uncertainty, equity has refused to aid the plaintiff because his conduct violated good morals.⁷

Specific performance may be denied also if the hardship to the defendant of performing will be out of all proportion to the value of the performance to the plaintiff.⁸ Appreciation or depreciation in value or other events subsequent to the formation of the contract will not ordinarily afford ground for refusing enforcement by equity even though they make the performance of the two parties unequal.⁹ But if the plaintiff was in default or guilty of gross laches, and the value of the property has materially changed, specific performance may be denied, since otherwise a plaintiff might endeavor to take a speculative advantage of the changes in value.¹⁰ Even apart

⁷ *Weeghman v. Killifer*, 215 Fed. 168, 289, 131 C. C. A. 558. The defendant Killifer was employed by the Philadelphia Ball Club, and his contract contained an option to the Club to reengage him at a salary to be agreed upon. The Club had announced that it exercised the option, but no salary had been agreed upon when the plaintiff, knowing the facts, induced Killifer to enter into a contract to play with a Chicago Club. The court, though admitting the invalidity of the Philadelphia employment denied the plaintiff an injunction, leaving him to his remedy at law. See also *infra*, § 1429, *ad fin.*

⁸ *South, etc., R. Co. v. Highland Ave., etc., R. Co.*, 119 Ala. 105, 24 So. 114; *Herzog v. Atchison, etc., R. Co.*, 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; *Sanitary Dist. of Chicago v. Martin*, 227 Ill. 260, 81 N. E. 417; *Harter v. Morris*, (Ind. App. 1916), 123 N. E. 23.

⁹ *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Haywood v. Cope*, 25 Beav. 140; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed 501; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 36

L. Ed. 776, 12 Sup. Ct. 900; *Walton v. McKinney*, 11 Ariz. 385, 94 Pac. 1122; *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912 C. 556; *King v. Raab*, 123 Iowa, 632, 99 N. W. 306; *Lee v. Kirby*, 104 Mass. 420, 428; *Nims v. Vaughn*, 40 Mich. 356; *Willard v. Foster*, 24 Neb. 205, 38 N. W. 786; *Keim v. Lindley* (N. J. Eq.), 30 Atl. 1063; *Prospect Park &c. R. Co. v. Coney Island &c. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Hairston v. Bescherer*, 141 N. Car. 205, 53 S. E. 845; *Sylvester v. Born*, 132 Pa. 467, 19 Atl. 337; *Rausch v. Hanson*, 26 S. Dak. 273, 128 N. W. 611; *Clark v. Hutsler*, 96 Va. 73, 30 S. E. 469; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

¹⁰ *Holgate v. Eaton*, 116 U. S. 33, 6 S. Ct. 224, 29 L. Ed. 538; *Cooper v. Brown*, 2 McLean, 495; *Schuessler v. Hatchett*, 58 Ala. 181; *Swaim v. Beakley*, 133 Ark. 406, 202 S. W. 476; *Requa v. Snow*, 76 Calif. 590, 18 Pac. 862; *Tobey v. Foreman*, 79 Ill. 489; *Findley v. Koch*, 126 Iowa, 131, 101 N. W. 766; *Niquette v. Green*,

from such default if the subsequent events though not amounting to such impossibility as would excuse at law are, nevertheless, of a kind which not only greatly change the value of one performance or the other, but also could not reasonably have been anticipated when the contract was made, specific performance has in some cases been denied.¹¹ If such events, however, while producing hardships which makes it inequitable to decree performance of all the terms of the contract, nevertheless do not affect its primary object, equity may enforce it with such modifications as justice requires.¹²

§ 1426. Non-disclosure.

Since courts of equity refuse to enforce harsh and unfair bargains, it follows that the boundaries of unfair dealing and of mistake which will defeat the right to specific performance are wider than those which define such fraud or mistake as will prevent the enforcement of contracts at law or justify an injunction or rescission in equity. Not only will innocent misrepresentation of a material fact preclude recovery, a doctrine that has now been generally adopted from courts of equity by courts of law, as a ground for rescission,¹³ but failure to communicate material facts of which fair dealing demanded the disclosure, will preclude specific performance both of contracts

81 Kan. 569, 106 Pac. 270; Joffrion v. Gumbel, 123 La. 391, 48 So. 1007; Van Buren v. Stocking, 86 Mich. 246, 49 N. W. 50; Green v. Reder, 199 Mich. 594, 165 N. W. 807; Pomeroy v. Fullerton, 141 Mo. 581, 33 S. W. 173; Reddish v. Miller, 27 N. J. Eq. 514; Ruff's Appeal, 117 Pa. 310, 11 Atl. 553; Harper v. Hughes (Tex. Civ. App.), 143 S. W. 7.15; Gish v. Jamison, 96 Va. 312, 31 S. E. 521; Newberry v. French, 98 Va. 479, 36 S. E. 519; McAllister v. Harman, 101 Va. 17, 42 S. E. 920.

¹¹ King v. Raab, 123 Iowa, 632, 99 N. W. 306; Bartley v. Lindabury, 89 N. J. Eq. 8, 104 Atl. 333; Gottlieb v. Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455; Wadick v. Mace, 191 N. Y. 1, 83 N. E. 571;

Huntington v. Titus, 50 N. Y. App. Div. 468, 64 N. Y. S. 58. If the principle is sound that the risk of accidental destruction of the property is on the purchaser from the signing of the contract (see *supra*, §§ 927 *et seq.*) there can be no propriety in any case in relieving him from performance because of supervening hardship.

¹² Wright v. Vocalion Organ Co., 148 Fed. 209, 79 C. C. A. 183; La Follette v. La Follette Water &c. Co., 252 Fed. 762, 164 C. C. A. 602; King v. Raab, 123 Ia. 632, 99 N. W. 306; cf. Franklin Tel. Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776, 12 Sup. Ct. Rep. 900; Clark v. Hutsler, 96 Va. 73, 30 S. E. 469.

¹³ See *infra*, § 1500.

between vendor and purchaser,¹⁴ and contracts of other kinds.¹⁵ The law of England, however, has gone very far in enforcing specific performance in spite of non-disclosure of material matters,¹⁶ though there as elsewhere concealment would deprive the plaintiff of relief.¹⁷

¹⁴ *Byars v. Stubbs*, 85 Ala. 256, 4 So. 755; *Shoop v. Burnside*, 78 Kans. 871, 98 Pac. 202; *Bowman v. Iorns*, 2 Bibb, 78, 4 Am. Dec. 686; *Woollums v. Horsley*, 93 Ky. 582, 20 S. W. 781; *Wolford v. Steele*, 27 Ky. Law. Rep. 1177, 87 S. W. 1071, 27 Ky. L. Rep. 88, 84 S. W. 327; *Banaghan v. Malaney*, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378; *Bean v. Valle*, 2 Mo. 103; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *Margraf v. Muir*, 57 N. Y. 155.

¹⁵ *Cowan v. Sapp*, 81 Ala. 525, 8 So. 212; *Hetfield v. Willey*, 105 Ill. 286; *Shea v. Evans*, 109 Md. 229, 72 Atl. 600; *Dodd v. Home Mutual Ins. Co.*, 22 Oreg. 3, 28 Pac. 881, 29 Pac. 3.

¹⁶ *Turner v. Green*, [1895] 2 Ch. 205; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

¹⁷ "The distinction between suppression of a fact and mere silence is a very old one, and is to be found in a passage from Cicero (*De Off.*, lib. iii. c. 13), which is cited by Sir Edward Fry in his book (3d. Ed. p. 329) '*Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas.*' The obligation to speak is at the root of this proposition." *Turner v. Green*, [1895] 2 Ch. 205. So in *Fothergill v. Phillips*, L. R. 6 Ch. 770, a suit for the enforcement of an agreement to sell a farm from which unknown to the defendants the plaintiffs had by trespass taken coal, Lord Hatherley said: "The observations of the Vice-Chancellor, as to the purchasers knowing more of the value than the vendors did, would, if I may venture to say so,

have been erroneous if made without reference to the special circumstances of the case. I apprehend it would be an error to say generally that you cannot enforce a contract in this court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. But I apprehend that the Vice-Chancellor meant his observations to be understood with reference to the circumstances of the particular case, and that when he says the vendors did not know the subject-matter of the contract, he meant that they did not know that coal had been taken to the extent of 2000 tons, and that in that state of circumstances they could not be held to the bargain. If, indeed, under-value were shown, this observation would naturally suggest itself; the case is not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. I apprehend that in such a case the court, whatever it might do as to cancelling the contract, certainly would decline to enforce it." In *Falcke v. Gray*, 29 L. J. Ch. 28, 31, *Kindersley, V. C.*, said: "Lord Thurlow went so far as to say, that if a man went to purchase an estate, and

§ 1427. Mistake.

Because of the discretionary character of the remedy, in some cases a mistake by the defendant though not sufficient to prevent the formation of a contract or to give equitable ground for its reformation or rescission will, nevertheless, excuse him from liability in a suit for specific performance. Unilateral mistake has not infrequently been thus held an excuse.¹⁸ But this principle is ordinarily limited to cases where the enforcement of the contract, as made, would be harsh.¹⁹ And if the defendant was guilty of gross carelessness in making a mistake, his negligence will dispose the court not to exercise its discretion in his favor.²⁰

Mistake of law, though not generally ground for rescinding or reforming a contract,²¹ may afford a reason for denying specific enforcement thereof, especially if its terms are unfair.²² And a degree of mental weakness in a spendthrift,²³ intoxicated person,²⁴ or aged or infirm person,²⁵ or person ig-

there was a valuable mine under it, of which the purchaser knew, but the vendor did not, the court would not set the contract aside; yet no one can doubt that the court would not enforce specific performance of such a purchase." See in accord *Byars v. Stubbs*, 85 Ala. 256, 4 So. 755; *Bean v. Valle*, 2 Mo. 103. But see *contra Caples v. Steel*, 7 Or. 491. See further, *infra*, §§ 1497-1499.

¹⁸ *Webster v. Cecil*, 30 Beav. 62; *Day v. Wells*, 30 Beav. 220; *Rushton v. Thompson*, 35 Fed. 635; *Clowes v. Miller*, 74 Conn. 287, 295, 50 Atl. 728; *Coppage v. Equitable & Co. Trust Co.*, (Del. Ch. 1917), 102 Atl. 788; *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300; *Kelley v. York Cliffs Imp. Co.*, 94 Me. 374, 47 Atl. 898; *Somerville v. Coppage*, 101 Md. 519, 61 Atl. 318; *Bowman v. McClenahan*, 19 N. Y. Misc. 438, 44 N. Y. S. 482 (*affd.* in 20 N. Y. App. Div. 346, 46 N. Y. S. 945).

¹⁹ *Stewart v. Kennedy*, 15 A. C. 75, 105; *Preston v. Luck*, 27 Ch. Div.

497; *Dewey v. Whitney*, 93 Fed. 533, 35 C. C. A. 414; *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509; *Western R. Corp. v. Babcock*, 6 Metc. 346; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Lacroix v. Longtin*, 22 Ont. L. R. 506.

²⁰ *Tamplin v. James*, 15 Ch. D. 215; *Van Praagh v. Everidge* [1902] 2 Ch. 286; *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111. See *infra*, § 1596.

²¹ *Infra*, §§ 1581 *et seq.*

²² *Higgins v. Butler*, 78 Me. 520, 7 Atl. 276; *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447.

²³ *Henderson v. Hays*, 2 Watts, 148.

²⁴ *Nagle v. Baylor*, 3 Dr. & War. 60; *Moetsel v. Koch*, 122 Iowa, 196, 97 N. W. 1079; *Henderson v. Hays*, 2 Watts, 148.

²⁵ *Banaghan v. Malaney*, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378; *Cuff v.*

norant of the language,²⁶ which would not amount to the insanity or imbecility necessary to produce legal incapacity to contract,²⁷ will afford ground for refusing specific performance, especially if the bargain is not a fair one.

§ 1428. Inadequacy of consideration.

If the consideration for a promise is so inadequate as to warrant the conclusion that the nature of the bargain cannot have been fairly understood, specific performance will be denied;²⁸ especially when such inadequacy is taken in connection with other circumstances, even though they do not amount to actual fraud.²⁹ It is generally said that the inadequacy of consideration standing alone must be so extreme as to afford evidence of fraud, or it will be no bar to specific performance.³⁰ The absolute form of the statement is probably due originally to a purpose merely to deny that the English law has any principle like that of the Roman law which required as a condition of the validity of a contract that the price should exceed half of the value, and unquestionably it is undesirable to lay down a hard and fast rule of this sort. There are many degrees of inadequacy and as a matter of fact inadequacy of consideration

Dorland, 50 Barb. 438; *Spotts v. Eisenhauer*, 31 Pa. Super. Ct. 89.

²⁶ *Miller v. Tjexhus*, 20 S. Dak. 12.

²⁷ See *supra*, §§ 249 *et seq.*

²⁸ *Chesterfield v. Jansen*, 2 Ves. Sr. 125; *Day v. Newman*, 10 Ves. 300; *Savile v. Savile*, 1 Peere. Wms. 745; *Riordan v. Stout*, 17 D. C. App. Cas. 397; *Christian v. Ransome*, 46 Ga. 138; *Thayer v. Younge*, 86 Ind. 259; *Norris v. Clark*, 72 N. H. 442, 57 Atl. 334.

²⁹ *Cleere v. Cleere*, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; *Knott v. Giles*, 27 Dist. of Col. App. Cas. 581; *Shoop v. Burnside*, 78 Kans. 871, 98 Pac. 202; *Ratterman v. Campbell*, 26 Ky. L. Rep. 173, 80 S. W. 1155; *Wolford v. Steele*, 27 Ky. L. Rep. 88, 84 S. W. 327; *Higgins v. Butler*, 78 Me. 520, 7 Atl. 276; *Worth v. Watts*, 74 N. J. L. 609, 70 Atl. 357; *Great Northern R. Co. v. Sheyenne*

Tel. Co., 27 N. Dak. 256, 263, 145 N. W. 1062; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332; *Gough v. Bench*, 6 Ont. 699.

³⁰ *Coles v. Trecothick*, 9 Ves. 234, 246; *Callaghan v. Callaghan*, 8 Cl. & F. 374, 401; *Erwin v. Parham*, 12 How. 197, 13 L. Ed. 952; *Alabama Central R. Co. v. Long*, 158 Ala. 301, 48 So. 363; *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641; *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938; *Lee v. Kirby*, 104 Mass. 420; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Seymour v. DeLancey*, 3 Cow. 445, 15 Am. Dec. 270; *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186; *Kramer v. Dinsmore*, 152 Pa. 264, 25 Atl. 789. See also *Harri-son v. Guest*, 8 H. L. C. 481.

rarely does stand alone. There are always many surrounding circumstances, and it is certainly true that inadequacy of consideration in connection with other facts which of themselves would not bar relief may justify a refusal to enforce a contract. Moreover, if a case be supposed to arise on demurrer to the bill or otherwise where the only possible matter of objection is extreme inadequacy of consideration, to say that this of itself cannot be sufficient reason to refuse specific performance is inconsistent with the numerous cases which assert that the remedy is discretionary, and that harsh or unfair contracts will not be enforced.³¹ Surely inadequacy of consideration may make a bargain harsh and unfair, though it is not fraudulent.³²

§ 1429. Public policy.

If a contract is illegal or opposed to public policy, specific performance is obviously improper, and it is possible that specific performance may be opposed to public policy, though a recovery of damages at law would not be. A plaintiff who is ignorant of the facts on which illegality is based, may frequently recover at law on an illegal contract.³³ But specific performance of such a contract is another matter and though even this has been granted where public necessity required it,³⁴ such an instance is exceptional. On the other hand, in some cases contracts which might not be thought illegal at law will, nevertheless, be denied specific enforcement. The con-

³¹ *Supra*, § 1425.

³² See, e. g., *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317; *Koch v. Streuter*, 232 Ill. 495, 83 N. E. 1072; *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274; *Spotts v. Eisenhauer*, 31 Pa. Super. Ct. 89.

³³ See *infra*, § 1631.

³⁴ In *Seattle Electric Co. v. Snoqualmie Falls Power Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032, the court for a brief period specifically enforced a contract which was held illegal as designed to create a monopoly. A refusal to enforce the contract would have involved the sudden

cutting off of the supply of electricity upon which the transportation and lighting systems of the city of Seattle were dependent. The court held that the public interest required that the contract be performed until such time as an adequate supply of electricity could be otherwise procured. At law, the primary question is whether the plaintiff's part in the contract in question is so blameworthy that he should be denied recovery. (*Infra*, § 1630). In equity when specific performance is sought, there must be the further inquiry whether it is against public policy to have the contract performed.

tract of a fiduciary to convey or otherwise deal in violation of his trust with property to which that trust relates, may impose a personal liability upon him,³⁵ which could be enforced by the other party to the contract if he was ignorant of the circumstances rendering the contract fraudulent, but specific performance could not be allowed.³⁶ And generally, equity will not enforce specifically a contract which involves a breach of duty to a third person, and will certainly never do so where the plaintiff was chargeable at the time he entered into the contract with notice of the defendant's fiduciary duty; or if the equity of the third person is equal or superior to that of the plaintiff.³⁷ Even though a prior contract of the defendant with a third person was oral and unenforceable because of the Statute of Frauds, equity will not aid a plaintiff who subsequently entered into a written contract with the defendant, the performance of which would involve breach of the prior oral agreement.³⁸

§ 1430. Completeness of relief.

At least in the enforcement of affirmative promises a court of equity usually deems it neither wise nor just to enforce one or more of such promises in a contract unless it can enforce all of the contract outstanding at the time of the suit including the promises of the plaintiff as well as those of the defendant's.³⁹

³⁵ See *supra*, § 312, *infra*, § 1631.

³⁶ *Goodwin v. Fielding*, 4 De G. M. & G. 90, 105; *Cyrus v. Holbrook*, 32 Ky. L. Rep. 466, 106 S. W. 300; *Repetto v. Baylor*, 61 N. J. Eq. 501, 48 Atl. 774.

³⁷ "It is said that in no case will the court enforce the specific performance of a contract which amounts to a breach of trust, even though the purchaser be without fault. 2 Perry, Trusts, s. 787. However that may be, equity will not compel the specific performance of a contract to convey the legal title to real estate, which equitably belongs to one person, to a third person who has notice of such equity, but will leave the party to his action at law for damages. *Spence v. Hogg*, 1 Coll.

225; *Connihan v. Thompson*, 111 Mass. 270; *Annan v. Merritt*, 13 Conn. 478; *Green v. Finin*, 35 Conn. 178." *Abbott v. Baldwin*, 61 N. H. 582, 585.

³⁸ *Stitt v. Ward*, 142 N. Y. App. Div. 626, 127 N. Y. S. 351; *Patterson v. Marts*, 8 Watts, 374, 34 Am. Dec. 474. But see *Howe v. Howe & Owen Ball Bearing Co.*, 154 Fed. 820, 83 C. C. A. 536. See also *supra*, § 529.

³⁹ "This court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all." *Romilly, M. R. in Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18, 23; *Gervais v. Edwards*, 2 Dr. & War. 80; *Ogden v. Fossick*, 4 De G. F. & J. 426; *Nickels v. Hancock*, 7 De G. M. & G. 300; *Pantages v. Grauman*, 191 Fed. 317,

"Courts of equity . . . make it a condition of giving relief to the plaintiff that he shall submit to a decree made against him, also; and, indeed, they treat a plaintiff as so submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently."⁴⁰ The requirement that the relief given shall be complete not only excludes the jurisdictions of the court, where an entire contract cannot be specifically enforced, but also in order that the exclusion may be kept within as narrow limits as possible, leads the court to take jurisdiction of portions of a contract, which if standing alone would not be the subject of equitable relief. If the whole outstanding portion of a contract be of such a nature that equity *can* enforce it, and a part of it is of such a nature that equity *ought* to enforce it, then equity will enforce the whole, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well.⁴¹ Therefore, equity will give specific performance of a portion of a contract which provides for the sale of personalty of a kind for which damages are ordinarily regarded as a sufficient equivalent, when the remainder of the contract is of such a character as to give equitable jurisdiction.⁴² It is this desire to give complete relief that leads equity to give specific performance with compensation where the defendant is unable to perform in full, instead of leaving the plaintiff to adjust his damages at law after equity has given him such spe-

112 C. C. A. 61; *Tombigbee Valley R. Co. v. Fairford Lumber Co.*, 155 Ala. 575, 47 So. 88; *Fordyce Lumber Co. v. Wallace*, 85 Ark. 1, 107 S. W. 160; *Deitz v. Stephenson*, 51 Ore. 598, 95 Pac. 803; *Bannerot v. Davidson*, 226 Pa. 287, 75 Atl. 417; *Northern Texas, etc., Co. v. Lary* (Tex. Civ. App.), 136 S. W. 843.

⁴⁰ Langdell, 1 Harv. L. Rev. 361, quoted with approval in *Blanton v. Kentucky Distilleries, etc., Co.*, 120

Fed. 318, 351. See also *Catholic, etc., Soc. v. Oussano*, 215 N. Y. 1, 109 N. E. 80, Ann. Cas. 1917 A. 479.

⁴¹ A Brief Survey of Equity Jurisdiction (2d ed.), Langdell.

⁴² *Nutbrown v. Thornton*, 10 Ves. Jr. 159; *Brown v. Smith*, 109 Fed. 26; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Leach v. Fobes*, 11 Gray, 506, 71 Am. Dec. 732; *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067.

cific relief as is possible.⁴³ So, as an adjunct to specific performance, the purchaser is ordinarily allowed the rents and profits of the land or its rental value, and the vendor interest on the purchase money during the period between the day fixed by the contract and the day when conveyance is made;⁴⁴ but where interest exceeds the rents and profits if the delay was due to the vendor's fault, he will be allowed to retain the rents and profits, and allowed no interest.⁴⁵

For the same reason if a loss has taken place during the pendency of a bill to enforce the issue of a policy of insurance, equity will decree that the plaintiff shall recover the amount of his loss, and will not merely order the issue of a policy on which the plaintiff might bring an action at law.⁴⁶

§ 1431. Exceptions to the rule of complete relief.

There are some exceptions to the general rule that the decree must completely dispose of the contract between the parties. Cases where specific performance of part of a contract is given with damages or abatement of the price,⁴⁷ though opposed to the doctrine of mutuality as it is often stated,⁴⁸ are not at variance with the rule requiring a complete disposition of the controversy. Nor are cases where the parties have contracted with one another for the purchase of several lots. The question in that case is whether there is one contract or several and this problem is the same where specific performance is involved as in an action at law.⁴⁹ The mere fact that a single contract is divisible into several performances with a price fixed for each affords in itself no ground for a partial decree, for there is no reason to suppose contemporaneous performance of all the promises was not intended; but if the contract originally contemplated piecemeal performance, as if part of a lot was to be transferred for part of the total price at a time before the re-

⁴³ See *infra*, § 1436.

⁴⁴ See *Sweeney v. Brow*, 40 R. I. 281, 100 Atl. 593.

⁴⁵ *Esdaille v. Stevenson*, 1 Sim. & Stu. 122; *Jones v. Mudd*, 4 Russ. 118. See also *Worrall v. Munn*, 38 N. Y. 137.

⁴⁶ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187.

⁴⁷ See *supra*, § 844, *infra*, § 1436.

⁴⁸ See § 1433.

⁴⁹ See for a discussion of it, *supra*, § 863. See also *Croome v. Lediard*, 2 Myl. & K. 51; *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235.

mainder of the lot was agreed to be conveyed, there is no reason for denying specific enforcement of the earlier portion of the contract if the remaining performance has not become impossible, and if it is not yet due.⁵⁰ But the most frequent occasion for partial decrees is where the plaintiff has wholly or partly performed the consideration on his side and a decree of part of the performance promised by the defendant is necessary to protect the plaintiff's right to the performance promised in return for his own. In a strictly divisible contract if the plaintiff has performed a division of the contract, it is obvious that if the corresponding performance due from the defendant is land or some other matter of which equity takes jurisdiction, the plaintiff should have specific performance, whether the remaining performance under the contract is likely to be rendered or not. The defendant has come under an absolute and indefeasible duty to give the return agreed upon, for what the plaintiff has already done. Courts have, however, and with reason gone farther than this. In many cases of partly executed contracts, particular portions of the contract independent in their character have been specifically enforced,⁵¹ especially by injunction, though the whole contract could not be.⁵² This has been done in case of a particular covenant of a lease⁵³ or of a partnership agreement.⁵⁴

§ 1432. A decree need not be capable of complete immediate performance.

Two difficulties in giving specific performance are often presented by the same case and are sometimes confused together.

(1) The impossibility of making a decree which can be immediately completely executed and, (2), the fact that the terms of the contract require one side or the other to perform a series

⁵⁰ See *Wilkinson v. Clements*, L. R. 8 Ch. 96; *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235, 244.

⁵¹ *Mutual Oil Co. v. Hills*, 248 Fed. 257, 160 C. C. A. 335.

⁵² See *infra*, § 1450.

⁵³ *Rigby v. Gt. Western R.*, 15 L. J. Ch. 266, 2 Phillips, 44; *Jones v. Parker*, 163 Mass. 564, 40 N. E.

1044, 47 Am. St. Rep. 435. See also *Lytton v. Gt. Northern R.*, 2 K. & J. 394; *Wolverhampton &c. R. v. London &c. R.*, L. R. 16 Eq. 433.

⁵⁴ *Kemble v. Kean*, 6 Sim. 333; *Waring v. Manchester &c. R.* 7 Hare, 482, 496. See also *Rolfe v. Rolfe*, 15 Sim. 88.

of acts, or to make a continuous performance, enforcement of which would involve an extended supervision which equity is reluctant to exercise. Though the second difficulty involves the first, the first does not necessarily involve the second. In the typical case of a contract for the sale of land, the performance on one side or the other, though of a character such as equity most often enforces, may not be due until after the time when a decree should be rendered. It is often said, indeed, that a court of equity can grant specific performance only of matters which it can dispose of by a decree capable of present performance;⁵⁵ and undoubtedly the typical affirmative decree is one which can be presently executed on both sides. If the necessities of the case require it, however, an affirmative decree will be made which requires future action.⁵⁶ Specific performance of negative promises by means of injunction extending over a considerable period of time is common; and there seems no occasion to limit the capacity of equity in making affirmative decrees to any greater extent than the necessity and convenience of particular cases require.

§ 1433. Rule of mutuality as generally stated.

There is nothing in the law of specific performance which has given rise to so much confusion as the rule requiring mutuality in order that the plaintiff shall be entitled to specific performance. The rule has been stated as follows:

"A contract to be specifically enforced by the court must, as a general rule, be mutual,—that is to say, such that it might

⁵⁵ Fry on Specific Performance (5th ed.), Sec. 835; Langdell, Brief Survey of Eq. Jur. 50; Roquemore v. Mitchell, 167 Ala. 475, 480, 52 So. 423, 140 Am. St. Rep. 52.

⁵⁶ In *Noyes v. Bragg*, 220 Mass. 106, 107 N. E. 669, the plaintiff had contracted to buy a farm of the defendant for eleven hundred dollars in instalments of twenty-five dollars a month with interest on the unpaid purchase money. The plaintiff was given possession. After part payment by the plaintiff the defendant

repudiated the contract and conveyed the premises to a third person who had notice of the plaintiff's rights. The plaintiff was granted a decree for a conveyance upon his completing payment in full of the price at the agreed rate and times; while the decree also provided that he should pay past over-due instalments with interest and future instalments when due. See also the cases where continuous performance was decreed, *supra*, § 1423.

at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."⁵⁷ Understanding the word "enforced" in this passage to mean specifically enforced, the reader will see that as thus stated, the rule not only requires the existence of a valid contract but "mutuality" of remedy.⁵⁸ Of the attempts to apply the rule it has been said:

"The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember."⁵⁹ It is impossible to attempt here to collect and differentiate all the decisions which have dealt with the matter.⁶⁰ As the rule, if taken literally, is in conflict with numerous decisions, and its broader statements are falling into some discredit,⁶¹ this is the less essential. In the discussion of the cases

⁵⁷ Fry, *Specific Performance* (5th ed.), § 460.

⁵⁸ See to the same effect, Pomeroy, *Specific Performance*, § 165.

⁵⁹ Professor Langdell in 1 Harv. L. Rev. 104. It is criticised with equal severity by Pomeroy, *Eq. Jur.*, § 769; *Spec. Perf.*, § 169.

⁶⁰ They are collected and discussed by Professor William Draper Lewis in 49 *Amer. L. Rev.* 270, 382, 445, 507, 559, 50 *Amer. L. Reg.* 65, 251, 329, 523. Recent decisions stating the requirement in various terms, but on their facts generally reducible to the principle stated, *infra*, § 1440, are: *Taussig v. Corbin*, 142 Fed. 660, 73 C. C. A. 656; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Pantages v. Grauman*, 191 Fed. 317, 112 C. C. A. 61; *Black Diamond Coal Min. Co. v. Jones Coal Co.*, (Ala. 1917), 76 So. 42; *Pacific, etc., R. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; *Welty v. Jacobs*, 171

Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619; *Bartholomas, etc., Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058; *Parker v. Sargent*, 201 Ill. App. 574; *Kansas Const. Co. v. Topeka, etc., R.*, 135 Mass. 34, 46 Am. Rep. 439; *Carney v. Pendleton*, 139 N. Y. App. D. 152, 123 N. Y. S. 738; *Stokes v. Stokes*, 148 N. Y. 708, 43 N. E. 211; *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571; *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251; *Asberry v. Mitchell*, 121 Va. 276, 93 S. E. 638; *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164.

⁶¹ In *Javierre v. Central Alta-gracia*, 217 U. S. 502, 508, 54 L. Ed. 859, 30 Sup. Ct. 598. Holmes, J., said: "There is too a want of mutuality in the remedy, whatever that objection may amount to." In *Lamprey v. St. Paul, etc., R.*, 89 Minn. 187, 192, 94 N. W. 555, Start, C. J.,

mutuality of obligation as well as of remedy is often brought up; but the requirement of mutuality of obligation is simply the requirement of a valid contract, an obvious necessity, but better expressed in other language.⁶²

§ 1434. Ames's criticisms of the rule as generally stated.

In an illuminating article on the subject,⁶³ Ames objects to the rule as generally stated for the reason that "the truth of the following eight propositions, each one of which is at variance with the statement just quoted,⁶⁴ will be generally admitted:

"(1) A bilateral contract between a fiduciary and his principal is often enforced in favor of the principal, although not enforceable against him.⁶⁵

"(2) A similar contract procured by the fraud or misrepresentation of one of the parties may be enforced against him, although not by him.⁶⁶

"(3) In England, one who, after making a voluntary settlement, has entered into a contract to sell the settled property, may be compelled to convey, although he cannot force the buyer to accept a conveyance.⁶⁷

"(4) A vendor, whose inability to make a perfect title debars him from obtaining a decree against the buyer, may in many cases be forced by the buyer to convey with compensation.⁶⁸

"(5) Notwithstanding the opinions of Lord Redesdale and Chancellor Kent to the contrary, a party to a bilateral con-

said: "The doctrine of this court is that if a contract for the conveyance of real estate is supported by a valid consideration, and there is no other good reason why it should not be specifically enforced except the want of mutuality of remedy, it will be so enforced." In *Jones v. Tankerville* [1909] 2 Ch. 440, Parker, J., did not regard lack of mutuality as fatal to the plaintiff's right. See also *Great Northern R. v. Sheyenne Tel. Co.*, 27 N. Dak. 256, 263, 145 N. W. 1062, 19 Law

Quarterly, 341, as well as the articles of Ames referred to in the following section; and of Stone, 16 Col. L. Rev. 443.

⁶² See *supra*, § 140.

⁶³ 3 Columbia L. Rev. 1; Ames, *Lectures on Legal History*, 370.

⁶⁴ *I. e.*, the passage from Fry on Specific Performance quoted *supra*, § 1433.

⁶⁵ See *infra*, § 1435.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ See *infra*, § 1436.

tract, who has signed a memorandum of it, may be compelled to perform it specifically, although he could not maintain a bill against the other party who had not signed such a memorandum.⁶⁹

"(6) A contract between an infant and an adult may be enforced against the adult after the infant comes of age, although no decree could be made against the plaintiff.⁷⁰

"(7) A plaintiff who has performed his part of the contract, although he could not have been compelled in equity to do so, may enforce specific performance by the defendant.⁷¹

"(8) One who has contracted to sell land not owned by him, and who, therefore, could not be cast in a decree, may, in many cases, by acquiring title before the time fixed for conveyance, compel the execution of the contract by the buyer."⁷² These propositions may be more particularly examined.

§ 1435. Contracts voidable for fraud or defective title.

Where one party to a contract has been guilty of fraud, he cannot enforce the contract either at law or in equity unless it has been ratified after discovery of the facts by the other party.⁷³ Such a contract, therefore, is one which neither at the outset nor subsequently is enforceable by both parties. There is neither mutuality of obligation⁷⁴ nor mutuality of remedy in the sense in which those phrases are frequently and perhaps naturally understood, yet it cannot be doubted that the defrauded party may maintain a bill for the specific performance of a contract otherwise appropriate for equitable relief. Similarly where the defendant has been guilty of constructive fraud as where a trustee has contracted to buy property belonging to the trust⁷⁵ the transaction cannot be enforced by him, but against him it shall stand. And though a prior voluntary settlement made by a vendor will preclude him from enforcing a subsequent contract to sell,⁷⁶ the purchaser may have specific performance.⁷⁷ Similarly a contract perhaps void-

⁶⁹ See *infra*, § 1437.

⁷⁰ See *infra*, § 1438.

⁷¹ See *infra*, § 1439.

⁷² See *infra*, § 1435.

⁷³ See *infra*, §§ 1526 *et seq.*

⁷⁴ See *supra*, § 105.

⁷⁵ *Ex parte Lacey*, 6 Ves. 625.

⁷⁶ *Smith v. Garland*, 2 Meriv. 123.

⁷⁷ *Rosher v. Williams*, L. R. 20 Eq. 210.

able at its inception and for some time thereafter because of the vendor's incomplete title⁷⁸ may be specifically enforced by the vendor if he has acted in good faith, and at any time previous to decree is able to complete his title.⁷⁹

§ 1436. A vendor with an incomplete title may be compelled to convey.

As has been seen, a vendor who is not able to convey a perfect title, or whose ability to perform is deficient in some particular, can, nevertheless, enforce a contract specifically with compensation sufficient to make good the incompleteness of his performance provided the defect is not great, but only subject to this proviso.⁸⁰ A purchaser, on the other hand, can require defective specific performance with abatement of the price or with compensation, without regard to the extent of the deficiency, unless when he entered into the contract he was aware that the vendor was unable to fulfil the contract.⁸¹

⁷⁸ See *supra*, § 879.

⁷⁹ *Hoggart v. Scott*, 1 Russ. & M. 293; *Wylson v. Dunn*, 34 Ch. Div. 569; *Halkett v. Dudley*, [1907] 1 Ch. 590; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Day v. Mountain*, 137 Fed. 756, 70 C. C. A. 190; *Mackey Wall Plaster Co. v. United States Gypsum Co.*, 244 Fed. 275; *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578; *Guild v. Atchison, etc., R. Co.*, 57 Kan. 70, 45 Pac. 82, 33 L. R. A. 77, 57 Am. St. Rep. 312; *Logan v. Bull*, 78 Ky. 607; *Maryland Constr. Co. v. Kuper*, 90 Md. 529, 542, 45 Atl. 197; *Dresel v. Jordan*, 104 Mass. 407; *Lockett v. Williamson*, 37 Mo. 388, 395; *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889; *Johnson v. Higgins*, 77 Neb. 35, 108 N. W. 168; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1029, 30 L. R. A. (N. S.) 25, Ann. Cas. 1912 A. 319; *Jenkins v. Fahey*, 73 N. Y. 355; *Wilson v. Tappan*, 6 Ohio, 172; *Armstrong v. Maryland Coal*

Co., 67 W. Va. 589, 69 S. E. 195. See also *Blanton v. Kentucky &c. Warehouse Co.*, 120 Fed. 318 a. c. *sub nom.* 149 Fed. 31, 80 C. C. A. 343; and *supra*, § 852. A few contrary decisions based on lack of mutuality are not to be supported. *Gage v. Cummings*, 209 Ill. 120, 70 N. E. 679 (much qualified by *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578); *Luse v. Deits*, 46 Ia. 205. See also *Norris v. Fox*, 45 Fed. 406; *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900.

⁸⁰ See *supra*, § 844.

⁸¹ *Barnes v. Wood*, L. R. 8 Eq. 424; *Horrocks v. Rigby*, 9 Ch. Div. 180; *Burrow v. Scammell*, 19 Ch. D. 175; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258; *Dixon v. Anderson*, 252 Fed. 694, 164 C. C. A. 534; *Bogan v. Daughdrill*, 51 Ala. 312; *Bonner v. Little*, 38 Ark. 397; *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394; *Cochrane v. Justice Co.*, 16 Colo. 415, 26 Pac. 780; *Knox v. Spratt*, 23 Fla. 64, 66,

In a few cases where the defect in title is extreme the purchaser has been denied relief.⁸² Especially this has been held when the vendor was unable to obtain release of an inchoate right of dower.⁸³ But many jurisdictions allow specific performance,

6 So. 924; *Phinisy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680; *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826; *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884; *Wilson v. Brumfield*, 8 Blackf. 146; *Townsend v. Blanchard*, 117 Iowa, 36, 90 N. W. 519; *Pingree v. Coffin*, 12 Gray, 288, 316; *Covell v. Cole*, 16 Mich. 223; *Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142; *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. (N. S.) 595; *Chambliss v. Person*, 77 Miss. 806, 28 So. 21; *Luckett v. Williamson*, 31 Mo. 54; *Lanyon v. Cheaney*, 186 Mo. 540, 85 S. W. 568; *Borden v. Curtis*, 48 N. J. Eq. 120, 21 Atl. 472; *Keator v. Brown*, 57 N. J. Eq. 600, 42 Atl. 278; *Campbell v. Hough*, 73 N. J. Eq. 601, 68 Atl. 759; *Ferrell v. Bork*, 76 N. J. Eq. 615, 79 Atl. 897; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *Waters v. Travis*, 9 Johns. 450; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. 41; *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378; *Henry v. Liles*, 2 Ired. Eq. 407; *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824; *Ketchum v. Stout*, 20 Oh. St. 453, 459; *Lucas v. Scott*, 41 Oh. St. 636, 640; *Napier v. Darlington*, 70 Pa. 64; *Payne v. Melton*, 69 S. C. 370, 48 S. E. 277; *Harbers v. Gadsden*, 6 Rich. Eq. 284, 62 Am. Dec. 390; *Moses v. Wallace*, 7 Lea, 413; *Austin v. Ewell*, 25 Tex. 403; *Roberts' Heirs v. Lovejoy*, 60 Tex. 253; *Dunsmore v. Lyle*, 87 Va. 391, 393, 12 S. E. 610; *Morgan v. Brast*, 34 W. Va. 332, 12 S. E. 710; *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351; *Lathrop v. Columbia Collieries Co.*, 70 W. Va. 58, 73 S. E. 299; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W.

176; *Connor v. Potts*, [1897] 1 Ir. 534; *Stammers v. O'Donahue*, 28 Grant Ch. (Up. Can.) 207.

⁸² *Phillips v. Stanch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Chicago, etc., R. Co. v. Durant*, 44 Minn. 361, 46 N. W. 676; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *Eickwort v. Powers*, 17 N. Y. S. 137.

⁸³ In *Kuratli v. Jackson*, 60 Or. 203, 210, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195, Ann. Cas. 1914 A. 203, the court said: "It is said in *Riess's Appeal*, 73 Pa. 485, 491, that the dower right of the widow is of such a contingent nature, depending as it does upon her surviving her husband, as well as her continuing in life after his death, that no abatement in the price can be made which would be just to both parties, without in effect making a new contract for them; a contract which, perhaps in the first instance, neither party would have agreed to, certainly not the vendor. This is the holding in *Aiple-Hemmelmann, etc., Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, in which the opinion is exhaustive, and is supported by the authorities which are there collated. [The decision is overruled by *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915 C. 367.] The following cases support that view: *Reilly v. Smith*, 25 N. J. Eq. 158; *Riess's Appeal*, 73 Pa. 485; *Fortune v. Watkins*, 94 N. C. 304, 315; *Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097; *Sternberger v. McGovern*, 56 N. Y. 12, 19; *Lucas v. Scott*, 41 Oh. St. 641; *Graybill v. Brugh*, 89 Va. 895, 899, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894; *Barbour v. Hickey*, 2 App. D. C. 207,

with compensation in such a case,⁸⁴ and there seems little reason for making any exception to the general rule merely because the deficiency is extreme; and the purchaser should be and has been allowed to enforce the contract in such a case.⁸⁵ The only proper ground for refusing a decree with compensation is that no exact equivalent in compensation is possible, and it may be urged with some force that this is true where the defect in question is an inchoate right of dower. It is often objected that where the defect is extreme equity would be enforcing a contract which the parties did not make if it gave specific enforcement of part with compensation for the defect. If this objection were sound it would be fatal to any decree for less than the entire promised performance with compensation for the remainder. Equity has no more right to enforce as a contract something a little different from that which the parties undertook than one which is widely different. But the objection is unsound: The rule of equity requiring complete equitable relief if any is to be given,⁸⁶ is merely one of expediency. By the terms of this contract the purchaser is entitled, on paying the contract price for entire performance, to receive such partial performance as the vendor can give, and the purchaser after thus carrying out the bargain would also have a right of action against the vendor for the latter's failure to perform in full. A court of equity in giving relief with compensation is merely disposing in one suit of the two rights of the purchaser. In jurisdictions where damages for breach of contract by a vendor are restricted to a recovery of the purchase money⁸⁷ the damage allowed a purchaser who obtained specific performance with compensation, should be a proportional part of

24 L. R. A. 763; *Plum v. Mitchell*, 16 Ky. L. Rep. 162, 26 S. W. 391.

"Others hold that, if the vendee had knowledge that the vendor was married, specific performance with abatement will not be decreed. *Lucas v. Scott*, 41 Ohio St. 641; *Savings Bank Co. v. Parisette*, 68 Ohio St. 450, 67 N. E. 896, 96 Am. St. Rep. 672; *Downer v. Church*, 44 N. Y. 647; *Fortune v. Watkins*, 94 N. C. 304, 315." This was the decision in

Kuratli v. Jackson, 60 Oreg. 203, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195, Ann. Cas. 1914 A. 203.

⁸⁴ See *supra*, § 1422.

⁸⁵ *Jones v. Evans*, 17 L. J. Ch. 469; *Oceanic Co. v. Sutherbury*, 16 Ch. D. 236, 246; *Bass v. Gilliland's Heirs*, 5 Ala. 761; *Bogan v. Daughdrill*, 51 Ala. 312; *Napier v. Darlington*, 70 Pa. 64.

⁸⁶ See *supra*, § 1430.

⁸⁷ See *supra*, § 1399.

the purchase price. If the purchaser when he entered into the contract knew of the facts which subsequently prevented the vendor from conveying a perfect title, no compensation is allowed the purchaser who seeks specific performance.⁸⁸

§ 1437. A contract may be enforced though the plaintiff has not satisfied the Statute of Frauds.

It is the generally established law that a memorandum of a contract within the Statute of Frauds if signed by the party to be charged, though not signed by the other party, makes the contract enforceable against the party who has signed.⁸⁹ In some States, it is indeed held that in a contract for the sale of land the vendor must sign the memorandum in order that the contract shall be enforceable against either party, and that when signed by the vendor the memorandum is effectual to charge both parties to the contract.⁹⁰ In such jurisdictions no difficulty in regard to mutuality can be suggested. But under the more general rule, either party who signs and only a party who signs can be sued.⁹¹ It is obvious that on this theory where a memorandum is signed by one party only, the contract lacks mutuality of obligation and of remedy as those terms are ordinarily understood yet, in spite of a doubt expressed by Lord Redesdale,⁹² not only a court of law but a court of equity allows enforcement of such a contract by the party who has not satisfied the statute,⁹³ since the plaintiff by filing his bill submits

⁸⁸ *Castle v. Wilkinson*, L. R. 5 Ch. 534, 39 L. J. Ch. 843; *Mundy v. Shellabarger*, 161 Fed. 503, 88 C. C. A. 445; *Olson v. Lovell*, 91 Cal. 506, 27 Pac. 765; *Knox v. Spratt*, 23 Fla. 64, 6 So. 924; *Short v. Kieffer*, 43 Ill. App. 515; *Planer v. Equitable Life Assur. Soc. (N. J.)*, 37 Atl. 668; *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378; *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1; *People's Sav. Bank v. Parisette*, 68 Ohio St. 450, 67 N. E. 896, 96 Am. St. Rep. 672.

⁸⁹ *Supra*, § 586.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Lawrenson v. Butler*, 1 Sot. & Lef. 13. See also dicta of Chancellor Kent and Gibson, C. J., in *Clason v. Bailey*, 14 Johns. 485; *Wilson v. Clarke*, 1 Watts & S. 554.

⁹³ *Buckhouse v. Crosby*, 2 Eq. Ab. 32, pl. 44, 3 Sw. 434 n. (s. c.); *Fowle v. Freeman*, 9 Ves. 351; *Morgan v. Holford*, 1 Sm. & G. 101; *Martin v. Pycroft*, 2 D. M. & G. 785, 795; *Davis v. Robert*, 89 Ala. 402, 405, 8 So. 114, 18 Am. St. Rep. 126; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; *Perry v. Paschal*, 103 Ga. 134, 127, 29 S. E. 703; *Gradle*

himself to the jurisdiction of the court and enables it to give a decree compelling him as well as the defendant to perform.

§ 1438. Contracts with infants.

An infant is not allowed to enforce a contract specifically, because it is said the contract lacks mutuality.⁹⁴ This is often thought to mean merely that since the adult could not have enforced the contract against the infant, the infant is similarly deprived of equitable relief, but the difficulty is not simply that the adult could not have enforced the contract against the infant, but that even though the adult performed the contract, the infant might subsequently exercise his privilege to rescind the transaction. The decree of the court should not be used to deprive him of his privilege;⁹⁵ and unless he is deprived of it the adult is subjected to injustice if compelled to perform. This difficulty does not arise where the infant has come of age before seeking to enforce the contract. In such a case specific performance should be granted;⁹⁶ and also where the infant has irrevocably performed his side of the contract.⁹⁷

v. Warner, 140 Ill. 123, 29 N. E. 1118; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; *Shirley v. Shirley*, 7 Blackf. 452; *Brown v. Ward*, 110 Iowa, 123, 81 N. W. 247; *Getchell v. Jewett*, 4 Me. 350; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Slater v. Smith*, 117 Mass. 96; *Record v. Littlefield*, 218 Mass. 483, 106 N. E. 142; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. Rep. 592, *Smith v. Wilson*, 160 Mo. 657, 61 S. W. 597; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842; *Jasper v. Wilson*, 14 N. Mex. 482, 94 Pac. 951, 23 L. R. A. (N. S.) 982; *Flegel v. Dowling*, 54 Ore. 40, 102 Pac. 178, 135 Am. St. 812; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500; *LeVine v. Whitehouse*, 37 Utah, 260, 109 Pac. 2; *Ann. Cas.* 1912 C.

407; *Central Land Co. v. Johnson*, 95 Va. 223, 28 S. E. 175; *Creigh's v. Adm'r v. Boggs*, 19 W. Va. 240; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195.

⁹⁴ *Flight v. Bolland*, 4 Russ. 298; *Solt v. Anderson*, 63 Neb. 734, 89 N. W. 306. See also *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900. So where by statute written authority is required to enable a husband to bind his wife by a contract made by him with a third person as her agent, and no such authority was given, the contract will not be enforced against the third person. *Wood v. Lett*, 196 Ala. 601, 71 So. 177.

⁹⁵ *Ames's Lectures on Legal History*, 372.

⁹⁶ *Ibid.*, page 374; *Clayton v. Ashdown*, 9 Vin. Abr. 393.

⁹⁷ *Asberry v. Mitchell*, 121 Va. 276, 93 S. E. 638.

§ 1439. Unilateral contracts, and partly performed bilateral contracts.

It is obvious that there is neither mutuality of obligation nor of remedy in a unilateral contract, and in a bilateral contract after performance by one party there necessarily ceases to be any such mutuality. Nevertheless unilateral contracts may be specifically enforced.⁸⁸ The supposed rule of mutuality as stated by Fry requires that the contract at its inception should be capable of specific enforcement on both sides. If so a promise to convey land or do any other act of a nature which equity specifically enforces could not be enforced if the consideration was a counter promise to render services or to do any other acts of a nature which equity does not attempt to enforce, even though the counter-performance had been rendered. There is no propriety in such a rule,—and no good reason can be given to support it, or to distinguish the case from a contract, unilateral at the outset, to convey land; and in fact the cases are not distinguished. The promise for which specific performance is appropriate is enforced if the counter-promise or so much of it as is incapable of specific enforcement has been performed.⁸⁹ The case upon which Fry bases his statement to the contrary¹ from which subsequent mistaken statements have followed was a decision concerning an illegal contract, and the court rightly held that the fact that the illegal portion of the contract had been performed would not induce it to en-

⁸⁸ *Palmer v. Scott*, 1 Russ. & M. 391; *Wilks v. Georgia Pacific R. Co.*, 79 Ala. 180; *Davis v. Williams*, 121 Ala. 542, 25 So. 704; *Spires v. Urbahn*, 124 Cal. 110, 56 Pac. 794; *Frue v. Houghton*, 6 Colo. 318; *Perkins v. Hadsell*, 50 Ill. 216; *Western R. Corporation v. Babcock*, 6 Met. 346; *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

⁸⁹ *Wilkinson v. Clements*, L. R. 8 Ch. 96; *Lane v. May & Co.*, 121 Ala. 296, 25 So. 809; *Thurber v. Meves*, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; *Lindsay v. Warnock*,

93 Ga. 619, 21 S. E. 127; *Denlar v. Hill*, 123 Ind. 68, 24 N. E. 170; *Minneapolis & C. R. v. Cox*, 76 Ia. 306, 41 N. W. 24, 14 Am. St. 216; *Topeka & C. Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085, 115 Am. St. Rep. 596; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Asberry v. Mitchell*, 121 Va. 276, 93 S. E. 638. Cf. *Norris v. Fox*, 45 Fed. 406; *Pantages v. Grauman*, 191 Fed. 317, 323, 112 C. C. A. 61; *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571.

¹ Fry, *Spec. Perf.*, § 463, citing *Hope v. Hope*, 8 De G. M. & G. 731, 746.

force what had been promised in return. The enforcement by equity of confessedly gratuitous promises to convey land, because the promisee has entered and made improvements² shows even more strongly that it is not a condition of specific performance that the plaintiff shall at any time have been under a specifically enforceable obligation to the defendant.

§ 1440. True doctrine of mutuality.

Ames concludes his destructive criticism by the following suggestions:³

"If, however, we examine the actual cases in which a plaintiff failed to obtain specific performance of a contract solely on the ground that equity could not force him to perform his own counter-promise, we shall find that the underlying principle of the decisions is simple and just, easy to grasp and to carry in the mind, and one that may be expressed in few words without qualifying exceptions. This principle may be stated as follows: Equity will not compel specific performance by a defendant if, after performance, the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." In other words, the doctrine of mutuality involves the application to equitable procedure of the fundamental doctrines of the dependency of mutual promises.⁴

The principle thus stated requiring that the defendant shall not be compelled to perform if he has not received or cannot be assured by the decree what he bargained for as the exchange for his performance, seems sound and reasonable if the exchange promised by the plaintiff for the defendant's performance is due or overdue at the time of the decree, and this is the typical case; but if the defendant contracted to convey Blackacre on January 1, in return for the plaintiff's promise to render personal services in the following July, the defendant if compelled in January to perform specifically is subjected to no greater chance of loss than would have been involved in any event by his performance of the contract. He will have a right of action in July for the full value of the services if the plaintiff fails to

² See *supra*, § 139 *ad. fin.*

also 16 Col. L. Rev. 443, by Harlan F. Stone.

³ 3 Columbia L. Rev. 1; Ames, Lectures Leg. Hist. 370, 371. See

⁴ See *supra*, §§ 812 *et seq.*

perform them. However such a case might be decided, equity in its dealings with negative covenants, considerably amplifies the principle suggested by Ames, in the direction suggested.

The correct doctrine in regard to mutuality has been more than once enunciated by eminent judges, but other inconsistent and confused statements though generally made in cases which were properly decided on any view have somewhat obscured the matter.⁵

§ 1441. Options.

An option is a term of business usage rather than of strictly legal nomenclature, and has frequently been used to include indiscriminately both binding conditional contracts and mere unsealed offers without consideration. Such an offer has of course no binding force either at law nor in equity;⁶ but an option for which consideration has been given is both an offer and also a unilateral contract.⁷ The only difference in the two kinds of offers is that the former kind is revocable. In either case when the offer is seasonably accepted a new bilateral contract arises, and it is, strictly speaking, this contract which is

⁵ In *Forrer v. Nash*, 35 Beav. 167, Lord Romilly, M. R., said: "It is to be observed that there was no mutuality, for the defendant could not have had a decree against the plaintiff to perform the contract, because the court does not attempt to compel a person to do what is impossible. The plaintiff had no power to grant the lease, and neither the court nor the defendant could have compelled him to do so." In *Blackett v. Bates*, 1 Ch. App. 125, Lord Cranworth said, in refusing specific performance, that a court of equity "does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks,—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a

right to enforce the performance by plaintiff of daily duties during the whole term of the lease. The court has no means of enforcing the performance of those duties." In *Strang v. Railroad Co.*, 101 Fed. 511, 516, 41 C. C. A. 474, Simonton, J., said: "The bill, in purpose and substance, is for the specific performance of a contract to build the road. If the court could undertake to order the defendant, on its part, to fulfill all the parts of its contract, it must order the plaintiff, on his part, to fulfill his contract: that is, to build the road. A contract to be specifically performed, must be mutual." See also *Blanton v. Kentucky Distilleries, etc., Co.*, 120 Fed. 318, affd. 149 Fed. 31, 80 C. C. A. 343; *Roller v. Weigle* (App. Dist. Col.), 261 Fed. 250.

⁶ See *supra*, § 55.

⁷ See *supra*, § 61.

specifically enforced.⁸ Failure to recognize this has sometimes caused confusion. It is indeed abundantly settled that if the option was given for valid consideration the acceptor may enforce it;⁹ and it is not necessary that the consideration shall have been given exclusively for the option. It is enough if it is one term of a contract for which consideration was given. Thus an option in a lease or in another instrument given contemporaneously with a lease and as part of the same transaction, may be specifically enforced.¹⁰ Even though no consideration was given for the option it is, nevertheless, enforceable if under seal in a jurisdiction where seals still retain their com-

⁸ *Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97.

⁹ *Lawes v. Bennett*, 1 Cox Ch. 167; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213; *Dunlop v. Baker*, 239 Fed. 193, 152 C. C. A. 181; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; *Meyer v. Jenkins*, 80 Ark. 209, 96 S. W. 991; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; *Thomas v. Gottlieb, etc., Brewing Co.*, 102 Md. 417, 62 Atl. 633; *Boston, etc., R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 Am. St. Rep. 586; *Warren v. Castello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915 C. 367; *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25; *Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97; *Fox v. Hawkins*, 150 N. Y. App. D. 801, 135 N. Y. S. 245; *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 159, 65 S. E. 932,

934, 134 Am. St. Rep. 982; *Gilbert v. Port*, 28 Oh. St. 276; *People's St. R. Co. v. Spencer*, 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 22; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195; *Wall v. Minneapolis, etc., R. Co.*, 86 Wis. 48, 56 N. W. 367; *Andrews v. Calori*, 38 Can. Sup. Ct. 588. In *Kennerley v. Simonds*, 247 Fed. 822, the court declined to give an injunction restraining an author from publishing elsewhere, who as part of a contract had given the plaintiff the "refusal" of his later work.

¹⁰ *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *De Rutte v. Muldrow*, 16 Cal. 505; *Soper v. Myers*, 45 App. Dist. Col. 286; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Stansbury v. Fringer*, 11 Gill. & J. 149; *Murphy v. Anderson*, 128 Minn. 106, 150 N. W. 387; *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915 C. 367; *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Thomason v. Smith*, 88 N. J. Eq. 476, 103 Atl. 25; *Carney v. Pendleton*, 139 N. Y. App. D. 152, 123 N. Y. S. 738; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485.

mon law significance.¹¹ The enforcement of such an option is no exception to the rule that equity will not enforce a contract without consideration, for, as has been said, it is the contract created by the acceptance of the option which is enforced, and it might as well be said that no contract which originated in an offer and a subsequent acceptance could be enforced as to deny enforcement to a contract arising from the acceptance of an option. It is true, that if an attempt has been made to revoke the offer contained in an option for which consideration has been given or which is under seal, to deny effect to the revocation and treat the offer as irrevocable is equivalent to a preliminary specific performance, but it is not effected by a decree in equity. A court of law as well as a court of equity assumes the irrevocability of such offers.¹² An option for which no consideration is given, and which is not under seal is subject to the same rule if accepted before revocation or expiration by lapse of time, for every offer is an option, revocable or not as the case may be, for the time therein stated, or if no time is stated for a reasonable time; and cases which hold that a contract based on an option is not specifically enforceable,¹³ because the option at the outset lacked mutuality are suggesting a test which is not only intrinsically unreasonable, but is destructive of the right to enforce any contract based on acceptance of a continuing offer.

§ 1442. Terminable contracts.

Equity will not enforce a contract specifically which the defendant has a right under the contract to terminate immedi-

¹¹ *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Thomason v. Bescher*, 176 N. Car. 622, 97 S. E. 654, 2 A. L. R. 626; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501. But see *contra*—*Rude v. Levy*, 43 Col. 432, 96 Pac. 560, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123; *Corbett v. Cronkhite*,

239 Ill. 9, 87 N. E. 874; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755. See also *Levin v. Diets*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251, and the criticism of it by Harlan F. Stone in 16 Col. L. Rev. 443, 452.

¹² See *supra*, § 61.

¹³ *E. g.*, *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

ately, as a contract to enter into a partnership,¹⁴ or lease,¹⁵ terminable at the will of the defendant. Partly from confusion with this principle, partly for alleged lack of mutuality, specific performance has been refused in a number of cases because the plaintiff had a power given him under the contract to terminate it after a certain time or on giving a certain notice, or on paying a trifling sum of money, and no such power was given the defendant.¹⁶ There seems no foundation for any such broad rule.¹⁷ Doubtless such a contract may be so harsh or one sided

¹⁴ *Hercy v. Birch*, 9 Ves. 357; *Wilcox v. Williams*, 92 Hun, 250, 36 N. Y. S. 944. A qualification is, however, stated in *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Indiana, 665, 671, 59 N. E. 995.

"The general rule is that a partnership contract cannot be specifically enforced; that is, it is impracticable for a court of equity to compel one person to act in the relation of a partner to another; but if a party, on the faith of another's agreement to execute certain articles of co-partnership, has placed himself in a position from which he can not be restored except by counting on the legal rights which were to be evidenced by the articles, a court of equity will decree the execution of the articles, although the partnership might be terminated by the defendant immediately. *Satterthwait v. Marshall*, 4 Del. Ch. 337, 354; *Whitworth v. Harris*, 40 Miss. 483, 491; *Birchett v. Bolling*, 5 Munf. (Va.) 442. Note to *Crawshay v. Maule*, 1 Swan. 495, 513; *Buxton v. Lister*, 3 Atk. 383; *England v. Curling*, 8 Beav. 129; *Gow on Partnership* (1st Am. ed.), pp. 148, 149; *Parsons on Partnership* (4th ed.), § 163, and notes; *Story on Partnership* (7th ed.), §§ 188, 189, and notes; 1 Md. Ch. Pr. (3d ed.) 411, note."

¹⁵ *E. g.*, because the plaintiff has already broken a condition. *Rankin v. Lay*, 2 De G. F. & J. 65, 72; *Lillie*

v. Legh, 3 De G. & J. 204; *St. Joseph, etc., Co. v. Globe, etc., Co.*, 156 Ind. 665, 671, 59 N. E. 995.

¹⁶ *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373, 121 Fed. 674, 57 C. C. A. 428; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696; *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344; *Rust v. Conrad*, 47 Mich. 449, 11 N. W. 285, 41 Am. Rep. 720 (but see *Grummett v. Gingrass*, 77 Mich. 369, 388, 43 N. W. 999); *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334; *Dockstader v. Reed*, 121 N. Y. App. Div. 846, 106 N. Y. S. 795; *Soloman v. Wilmington Sewerage Co.*, 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391. A number of suits on contracts of baseball players, in which the clubs employing them were given such options have been rested in part on the ground stated in the text. These cases are collected and discussed by Gilbert in 4 Cal. L. Rev. 114.

¹⁷ See *Rolfe v. Rolfe*, 15 Sim. 88; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 36 L. Ed. 776, 12 Sup. Ct. Rep. 900; *Singer Sewing Mach. Co. v. Union Button Hole, etc., Co.*,

that equity should decline to enforce it and this explains some of the decisions; but the mere fact that one party to a contract is given a right which the other is not is no reason for refusing equitable relief.¹⁸ In the numerous cases where injunctions are granted restraining competition, the court enforces a promise of the defendant which has no correlative promise on the part of the plaintiff; and in the common case of an option for which payment has been made there is a promise to buy or sell as the case may be without a corresponding obligation on the other side.¹⁹ Such contracts are it is true ordinarily unilateral, but it surely can make no difference in the validity of an option that instead of paying \$100 for it the promisee agrees to pay that or any other sum or to do any act. In such a contract the party having the option will in effect have a bargain for the property under option with a right to terminate all liability by paying the agreed price of the option; while the other party will have no corresponding power to terminate his liability. In New York a still further restriction has been placed on the right to enforce specifically terminable contracts. Where each

Holmes, 253; *Philadelphia Baseball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. Also criticisms by Pomeroy in 36 Cyc. 632, and by Schofield in 3 Ill. L. Rev. 43. In *McCall Company v. Wright*, 198 N. Y. 143, 153, 91 N. E. 516, 31 L. R. A. (N. S.) 249, the court said with reason, though with some lack of consistency with earlier decisions:

"A court of equity does not refuse under otherwise proper circumstances to restrain a continuing violation of a valid subsisting obligation not to injure another, simply because that other has the option to cancel the obligation by terminating the agreement which creates it. It seems to me that no element of mutual obligation is involved. One party has furnished a good consideration for which the other has agreed to refrain from doing certain things, and it is no excuse for a violation

of the agreement while it lasts that the beneficiary may at some time terminate it. A perfectly familiar illustration of this class of actions is the one brought by a vendor of real estate to restrain a violation by the vendee of a restrictive covenant in the deed. There is at the time no mutual obligation resting on the vendor. But the vendee for a good consideration has agreed not to do certain things and I apprehend it would not be a defense to an action to restrain his violation that the vendor might in the future do something which would terminate the obligation."

¹⁸ *Boonton v. United Water Supply Co.*, 83 N. J. Eq. 536, 91 Atl. 814. See also *Conley Camera Co. v. Multiscope & Film Co.*, 216 Fed. 892, 133 C. C. A. 96.

¹⁹ See *Conley Camera Co. v. Multiscope & Film Co.*, 216 Fed. 892, 133 C. C. A. 96; and *supra*, § 1441.

party was given a right after three years to terminate an employment for five years, and it was so terminated by the plaintiff, the court refused to enforce a promise of the defendant not to give his services to a competitor of the plaintiff for the full term of five years.²⁰ It will be noticed that the contract had been wholly performed on both sides, except the negative promise in question, and in substance the situation was exactly like the common provision that for a limited time after the expiration of a contract of employment the employee will not compete with his employer or enter into the service of a competitor. Such contracts are enforced in New York ²¹ as well as elsewhere unless they are under the particular circumstances harsh, or so unreasonably or unnecessarily in restraint of trade as to be opposed to public policy.

§ 1443. Mutuality as a reason for giving relief where the plaintiff has an adequate remedy at law.

The ordinarily received rule of mutuality ²² is open to objection also when applied as a reason for giving a plaintiff relief which it is possible though not essential for equity to give. In such a case the argument runs that since the defendant would unquestionably be given equitable relief if he were suing, the plaintiff also must have a right to specific performance. Where promises are mutually binding, justice requires that each promise should be adequately enforced; and further if not only the promises but the performances promised are, as is almost always the case,²³ intended as the price or exchange for each other, that one party should not be required to perform specifically when he will acquire thereby merely a right of action for damages; at least unless the terms of the contract indicate that he assumed that risk, by agreeing to perform at an earlier date than the other party. But if a court of law can effect the desired result on one side as fully as a court of equity,

²⁰ *Star Co. v. Press Pub. Co.*, 162 N. Y. App. D. 486, 147 N. Y. S. 579; See also *Winslow v. Mayo*, 123 N. Y. App. D. 758, 108 N. Y. S. 640, and criticism by Stone in 16 *Columbia L. Rev.* 443, 460.

²¹ *Mutual Milk Co. v. Prigge*, 112 N. Y. App. D. 652, 98 N. Y. S. 458; *Mutual Milk Co. v. Heldt*, 120 N. Y. App. D. 795, 105 N. Y. S. 661.

²² *Supra*, § 1433.

²³ See *supra*, §§ 813, 888.

and an equitable remedy is necessary for the enforcement of the promise on the other side, there seems no reason why a court of equity should give a remedy to each party;²⁴ and in fact though a vendor of land may specifically enforce the contract against the purchaser while the contract is still unperformed on his part,²⁵ if the vendor has fully performed so that nothing remains to be done by the purchaser but to pay the price (and probably if the price or an instalment of it is payable before and independently of the conveyance, the time for making which has not arrived), so that the vendor would recover at law the same amount that he would be given in equity, there is an adequate remedy at law, and there seems no reason why equity should take jurisdiction.²⁶ It has been suggested as a better justification for allowing a suit by the vendor than the necessity of mutuality which is the usual explanation, that the vendor holds the legal title to his property, subject to equitable rights in the purchaser, who is therefore entitled to the aid of the court of equity to adjust their rights.²⁷ It is true that if similar relief were obtainable at law, the vendor's right to come into equity would be doubtful. The vendor under an executory contract to sell chattels of unique or special character²⁸ may

²⁴ *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404; *Northern Central R. v. Walworth*, 193 Pa. 207, 213, 44 Atl. 253, 74 Am. St. Rep. 683.

²⁵ *Lewis v. Lechmere*, 10 Mod. 503. Of the numerous modern decisions, see, e. g., *Eastern Countries R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Cathart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120; *David v. McRae*, 183 Fed. 812; *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305, 138 Am. St. 167; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761; *Migats v. Stieglitz*, 166 Ind. 361, 77 N. E. 400; *Staples v. Mullen*, 196 Mass. 132, 81 N. E. 877; *Abbott v. Moldestad*, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348; *Moore v. Baker*, 62 N. J. Eq. 208, 49 Atl. 836; *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475; *Curtis Land, etc., Co. v. Interior*

Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

²⁶ Jurisdiction was denied in a suit for a preliminary instalment of the price in *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97, and in support of this decision Mr. Ames says (*Lectures on Legal History*, page 380): "a lessee, to put another illustration, may compel an execution of a lease, but will any one maintain that a lessor, who has executed a lease may collect the rent by a bill in equity? We may dismiss this phrase of the doctrine of mutuality from our minds."

²⁷ Ames, *Lectures Legal Hist.*, p. 380; *Stone*, 16 Columbia L. Rev. 451; *Cook*, 6 Am. Law. & Proc. 183.

²⁸ *Young v. Collier*, 31 N. J. Eq. 444; *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404;

therefore enforce specifically his contract with the purchaser; but it may be questioned whether corresponding relief should be given the purchaser in a jurisdiction where a court of law allows recovery of the full contract price in an action at law on an executory contract.²⁹

All of these results would be sufficiently explained by saying that where the legal remedy secured not only adequate redress, but practically identical redress with that which could be given by equity, equity will decline jurisdiction. It must be admitted, however unsatisfactory the reason may be for the vendor's right specifically to enforce the contract that it is in order to give him a mutual remedy, that nevertheless historically this idea of mutuality is the basis of his right; and the new explanation is somewhat inadequate because, for instance, if on account of fraud or other reason the purchaser could not enforce the contract it cannot be doubted that the vendor might do so although the purchaser had no equitable right of which enforcement was necessary.³⁰

§ 1444. Damages as alternative relief.

If the subject-matter of a contract is suitable for specific performance and the plaintiff was ignorant when he brought his bill that specific performance was impossible, the bill will not be dismissed, but in order to give complete relief and thereby prevent unnecessary litigation the plaintiff will be awarded damages without being compelled to resort to a court of law.³¹ *A fortiori* this relief will be granted where the defendant's inability to perform supervenes during the pendency of the bill.³² "This practice is not confined to cases where the relief sought

Cogent v. Gibson, 33 Beav. 557; *Perin v. Megibben*, 53 Fed. 86, 3 C. C. A. 443; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963; *Law v. Smith*, 68 N. J. Eq. 81, 59 Atl. 327.

²⁹ See *supra*, § 1365; *Northern Central R. v. Walworth*, 193 Pa. 207, 213, 44 Atl. 253, 74 Am. St. Rep. 683.

³⁰ *G. L. Clark*, 31 Harv. L. Rev. 274.

³¹ *Milkman v. Ordway*, 106 Mass. 232 (discussing the authorities). But

see *Van Allen v. New York &c. R. Co.*, 144 N. Y. 174, 179, 38 N. E. 997.

³² *Graves v. Ashburn*, 215 U. S. 331, 335, 54 L. Ed. 217, 30 Sup. Ct. 108; *Altoona, etc., Co. v. Kittanning, etc., R. Co.*, 126 Fed. 559; *Fleming v. Ellison*, 124 Wis. 36, 102 N. W. 398. See also *Wingert v. First Nat. Bank*, 223 U. S. 670, 672, 32 Sup. Ct. 391, 56 L. Ed. 605; *Lewis v. North Kingstown*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724.

is prevented by act of the defendant.³³ In many instances the change of circumstances arising from the lapse of time, renders the specific relief unsuitable or inequitable."³⁴ But if the plaintiff when he files his bill knew, or should have known that specific performance was impossible, the plaintiff must by amendment or new proceedings seek relief in an action at law.³⁵

§ 1445. An injunction as a means of specific performance.

A court may order specific performance of a negative promise by enjoining breach of it; and if a contract consisted wholly of negative stipulations complete specific performance could be granted in that way—more complete in fact than is ordinarily possible with affirmative promises; for while equity rarely grants an affirmative decree for the enforcement of a contract until it has been broken, it frequently grants an injunction to restrain a threatened breach.³⁶ The fundamental basis for granting relief by injunction is the same as for granting affirmative relief; namely, the inadequacy of damages. If the breach of a negative stipulation cannot be adequately compensated in damages the general basis for relief is established. The enforcement by an injunction of a negative promise does not present the difficulties of procedure which limit the enforcement of affirmative. It is always possible for the defendant to refrain from doing anything, and it involves no strain-

³³ *Rosen v. Mayer*, 224 Mass. 494, 495, 113 N. E. 217, citing *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613,

³⁴ *Ibid.*, citing *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536; *Lexington Print Works v. Canton*, 171 Mass. 414, 50 N. E. 931; *DeMinico v. Craig*, 207 Mass. 593, 94 N. E. 317, 42 L. R. A. (N. S.) 1048; *Wentworth v. Manhattan Market Co.*, 216 Mass. 374, 103 N. E. 1105. See also *McCormick v. Oklahoma City*, 203 Fed. 921, 122 C. C. A. 215.

³⁵ *Clark v. Rosario &c. Co.*, 176 Fed. 180, 99 C. C. A. 534; *Bromberg v. Eugenotto Constr. Co.*, 158 Ala. 323, 48 So. 60, 19 L. R. A. (N. S.)

1175; *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755; *Eggert v. Pratt*, 126 Iowa, 727, 102 N. W. 786; *Van Keuren v. Siedler*, 73 N. J. Eq. 239, 66 Atl. 920; *Knudston v. Robinson*, 18 N. D. 12, 118 N. W. 1051; *Kerlin v. Knipp*, 207 Pa. St. 649, 57 Atl. 34.

³⁶ *Star Chronicle Pub. Co. v. New York Evening Post*, 256 Fed. 435, 167 C. C. A. 563; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476; *Kearny v. Mayor*, (N. J. Eq. 1919), 107 Atl. 169; *Lattimer v. Livermore*, 72 N. Y. 174; *Dailey v. New York*, 170 N. Y. App. D. 267, 156 N. Y. S. 124, affd. without opinion, 218 N. Y. 665, 113 N. E. 1053. See also 42 N. J. Law J. 102.

ing of equitable powers to compel him to refrain. Indeed it has been said that an injunction will always be granted to enforce a unilateral negative contract, or a negative promise which though forming part only of the contract originally made by the parties is all that remains unperformed; and similarly where a negative covenant though part only of an outstanding contract is independent of the rest.³⁷ This may be doubted.³⁸

Courts have not infrequently said that a clear negative stipulation may be enforced by injunction, though damages might afford adequate relief.³⁹ But the explanation of such remarks can only be that to some extent the cases where damages are regarded as inadequate have become absolutely classified, and any case which falls within a class where relief is habitually given will be enforced without reference to the particular needs of the plaintiff. Thus contracts regarding land are given a somewhat artificial importance, and inquiry is not made in case of such a contract whether damages would afford adequate relief. The true rule appears to be that an injunction will not be granted unless the court would, if it were possible to do so, grant specific performance of an affirmative agreement relating to the same matter.⁴⁰ If this is shown, the right to an injunction is clear, not only where a negative covenant is the sole outstanding obligation of the contract, but where the defendant's negative obligation is independent.

§ 1446. Contracts in restraint of trade.

The ordinary method of enforcement of covenants by a vendor in restraint of trade so far as they are legal is by injunction.⁴¹

³⁷ Langdell, *Survey Eq. Jur.* 68.

³⁸ In *Fothergill v. Rowland*, L. R. 17 Eq. 132, an injunction restraining the sale of coal to others than the plaintiff to whom the defendant had promised all he should mine, was refused because loss of coal could be compensated by damages. See also *Bartholomæ & Co. v. Modselewski*, 269 Ill. 539, 109 N. E. 1058.

³⁹ *Doherty v. Allman*, 3 App. Cas. 709; *DeMattos v. Gibson*, 4 De G. &

J. 276; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Andrews v. Kinsbury*, 212 Ill. 97, 72 N. E. 11; *Walker v. McNulty*, 19 N. Y. Misc. 701, 45 N. Y. S. 42; *Emrick v. Groome*, 4 Pa. Dist. 511.

⁴⁰ *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180. As to the practice of enforcing affirmative obligations by enjoining their non-performance, see *supra*, § 1423, *ad fin.*

⁴¹ A few of many instances of the enforcement of such promises are

So where as part of a contract of employment or of partnership the employee or partner makes a valid agreement not to engage in a competing business during the term of his employment or subsequently, an injunction is allowed. The right is not based on the unique or special character of the service promised but upon the proposition that the defendant's qualifications for injuring the plaintiff by competition with him are "special, unique and extraordinary."⁴² The limitations on the validity of such agreements are elsewhere considered.⁴³ Analogous instances of enforceable negative promises are stipulations in a lease or other conveyance not to use land in a certain way,⁴⁴ or promises not to manufacture or sell a patented article in vio-

Dubowski v. Goldstein, [1896] 1 Q. B. 478; Archer v. Marsh, 6 A. & E. 959; Tallis v. Tallis, 1 E. & B. 391; Davis v. Booth, 121 Fed. 31, 65 C. C. A. 269; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781 [reversing 103 Ill. App. 212]; Beatty v. Coble, 142 Ind. 329, 41 N. E. 590; Rowe v. Toon (Ia.), 169 N. W. 38; Ropes v. Upton, 125 Mass. 258; Angier v. Webber, 14 Allen, 211, 92 Amer. Dec. 748; Butterick Publishing Co. v. Fisher, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283; (cf. Standard Fashion Co. v. Magrane-Houston Co., 251 Fed. 559, 163 C. C. A. 553, 259 Fed. 793 [C. C. A.]); Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 490; Althen v. Vreeland (N. J.), 36 Atl. 479; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357; Salzman v. Siegelman, 102 N. Y. App. D. 406, 92 N. Y. S. 844; Comerma Co. v. Comerma, 182 N. Y. App. D. 576, 169 N. Y. S. 884; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733;

Hulen v. Earel, 13 Okla. 246, 73 Pac. 927; Stofflet v. Stofflet, 160 Pa. St. 529, 28 Atl. 857; Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; Richards v. Shipley, 257 Pa. 134, 101 Atl. 456; Swanson v. Sims, (Utah, 1917), 170 Pac. 774.

⁴² McCall Co. v. Wright, 133 N. Y. App. D. 62, 117 N. Y. S. 775, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249. See also Robinson v. Heuer, 67 L. J. Ch. 644; Rousillon v. Rousillon, 14 Ch. D. 351; Carter v. Alling, 43 Fed. 208; Kinney v. Scarborough Co., 138 Ga. 77, 74 S. E. 772, 40 L. R. A. (N. S.) 473; Old Rose Distilling Co. v. Feuer, 202 Ill. App. 210; Marvel v. Jonah, 83 N. J. Eq. 295, 90 Atl. 1004; Magnolia Metal Co. v. Price, 65 N. Y. App. D. 276, 72 N. Y. S. 792; Mutual Milk & Cream Co. v. Heldt, 120 N. Y. App. D. 795, 105 N. Y. S. 661; Cf. Rosenstein v. Zents, 118 Md. 564, 85 Atl. 675, 44 L. R. A. (N. S.) 63; Gilbert v. Wilmer, 102 N. Y. Misc. 388, 168 N. Y. S. 1043.

⁴³ *Infra*, §§ 1633 *et seq.*

⁴⁴ DeWilton v. Saxon, 6 Ves. 106; Rankin v. Huskisson, 4 Sim. 13; Bramwell v. Lacy, 10 Ch. Div. 691; Hudson v. Cripps, [1896] 1 Ch. 265; Pope v. Bell, 35 N. J. Eq. 1.

lation of an agreement between the parties.⁴⁵ Where the plaintiff has been given an exclusive agency or right by the defendant, dealings with third persons in violation thereof may be enjoined.⁴⁶

§ 1447. *Lumley v. Wagner.*

The chief problems in the enforcement by injunction of negative promises arise where the negative promise is only part of an outstanding bilateral contract consisting of dependent promises, not all of which are specifically enforceable—as notably where they are personal in their nature. In 1852 Lord St. Leonards decided the case of *Lumley v. Wagner*,⁴⁷ which has subsequently been the leading authority for an extension of the right to enforce such negative promises, especially in contracts of personal service, but also in other contracts. The defendant in that case had agreed to sing at the plaintiff's theatre, from the first of April to the first of July following the date of the contract. She further contracted not to sing elsewhere during that period. The court, though professing inability to enforce the whole contract specifically, granted an injunction, restraining her from singing elsewhere. It is obvious that this decision violates two principles which have been generally supposed to be rules of equity:—

(1) That specific performance of part of a defendant's obligation will not be granted, leaving outstanding further connected obligations to the plaintiff for which the only remedy would be an action for damages.⁴⁸

(2) The rule of mutuality; since the defendant is compelled

⁴⁵ *American, etc., Co. v. Crossman*, 57 Fed. 1021; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

⁴⁶ *Dietrichsen v. Cabburn*, 2 Phillips, 52; *Donnell v. Bennett*, 22 Ch. D. 835. See also *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Cf. Fothergill v. Rowland*, L. R. 17 Eq. 132, stated in the preceding section, n. 38.

⁴⁷ 1 De G. M. & G. 604.

⁴⁸ See *supra*, § 1430. It is expressly assumed by Lord St. Leonards that the plaintiff might bring an action for

damages for the defendant's failure to sing at his theatre. The case does not come within the recognized exceptions to the requirement of complete enforcement discussed in a preceding section (§ 1431). Had the plaintiff bought of the defendant a record of her voice, a covenant on her part not to sing in the future, given in order to enhance the value of the record, would have afforded a clear basis for relief, but the decision cannot be thus explained.

to perform a material part of her promise, when her only redress if the plaintiff fails to perform on his part will be an action for damages.

More specifically, the case is inconsistent with several earlier decisions denying a plaintiff an injunction to enforce a negative covenant where the court was unable to enforce specifically a correlative affirmative undertaking.⁴⁹ For this reason, the decision has been frequently criticized, but it has nevertheless been followed both in England,⁵⁰ and in the United States;⁵¹ but what the boundaries are of the principle for which it stands has been the subject of dispute. The contract in question was one of service; the service was of an expert and peculiar character; there was an express negative covenant and though the defendant's entire performance was not, this particular covenant was fully enforced by the injunction; performance of this negative covenant was of value to the plaintiff apart from its correlative affirmative, since competition would thereby be limited. Which of these circumstances are essential for the jurisdiction?

§ 1448. Negative covenants may be implied.

Every promise can be put either in a negative form or an affirmative form. Thus a promise to do any specific thing may be translated into a promise to refrain from doing anything else but that; and a promise not to do a particular act may be translated into a promise to be constantly occupied with other acts than the one in question. Nevertheless feasant differs from non-feasant, and a duty of inaction in whatever form it is put is in its essence negative. A promise of forbearance, therefore, though affirmative in form is in substance negative. Conversely a duty of action is affirmative though put in a negative form, as a promise not to discharge an employee. Moreover, a promise which is affirmative both in form and substance may carry with it not only an agreement to do what is specifically agreed, but by necessary implication an agreement not

⁴⁹ *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; *Baldwin v. Society for Diffusing Useful Knowledge*, 95 Sim. 393; *Hills v. Croll*, 2 Phillips, 60.

⁵⁰ *Donnell v. Bennett*, 22 Ch. D. 835; *Grimston v. Cuninghame* (1894), 1 Q. B. 125; *William Robinson & Co. v. Heuer* (1898), 2 Ch. 451.

⁵¹ See cases cited *infra*, § 1450.

to do anything inconsistent therewith.⁵³ It must be recognized, therefore, in any discussion of negative promises, that they are of four classes, namely:

(1) Where the promise is expressly negative in form and substance;

(2) Where it is negative in substance but affirmative in form;

(3) Where it is negative in form but affirmative in substance;

(4) Where the negative promise is based merely on the implied obligation to refrain from doing anything inconsistent with an affirmative act which is promised.

In each of these cases, moreover, except the last the negative promise in question may constitute the promisor's sole undertaking in the contract or it may not. Where the negative promise is not the promisor's sole undertaking, its value to the promisee may be wholly dependent on performance of an affirmative undertaking, or it may have independent value. A promise to work for no one but the promisee has ordinarily no value except as part of the obligation to work for the promisee; but if the promisor has power to make himself hurtful as an aid to a competitor of the promisee, the negative promise has independent value. In cases of the latter sort as has been seen, injunctions are freely granted where damages afford inadequate redress.⁵³ Where, therefore, a negative promise is the promisor's sole undertaking or has independent value, no further test is required; but in the third and fourth cases supposed above, the promisor is bound to positive action by the promise in question and there is no virtue in making a decree that the defendant shall refrain from doing anything else but that action, as compared with one affirmatively ordering him to do the act. If, for instance, equity is not prepared to enforce directly a contract of employment, it cannot properly enforce even an express promise of an employer not to discharge his employee, for that means the same thing.⁵⁴ Therefore, it may

⁵³ It is on this theory that implied promises not to prevent performance are based, (see *supra*, § 1318); and also the doctrine of anticipatory breach, so far as it is explicable on any sound principle.

⁵⁴ See *supra*, § 1446.

⁵⁴ *Davis v. Foreman*, [1894] 3 Ch. 654; *Kirchner v. Gruban*, [1909] 1 Ch. 413. See, however, as to the enforcement of affirmative obligations by negative decree, *supra*, § 1423 *ad fin.*

he said that where the negative promise is in one of these last two classes, an injunction cannot be granted which is coextensive with the promise except when the character of the affirmative obligation is such that it would be specifically enforced as a whole; and in that case it would seem better to decree performance directly than by the roundabout means of an injunction.

§ 1449. In England only express negative promises are enforced.

The English court, though at first disposed to apply the doctrine of *Lumley v. Wagner* to negative promises necessarily implied from an affirmative undertaking,⁵⁵ has subsequently declined to permit such an extension, and now seems to have confined the jurisdiction of the court to cases where there is an express negative stipulation;⁵⁶ or where the express promise is negative in substance though affirmative in form.⁵⁷ It may certainly be said, as an English judge has said, "I can only say, that I should think it was safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."⁵⁸ No doubt in England⁵⁹ an injunction would not be granted unless damages were an inadequate remedy, and such a limitation is proper. A further requirement that the stipulation shall be express seems purely technical.⁶⁰

⁵⁵ *De Mattos v. Gibson*, 4 De G. & J. 276; *Montague v. Flockton*, L. R. 16 Eq. 189.

⁵⁶ *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

⁵⁷ *Metropolitan Electric Supply Co. v. Ginder* [1901] 2 Ch. 799.

⁵⁸ Lord Selborne, in *Wolverhampton, etc., Ry. Co. v. London, etc., Ry. Co.*, L. R. 16 Eq. 433, 440.

⁵⁹ Fry, *Specific Performance*, 5th ed., § 860.

⁶⁰ This requirement is apparently adopted in Illinois. *Consolidated Coal*

The essential troublesome question is whether the allowance of an injunction of certain conduct is proper where the injunction does not compel complete performance by the defendant of his outstanding obligations and where no provision is made by the decree for performance by the plaintiff of his obligations. This difficulty is the same whether the negative promise is express or implied.

§ 1450. Enforcement in the United States of negative promises correlative to a more extensive affirmative.

There is felt by the courts to be "a certain anomaly in granting the half way relief of an injunction . . . when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree."⁶¹ This anomaly may easily be overemphasized. It might well be asked: Is the contract one which equity would enforce as a whole, if it were not for inherent difficulties or technical rules, and if so will the partial enforcement of the contract by injunction probably lead to the performance of the whole, or at least give the plaintiff a fuller measure of relief than he could otherwise obtain, and impose no undue penalty on the defendant? Contracts for personal services are not ordinarily enforceable specifically,⁶² but the reason is often not because it is undesirable if damages are inadequate relief, but because of the inherent difficulties in enforcing a decree to perform the services. There is no inherent difficulty, however, in the enforcement of an injunction which goes no farther than to prohibit entering into other employment.

If, however, the services require no special skill, there is no occasion for granting any equitable relief. Damages are an adequate remedy, and, therefore, the employer will not be granted an injunction.⁶³ Where services contracted for are of

Co. v. Schmisser, 135 Ill. 371, 25 N. E. 795; Southern, etc., Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313, 9 L. R. A. (N. S.) 446; Carlson v. Koerner, 226 Ill. 15, 80 N. E. 562. See the criticism of the Illinois decisions by Professor Schofield in 2 Ill. L. Rev. 217.

⁶¹ *Javierre v. Central Altagracia*, 217 U. S. 502, 508, 30 S. Ct. 598, 600, 54 L. Ed. 859, *per* Holmes, J., quoted and applied in *Standard Fashion Co. v. Magrane-Houston Co.*, 251 Fed. 559, 163 C. C. A. 553.

⁶² See *supra*, § 1423.

⁶³ *Cochrane v. Exchange Tel. Co.*,

a special character and cannot properly be performed by others than the promisor, damages are inadequate, and injunctions have often been granted prohibiting an employee from entering into engagements inconsistent with his contract with the plaintiff.⁶⁴ This principle has been frequently applied to the contracts of actors and singers.⁶⁵ It has also been applied to a newspaper correspondent under exceptional circumstances,⁶⁶ and to a baseball player of extraordinary reputation.⁶⁷ In most of the decisions, however, the negative undertaking of the defendant had importance to the plaintiff apart from the pressure which its enforcement would put upon the defendant to perform his affirmative undertaking, and if the

65 L. J. Ch. 334; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Kennerley v. Simonds*, 247 Fed. 822; *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; *Simms v. Burnette*, 55 Fla. 702, 46 So. 90, 16 L. R. A. (N. S.) 389, 127 Am. St. Rep. 201; *Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986; *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115; *Rosenstein v. Zents*, 118 Md. 564, 85 Atl. 675, 44 L. R. A. (N. S.) 63; *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753; *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717; *Kessler v. Chappelle*, 73 N. Y. App. Div. 447, 77 N. Y. S. 285; *Columbia College v. Tunberg*, 64 Wash. 19, 116 Pac. 280.

⁶⁴ *Montague v. Flockton*, L. R. 16 Eq. 189; *California Bank v. Fresno Canal, etc., Co.*, 53 Cal. 201; *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, 57 Atl. 1080; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 691, 69 Atl. 186,

24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753; *Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 573; *Cort v. Lassard*, 18 Oreg. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. As to the discretionary character of the remedy, see *Edmundson-Randle Drug Co. v. Partin Mfg. Co. (Ala.)*, 75 So. 966; *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717.

⁶⁵ The leading case is *Lumley v. Wagner*, 1 De G. McN. & G. 604, stated *supra*, § 1447. To the same effect, see: *Grimston v. Cunningham*, [1894] 1 Q. B. 125; *McCaull v. Braham*, 16 Fed. 37; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Cort v. Lassard*, 18 Oreg. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726. But the defendant must be a person of exceptional artistic ability or reputation to justify the relief. *Carter v. Ferguson*, 58 Hun, 569, 12 N. Y. S. 580; *Cort v. Lassard*, 18 Oreg. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726.

⁶⁶ *Tribune Assoc. v. Simonds* (N. J. Eq.), 104 Atl. 386.

⁶⁷ *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 51 Atl. 973, 55 L. R. A. 227, 90 Am. St. Rep. 627.

defendant's performance of his negative obligation has no value to the plaintiff in itself an injunction will not generally be granted.⁶⁸ The enforcement of a negative promise of vital importance has not been confined to contracts of employment. Thus the use of a vessel in a way different from that agreed upon in a charter party has been enjoined;⁶⁹ one who had contracted to take his "whole supply" of electricity from the plaintiff has been enjoined from taking a supply from another,⁷⁰ and the same principle has been applied to other contracts.⁷¹

⁶⁸In *De Pol v. Sohlke*, 7 Rob. Super. (N. Y.) 280, an injunction was refused restraining a danseuse from appearing in New York on the ground that the plaintiff had no theatre there and would not be injured by her appearance.

⁶⁹*DeMattos v. Gibson*, 4 De G. & J. 276; *Messageries Imperiales Co. v. Baines*, 7 L. T. Rep. (N. S.) 763. Whether the doctrine of these cases would now be followed in England unless there were an express negative covenant may be doubted in view of the decision of *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

⁷⁰*Metropolitan Electric Supply Co. v. Ginder* [1901] 2 Ch. 799. *Hills v. Croll*, 2 Phillips, 60, seems overruled. See *Catt v. Tourle*, L. R. 4 Ch. 654.

⁷¹In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. 77, a city had contracted to take its water supply from a water company and had agreed in the contract that it would not establish a system of its own. It was enjoined from issuing bonds for that purpose. In *Dailey v. New York*, 170 N. Y. App. D. 267, 156 N. Y. S. 124, *affd.* without opinion 218 N. Y. 665, 113 N. E. 1053, the plaintiffs used dumping scows for the disposal of the refuse of New York streets under a contract with the city. The city, dissatisfied with the scows, notified

the plaintiff that their use would not be permitted. The court enjoined the defendant from refusing to deliver the refuse to the plaintiffs upon these scows.

In *Alpers v. City and County of San Francisco*, 32 Fed. 503, the plaintiff had a contract with San Francisco giving him the exclusive privilege for twenty years of having and removing the carcasses of all dead animals not slain for food. The board of supervisors having taken steps to obtain bids from parties desirous of obtaining the carcasses of dogs killed by the poundkeeper, the plaintiff applied for an injunction restraining the municipality from passing any ordinance impairing the obligation of his contract, and restraining the poundkeeper from delivering the carcasses of animals to any other person. The injunction against the poundkeeper was granted. See also *Star Chronicle Pub. Co. v. New York Evening Post*, 256 Fed. 435, 167 C. C. A. 563. But see *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. (N. S.) 98; *Bartholomæ & Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058. In *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283, the defendant who was agent for the sale of the plaintiff's patterns had contracted not to sell or permit to be sold on his premises any other make of patterns.

§ 1450a. Summary of principles governing enforcement of negative personal covenants.

A learned writer has thus summarized the results of the decisions:⁷²

"Much of the difficulty in such cases grows out of confusing situations where a court ought not to enforce a covenant directly or indirectly and those where there is no reason why it should not be enforced if it may be, but there are practical considerations in the way of direct enforcement. Where the covenant calls for 'service of a confining nature and under the direction of the employer as to details,'⁷³ there is more than a practical obstacle. The court ought not to exact performance even if it could. In other cases the interference with privacy or personal liberty may make direct enforcement impossible. In others it may be impossible to coerce directly a course of affirmative action involving individual taste or skill or judgment. In such cases there may be no policy of the law against enforcing the service, so that if the court, without making over the contract, can make use of a negative of separate significance to enforce the contract 'in the only manner in which it could be enforced,'⁷⁴ there may be every reason for doing so. Where breach of the negative involves a damage by itself apart from or over and above breach of the affirmative, it can be no objection to enforcement of that negative that it may tend to enforce an affirmative that ought to be performed. Mutuality of performance is a doctrine of equity for the protection of defendants by insuring to them when performance is exacted of them that they get the counter performance due them. If they

This negative promise was enforced by injunction. To the same effect are *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. (N. S.) 843; *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 N. Y. App. D. 564, 52 N. Y. S. 433, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; *Butterick Publishing Co. v. Rose*, 141 Wis. 533, 124 N. W. 647. But cf. *Standard Fashion Co. v. Magrane-Houston Co.*, 251 Fed.

559, 163 C. C. A. 553, 259 Fed. 793 (C. C. A.).

⁷² Roscoe Pound, 33 Harv. Law Rev. 439.

⁷³ Citing *Clyatt v. United States*, 197 N. S. 207, 215.

⁷⁴ Citing *Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256, 269. See also *Cincinnati v. Marsans*, 216 Fed. 269, *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198; *Great Northern R. Co. v. Telephone Co.*, 27 N. D. 256, 265, 145 N. W. 1062.

obstinately refuse to avail themselves of the opportunity to have all that the contract calls for, by remaining idle when enjoined from breaking the negative covenant, they ought not to be heard to complain. Great hardship upon the plaintiff,⁷⁵ may properly move the court to attach little weight to the possibility that the defendant, by doing nothing, may perform part of the contract with no equivalent."

§ 1451. Mutuality in negative contracts.

There can be no doubt that *Lumley v. Wagner*⁷⁶ and similar decisions violate the rule of mutuality as ordinarily applied to affirmative contracts, and it is important to fix the limits of the exception. It may be supposed, (1) that the negative performance of the defendant, by the terms of the contract is to precede the performance of the plaintiff, (2) that it is to continue *pari passu* with it or (3) that it is to follow the plaintiff's performance. A fourth case may also be supposed, which partakes partly of the nature of each of the others. The defendant's negative obligation may continue over a considerable period of time. It may be supposed that the plaintiff's performance can be rendered at a single moment, and is due at some time within the period over which the defendant's obligation extends. In every case the plaintiff's application for an injunction must be deemed an election to go on with the contract. Therefore if the plaintiff has already so far broken the contract that he will be unable to perform it substantially or if it appears to the court that for any reason he will not perform in the future on his part, an injunction should not be granted.⁷⁷ An exception to this principle, however, exists where the defendant's negative stipulation relates to a part of the plaintiff's performance only, and is designed to secure him the enjoyment of the agreed exchange for that part which has been rendered.⁷⁸

⁷⁵ Citing for example *Tribune Assoc. v. Simonds*, (N. J. Eq. 1918), 104 Atl. 386.

⁷⁶ 1 De G. M. & G. 604.

⁷⁷ *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180.

⁷⁸ In *Rolfe v. Rolfe*, 15 Sim. 88, A, B, and C were partners as tailors.

A and B went out of the trade in consideration of receiving £1000 each, and C was to continue the business on his own account. A entered into a covenant that he would not carry on, within certain limits, any business like that which he had just sold, and C entered into a covenant that

If the performance of the plaintiff was to proceed *pari passu* with the performance of the defendant's negative duty, the court can mold the form of the original injunction so that it shall apply only so long as the plaintiff performs on his part.⁷⁹

The case, however, remains where the negative performance of the defendant must precede the performance of the plaintiff. There seems little suggestion from the courts which follow *Lumly v. Wagner* that the injunction would be denied on this ground. The defence of allowing the injunction must therefore be, that its allowance will probably result in the full performance of the contract, and that as the defendant, when he made the contract, was willing to run the risk of negative performance on his part, before the plaintiff's performance was due, he cannot fairly complain if equity compels him to take that risk.⁸⁰

§ 1452. Modification of the rule of mutuality.

In view of the negative contracts under consideration it is obvious that the rule of mutuality, suggested by Ames⁸¹ must be modified, and Professor Gilbert has suggested two possible modifications, which seem to reconcile the decisions.

"Equity will not compel specific performance by a defendant if after performance the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract, excepting in the case of the enforcement of negative covenants in personal service contracts where affirmative performance by the defendant would be continuous, synchro-

he would employ A as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that the court could not grant the injunction when there was something remaining to be performed, and that A had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. The injunction was however granted, and properly, since it was necessary

to insure to the plaintiff the return for the sum of money, which he had already paid for the business.

⁷⁹ *Stocker v. Wedderburn*, 3 K. & J. 393; *Cincinnati Exhibition Co. v. Maroons*, 216 Fed. 269.

⁸⁰ See, however, *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723; *Bartholomæ, etc., Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058. Cf. *Southern, etc., Co. v. Garden City Sand Co.*, 223 Ill. 616, 79 N. E. 313, 9 L. R. A. (N. S.) 446.

⁸¹ See *supra*, § 1440.

nous with, and dependent upon performance by the plaintiff; and in this case equity will enjoin a breach of the negative covenant so long as the plaintiff is not guilty of a breach of his side of the contract. The alternative is the following:

“Equity will not compel specific performance by a defendant if after performance by the defendant it is either certain or probable that the defendant will have to resort to the common-law remedy of damages to secure performance of the plaintiff’s side of the contract.”⁸² The latter form seems preferable. There is no reason why the principle embodied in the decision of *Lumley v. Wagner*⁸³ should be confined to contracts of personal service.⁸⁴

§ 1453. Against whom specific performance may be sought.

Strictly a contract can be enforced either in law or in equity only against the party who entered into it. Only a promisor can be required to keep a promise; but where a promise relates to property equity fastens an obligation upon any one who receives the property either with knowledge of a duty owing by his grantor in regard to it or without consideration. The enforcement of an obligation against one who has obtained a conveyance of property which his grantor had contracted to sell to another, if the grantee is not a *bona fide* purchaser for value, illustrates this. On this principle equity is enabled to enforce contracts to leave property by will. Though such contracts cannot be strictly enforced after the death of the promisor, those who receive his property as heirs, personal representatives, devisees, or legatees if merely volunteers, can be compelled to convey it to the promisee.⁸⁵ But the consideration of such exercise of equitable powers belongs rather to a treatise on the law of trusts than to one on the law of contracts.

The cases of imposition of an equitable obligation analogous to a contract are not, however, confined to cases of trusts. Though cases are not frequent where direct enforcement of a positive contractual obligation can be given against one who has not entered into a contract unless a *res* is concerned to

⁸² Enforcement of Negative Covenants, 4 Cal. Law Review, 114, 130.

⁸³ 1 De G. M. & G. 604.

⁸⁴ See *supra*, § 1450.

⁸⁵ See *supra*, § 1421.

which equity can attach the character of a trust, or something analogous, negative stipulations of such a character that they would be enforced by injunction against the promisor may also be enforced by injunction against one who by his dealings with the promisor is inducing or forcing the latter to break them.⁸⁶ So where one has contracted not to engage in a certain business, others may be enjoined from employing him in that business or associating themselves in it with him.⁸⁷ And other illustrations of this jurisdictions of equity may be found.⁸⁸ These cases may, however, be regarded as illustrative of that principle of the law of torts, which prohibits unwarranted interference with the contracts of others.⁸⁹

⁸⁶ In *De Mattos v. Gibson*, 4 De G. & J. 276, one C had agreed that his vessel should carry a cargo to Suez, but later mortgaged the vessel to G, who had knowledge of the charter. The court held that though it could not specifically enforce a contract to make the agreed voyage, it could restrain the employment of the vessel in a different manner. Though the court declined to issue an injunction against G, under the particular facts of the case, it intimated that the conduct of the mortgagee, in interfering with the charter, might be

such as to justify an injunction against him. See also *Messageries Imperiales Co. v. Baines*, 7 L. T. Rep. 763.

⁸⁷ *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *Booth v. Seibold*, 37 N. Y. Misc. 101, 74 N. Y. S. 776.

⁸⁸ See "Equitable Rights and Liabilities of Strangers to a Contract" by Harlan F. Stone, 18 Columbia L. Rev. 291.

⁸⁹ See *Posner Co. v. Jackson*, 223 N. Y. 325, 332, 119 N. E. 573, and cases cited.

CHAPTER XL

RESCISSION AND RESTITUTION FOR BREACH OF CONTRACT

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§ 1454. Scope of the remedy.

The normal redress for breach of contract is to give the injured party what will put him in as good a position as if the contract had been performed. The normal redress for a tort is to give what will restore the injured party to as good a position as

he had before the tort. The latter form of redress is, however, also allowed in the law of contracts, both as an alternative remedy for breach of contract, and also in certain cases where a contract has been partly performed by the plaintiff but where no breach of contract has been committed by the defendants. In both cases the obligation is quasi-contractual, except where restitution in specie is enforced, in which case it is equitable.

§ 1455. Rescission as a remedy for breach of contract.

The right of rescission and restitution generally exists as an alternative remedy where there has been repudiation or a material breach of a contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value. This choice of remedies was not allowed by the early English law,¹ and there are still many exceptions and inconsistencies in the application of the rule, which are due in part to the fact that it has been developed very largely under cover of the fictitious declaration in *indebitatus assumpsit*, and of equally fictitious inferences that a refusal to perform a contract indicates assent to rescind it and restore what has been given under it. The erroneous basing of damages for breach of contract in some cases on the value of what the plaintiff gave² may also have played a part. As may be observed in other branches of the law, the English cases are more conservative than the American—less ready to accept a new general rule varying from early precedents; so that the principle stated above must be taken only with very considerable qualifications as a statement of the law of England. Indeed, that principle is directly at variance with statements of law made in modern English cases—statements which would doubtless in many classes of cases be acted on.³ In the United

¹ The earliest cases allowing an action for restitution against a defendant guilty of breach of contract, and who might have been sued on the contract for damages, are *Dutch v. Warren*, 1 Str. 406, and *Anonymous*, 1 Str. 407, decided in 1721; but in the first of these decisions, though the action was in form for restitution, the plaintiff's damages were restricted to the value

of what he ought to have received by the contract. No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord Mansfield and Lord Kenyon at the end of the eighteenth century.

² See *supra*, §§ 1338, 1341.

³ See, *e. g.*, *James v. Cotton*, 7 Bing. 266, 274, per Tindal, C. J.; *Street v.*

States though there are exceptions to the rule, it may safely be laid down as a general principle. The following sections show its applications and limitations.

§ 1456. Restitution of land conveyed.

If land has been conveyed and the purchaser fails to keep a promise made in consideration of the conveyance, the special right given by the vendor's lien is the only right the English seller has, other than an action on the contract for damages.⁴ But in the United States, in some cases at least, the vendor may obtain restitution by a bill in equity.⁵

Blay, 2 B. & Ad. 456, 462; Dawson v. Collis, 10 C. B. 523, 528.

⁴ Dart, Vendors & Purchasers (7th ed.), 729. See also, *infra*, § 1470.

⁵ Priest v. Murphy, 103 Ark. 464, 149 S. W. 98; Howlin v. Castro, 136 Cal. 605, 69 Pac. 432; Savannah, etc., Ry. Co. v. Atkinson, 94 Ga. 780, 21 S. E. 1010; Cooper v. Gum, 152 Ill. 471, 39 N. E. 267; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Domeracki v. Janikowski, 255 Ill. 575, 99 N. E. 579; Patterson v. Patterson, 81 Ia. 626, 47 N. W. 768; Clark v. McCleery, 115 Ia. 3, 87 N. W. 696; Shepardson v. Stevens, 77 Mich. 256, 43 N. W. 918; Clough v. Hosford, 6 N. H. 231; Williams v. Noiseux, 43 N. H. 388; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Michel v. Hallheimer, 56 Hun, 416, 10 N. Y. S. 489; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. See also Ferris v. Hogan, 121 Ala. 240, 25 So. 834. Even where a conveyance had passed, the vendor was allowed to treat it as null, thereby rendering a subsequent conveyance to another effectual, in Thompson v. Westbrook, 56 Tex. 265, and Kennedy v. Embry, 72 Tex. 387, 10 S. W. 88. But these cases were questioned in Huffman v. Mulkey, 78 Tex. 556, 561, 14 S. W. 1029, 22 Am. St. Rep. 71; and are opposed to Mc-

Cardle v. Kennedy, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85; Scott's Heirs v. Scott & McClure, 3 B. Mon. 2; Reeder v. Reeder, 89 Ky. 529, 12 S. W. 1063; Shepardson v. Stevens, 77 Mich. 256, 43 N. W. 918; Finger v. Finger, 40 Minn. 417, 42 N. W. 289; Lathrop v. Mayer, 86 Mo. App. 355; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Michel v. Hallheimer, 56 Hun, 416, 10 N. Y. S. 489; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. In most of the cases in this note the consideration for the conveyance was a promise to support the grantor. If possession has been given, but no conveyance passed, ejectment or trespass will lie against the defaulting purchaser. McDaniel v. Gray, 69 Ga. 433; Graves v. White, 87 N. Y. 463.

In Holloway v. Smith, 198 Ala. 118, 73 So. 417, land was conveyed in consideration of an oral promise by the grantee to build a house thereon. The court dismissed a bill alleging breach of the promise and praying that the land be charged with the cost of the agreed house or that the conveyance be set aside. The court regarded the relief as precluded by the section of the Statute of Frauds relating to oral trusts of land, confusing a constructive trust (where the parties make no agreement for a trust, but where the law

§ 1457. Restitution of money paid or claim released.

If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had both in England ⁶ and in the United States; and as will be seen from the cases cited below and from the following sections, in the United States at least, the failure need not be total if it is substantial and the *status quo* can be restored;⁷ but an unsub-

imposes as a remedy against a wrongdoer an obligation similar to that of a trustee) with an express oral trust, which though repudiated cannot be enforced. *Brock v. Brock*, 90 Ala. 86, 8 So. 11, 9 L. R. A. 287.

In *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182, the court said: "It is said by the defendant in error that the deed, being an executed conveyance of real estate, cannot be annulled or set aside by evidence that there has been a failure of consideration, and *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708; *Poe v. Uhrey*, 233 Ill. 56, 84 N. E. 46, and other cases are relied on in support of this proposition. We recognize the full force of the well-established rule that a failure of consideration for an executed conveyance of real estate gives the grantor no right, at law, to avoid his conveyance. Page on Contracts, § 1479, and cases there cited. But this is an equitable proceeding, in which specific justice between the parties before the court is of greater importance than the mere mechanical enforcement of a general rule of law. Courts of equity, in order to relieve against a great hardship where one has been induced to convey real estate for little or no consideration, will seize upon circumstances of oppression, fraud, or duress for the purpose of administering justice in the case in hand. *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267; *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015, and *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559,

are illustrations of different aspects of the rule above stated."

⁶ *Towers v. Barrett*, 1 T. R. 133; *Giles v. Edwards*, 7 T. R. 181; *Farrer v. Nightingal*, 2 Esp. 639; *Widdle v. Lyman*, Peake, A. C. 30; *Greville v. Da Costa*, Peake, A. C. 113; *Squire v. Tod*, 1 Camp. 293; *Wilde v. Fort*, 4 Taunt. 334; *Bartlett v. Tuchin*, 6 Taunt. 259; *Gosbell v. Archer*, 4 N. & M. 485. So in the colonies: *Wrayton v. Naylor*, 24 S. C. Canada, 295; *Wolff v. Pickering*, 12 S. C. Cape of Good Hope, 429, 432.

⁷ *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Glock v. Howard*, etc., *Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Grotheer v. Panama-Pacific Land Co.*, (Cal. App. 1919), 181 Pac. 667; *Lyon v. Annable*, 4 Conn. 350; *Thresher v. Stonington Bank*, 68 Conn. 201, 36 Atl. 38; *Janulewicz v. Quagliano*, 88 Conn. 60, 89 Atl. 897; *Barr v. Logan*, 5 Harr. (Del.) 52; *Payne v. Pomeroy*, 21 D. C. 243; *Trinkle v. Reeves*, 25 Ill. 214, 76 Am. Dec. 793; *Mound City Distilling Co. v. Consolidated Adjustment Co.*, 152 Ill. App. 155; *German, etc., Assoc. v. Droga*, 14 Ind. App. 691, 43 N. E. 475; *Wilhelm v. Fimple*, 31 Iowa, 131, 7 Am. Rep. 117; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rép. 677; *Pancoast v. Dinamore*, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582; *Ballou v. Billings*, 136 Mass. 307; *Putnam v. Bolster*, 216 Mass. 367, 103 N. E. 942; *Lodi v. Goyette*, 219 Mass. 72, 106 N. E. 601; *Martin v. Cunningham*, 231 Mass. 280, 121 N. E. 21; *Vallentyne v. Immigration Land Co.*, 95 Minn. 195, 103 N. W.

stantial failure by the defendant is insufficient;⁸ and if a purchaser has had possession of the property his right to recover the purchase price paid is subject to reduction to the extent of the profits, if any, realized by him from the use of the property.⁹ Where money has been paid for a promised conveyance of land, the right of the purchaser to rescind the contract for breach of contract must be qualified by the doctrines elsewhere referred to that time is not ordinarily of the essence in equity;¹⁰ that to a greater or less extent the relation of the parties has been treated as analogous to that of mortgagor and mortgage;¹¹ and that equity does not ordinarily require a vendor to perfect his title until the time of making a decree.¹² The contract itself may provide the contingencies on which restitution shall be allowed and such a provision will be enforced.¹³ If a claim has been released, for a promised consideration, which is not given, the claimant under the same principle as is applicable to the recovery of money paid may treat the release as rescinded and recover on the claim.¹⁴

1028; *Dakota, etc., Co. v. Price*, 22 Neb. 96, 34 N. W. 97; *Weaver v. Bentley*, 1 Caines, 47; *Cockcroft v. Muller*, 71 N. Y. 367; *Bigler v. Morgan*, 77 N. Y. 312; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196; *Glenn v. Rossler*, 88 Hun, 74, 34 N. Y. S. 608; *Altschul v. Koven*, 94 N. Y. S. 558; *Torrey v. McFadyen*, 165 N. C. 237, 81 S. E. 296; *Woodard v. Willamette Valley, etc., Land Co.*, 89 Oreg. 10, 173 Pac. 262; *Massey v. Becker*, 90 Oreg. 461, 176 Pac. 425; *Wilkinson v. Ferree*, 24 Pa. 190; *Ohio Valley Trust Co. v. Allison*, 243 Pa. 201, 89 Atl. 1132; *Rugg v. Midland Realty Co.*, 261 Pa. 453, 104 Atl. 685; *Raywood, etc., Co. v. Sharp* (Tex. Civ. App.), 175 S. W. 499; *Newberry v. Ruffin*, 102 Va. 73, 45 S. E. 733; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750; *King v. British Am. Co.*, 7 Can. Exch. 119.

⁸ *Gray v. Central Minn. Immigration Co.*, 127 Iowa, 560, 103 N. W. 792; *De*

Kay v. Bliss, 120 N. Y. 91, 24 N. E. 300, and see cases in the preceding note.

⁹ *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004. See also *Perlee v. Jeffcott*, 89 N. J. L. 34, 97 Atl. 789.

¹⁰ See *supra*, § 852.

¹¹ See *supra*, §§ 927 *et seq.*

¹² See *supra*, § 834. Therefore, even though a purchaser bringing an action against the vendor for damages because he did not have title, might have rescinded the contract on that account, yet, not having amended his complaint to demand a rescission till after the vendor had acquired title and offered to convey on payment of the amount due, he was held not entitled to rescission. *Morris v. Columbia Canal Co.*, 75 Wash. 483, 135 Pac. 238.

¹³ *Sutherland v. Green*, 49 Mont. 379, 142 Pac. 636; *Harrington v. Law* (R. I.), 90 Atl. 660.

¹⁴ *Illinois Central R. Co. v. Keebler*, 27 Ky. L. Rep. 305, 84 S. W. 1167; *Vasquez v. Pettit*, 74 Oreg. 496, Ann. Cas. 1917 A. 439, 145 Pac. 1066;

§ 1458. Restitution of personal property transferred.

If the title to personal property has been transferred, whether under a contract of exchange¹⁵ or sale,¹⁶ the English law does not permit the transferee to rescind the transaction and revest the title in himself because he has not received the promised payment. This is probably true even though the seller has retained possession of the property, and therefore has a vendor's lien.^{16a} The right of stoppage *in transitu*, although it may seem equivalent in effect to a right of rescission in the limited class of cases where it is applicable, does no more than continue the vendor's lien after the property has passed from his possession.¹⁷ In the United States, however, if the seller has not parted with possession of the goods, or has regained his lien by stoppage *in transitu*, he is allowed to rescind the sale on default of the buyer and to keep the goods as his own.¹⁸ But if the

Benson v. Mole, 9 Phila. 66. See also Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Stone v. Welling, 14 Mich. 514. Cf. Atchison &c. R. Co. v. Van-ordstrand, 67 Kan. 386, 73 Pac. 113; Post v. Thomas, 212 N. Y. 264, 106 N. E. 69; Jackowski v. Illinois Steel Co., 103 Wis. 448, 79 N. W. 757.

¹⁵ Emanuel v. Dane, 3 Camp. 299; Power v. Wells, Cowp. 818.

¹⁶ Greaves v. Ashlin, 3 Camp. 426; Martindale v. Smith, 1 Q. B. 389; Gilhard v. Brittan, 8 M. & W. 575; Page v. Cowasjee Eduljee, L. R. 1 P. C. 127. But see the early case of Langfort v. Tiler, 1 Salk. 113. See, also, Sale of Goods Act, § 48; Chalmers, Sale of Goods Act (3d ed.), 91.

^{16a} Martindale v. Smith, 1 Q. B. 389; Page v. Cowasjee Eduljee, L. R. 1 P. C. 127. See Williston, Sales, § 544.

¹⁷ Williston, Sales, § 539.

¹⁸ Uniform Sales Act, Sec. 61; Warren v. Buckminster, 24 N. H. 336; Bridford v. Crocker, 60 N. Y. 627. See also Strickland v. McCulloch, 8 N. S. Wales, 324; Williston, Sales, § 555.

In Dustan v. McAndrew, 44 N. Y. 73, 78, Earl, Com., in the opinion of the court said: "The vendor of personal

property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

This statement of the law is frequently quoted exactly or substantially and generally no distinction seems to be taken between cases where title to the property in question has passed and cases where title has not passed. Habeler v. Rogers, 131 Fed. 43, 45, 65 C. C. A. 281; Magnes v. Sioux City Seed Co., 14 Col. App. 219, 225, 59 Pac. 879; Leeper v. Schroeder, 24 Col. App. 164, 132 Pac. 701; Anderson v. Schroeder, 24 Col. App. 183, 132 Pac. 707; Robson v. Hale, 139 Ga. 753, 78 S. E. 177; Bagley v. Findlay, 82 Ill. 524; Ames v.

seller has parted with both possession and title, and is unable to regain possession by stoppage *in transitu*, there seems to be no authority, either in England or the United States, allowing him to bring trover or other action for the recovery of what he has transferred.¹⁹

§ 1459. Recovery of value of services.

If the performance rendered consists of services, there cannot ordinarily, from the nature of legal remedies, be actual restitution, but it is possible to give the equivalent in value under a common count. Since money paid may be thus recovered and similarly in the United States, land, logic would require such a remedy; and it is allowed in part, but only in part.* If the plaintiff has fully performed, the only redress he has for breach of contract by the other side is damages for the breach. It is true that if the performance to which he is entitled in return is a liquidated sum of money, he may sue in *indebitatus assumpsit*

Moir, 130 Ill. 582, 591, 22 N. E. 535; Comstock v. Price, 103 Ill. App. 19, 21; Bell v. Offutt, 10 Bush, 632; Rylance v. James Walker Co., 129 Md. 475, 99 Atl. 597; Putnam v. Glidden, 159 Mass. 47, 49, 34 N. E. 81; Ozark Lumber Co. v. Chicago Lumber Co., 51 Mo. App. 555, 561; Van Brocklen v. Smealie, 140 N. Y. 70, 75, 35 N. E. 415; Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; Ackerman v. Rubens, 167 N. Y. 405, 408, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; Levy v. Glassberg, 92 N. Y. S. 50; Storm v. Rosenthal, 141 N. Y. S. 339, 156 N. Y. App. Div. 544; Shawhan v. Van Nest, 25 Ohio St. 490; Ballentine v. Robinson, 46 Pa. 177; Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 654, 92 N. W. 368. See Williston, Sales, §§ 543 *et seq.*

The Indian Contract Act, § 107, provides that the lienholder, though title has passed, may resell, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale," and this provision is reproduced in Sec. 60 of the Uniform Sales Act.

¹⁹ See Williston, Sales, § 511; Power v. Wells, Cowp. 818; Emanuel v. Dane, 3 Camp. 299; Gillard v. Brittan, 8 M. & W. 575; Neal v. Boggan, 97 Ala. 611, 11 So. 809, and cases cited; Holland v. Cincinnati, etc., Co., 97 Ky. 454, 30 S. W. 972; Thompson v. Conover, 32 N. J. L. 466; Hornberger v. Feder, 61 N. Y. S. 865, 30 N. Y. Misc. 121. The Indian Contract Act, § 121, expressly denies the right to rescind after delivery, in the absence of express stipulation.

In Dow v. Harkin, 67 N. H. 383, 29 Atl. 846, however, the plaintiff, who had assigned a patent and conveyed tools to the defendant in consideration of an executory agreement which the defendant had failed to perform, was allowed to recover the tools as well as have the assignment set aside by proceedings in equity. The court intimated that the jurisdiction of equity arose from the assignment of the patent, but that as it took jurisdiction of the case it would also act in regard to the tools.

and not on the special contract,²⁰ but the measure of damages is what he ought to have received—not the value of what he has given.²¹ If, however, the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover, either in England or America, the value of the services rendered,²² though such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy in an action on the contract for damages. In some jurisdictions, if a price or rate of compensation is fixed by the contract, that is

²⁰ Chitty, Pleading (7th ed.), i. 358; *Atkinson v. Bell*, 8 B. & C. 277, 283; *Gandell v. Pontigny*, 4 Camp. 375, s. c., 1 Stark. 198; *Savage v. Canning*, Ir. R. 1 C. L. 434; *Wardrop v. Dublin*, etc., Co., Ir. R. 8 C. L. 295; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Peterson v. Pusey*, 237 Ill. 204, 86 N. E. 692; *Shilling v. Templeton*, 66 Ind. 585; *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206; *Southern Bldg. Assoc. v. Price*, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542; *Morin v. Robarge*, 132 Mich. 337, 93 N. W. 886; *Reifschneider v. Beck*, 148 Mo. App. 725, 129 S. W. 232; *Hosley v. Black*, 28 N. Y. 438; *Ludwig v. Pusey & Jones Co.*, 143 N. Y. App. D. 290, 128 N. Y. S. 72; *Hollander v. Kaufmann*, 172 N. Y. App. D. 218, 158 N. Y. S. 195.

²¹ *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Pusey & Jones Co. v. Dodge*, 3 Penn. (Del.) 63, 49 Atl. 248; *Barnett v. Sweringen*, 77 Mo. App. 64, 71, and cases cited; *Porter v. Dunn*, 61 Hun, 310, 16 N. Y. S. 77 (S. C.), 131 N. Y. 314, 30 N. E. 122). And see cases in the preceding note.

²² *Mayor v. Pyne*, 3 Bing. 285; *Planché v. Colburn*, 8 Bing. 14; *Clay v. Yates*, 1 H. & N. 73; *Bartholomew v. Marwick*, 15 C. B. (N. S.) 711; *M'Connell v. Kilgallen*, 2 L. R. Ir. 119; *Chicago v. Tilley*, 103 U. S. 146, 26 L.

Ed. 371; *American-Hawaiian*, etc., Co. v. *Butler*, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916 C. 44; *Hoyt v. Pomeroy*, 87 Conn. 41, 86 Atl. 755; *Ottoway v. Milroy*, 144 Ia. 631, 123 N. W. 467; *Jenson v. Lee*, 67 Kans. 539, 73 Pac. 72; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Posner v. Seder*, 184 Mass. 331, 68 N. E. 335; *Wheelock v. Zevitas*, 229 Mass. 167, 118 N. E. 279; *Midland Operating Co. v. Miller*, 197 Mich. 567, 164 N. W. 443; *Moore v. Board*, 215 Mo. 705, 115 S. W. 6; *Franklin Motor Car Co. v. Kast*, 171 Mo. App. 309, 157 S. W. 841; *Cook v. Gallatin R. Co.*, 28 Mont. 509, 73 Pac. 131; *Thompson v. Gaffey*, 52 Neb. 317, 72 N. W. 314; *Stephen v. Camden*, etc., Soap Co., 75 N. J. L. 648, 68 Atl. 69; *Person v. Stoll*, 72 N. Y. App. D. 141, 76 N. Y. S. 324, 174 N. Y. 548, 67 N. E. 1089; *Atlantic*, etc., Co. v. *Woodmere Realty Co.*, 156 N. Y. App. D. 351, 142 N. Y. S. 953; *Borup v. VonKokeritz*, 162 N. Y. App. D. 394, 147 N. Y. S. 832; *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244, Ann. Cas. 1918 A. 907; *Easton v. Quackenbush*, 86 Or. 374, 168 Pac. 631; *Franconi v. Graham* (Or.), 174 Pac. 548; *Boville v. Dalton Paper Mills*, 86 Vt. 305, 85 Atl. 623. But the right was denied as recently as 1802 in *Hulle v. Heightman*, 2 East, 145. See also cases collected, *infra*, §§ 1475, 1477.

made the conclusive test of the value of the services rendered.²³ More frequently, however, the plaintiff is allowed to recover the real value of the services though in excess of the contract price.²⁴ The latter rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible.

§ 1460. Anything received by plaintiff must be returned.

If a contract has been partly performed by the party in default, the other party, at least if he has received any benefit from such part performance, cannot ordinarily rescind the contract according to the English law. Even though he return what he has received, it is said the parties cannot be restored to their original position, because he has had the temporary enjoyment of the property. In the leading case of *Hunt v. Silk*,²⁵ the plaintiff, who sought to recover money he had paid under an agreement for a lease, because of the defendant's failure to make repairs as agreed, had had possession of the premises a few days. This was held fatal. Lord Ellenborough said: "If the plaintiff might occupy the premises two days beyond

²³ *Georgia Pine Lumber Co. v. Central Lumber Co.*, 6 Ala. App. 211, 60 So. 512; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Keeler v. Clifford*, 165 Ill. 544, 548, 46 N. E. 248; *Chicago Training School v. Davies*, 64 Ill. App. 503; *Rice v. Partello*, 88 Ill. App. 52; *Western v. Sharp*, 14 B. Mon. 177; *Doolittle v. McCullough*, 12 Ohio St. 360 (much qualified by *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182, 48 N. W. 888); *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548. See also *Eastern Arkansas Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

²⁴ *United States v. Behan*, 110 U. S. 338, 345, 28 L. Ed. 168, 4 Sup. Ct. 81; *Clover v. Gottlieb*, 50 La. Ann. 568, 23 So. 459; *Rodemer v. Hazlehurst*, 9 Gill, 288; *Fitzgerald v. Allen*, 128 Mass. 232; *Forbes v. Appleyard*, 181 Mass. 354, 359, 63 N. E. 894; *Kearney v. Doyle*,

22 Mich. 294; *Hemminger v. Western Assurance Co.*, 95 Mich. 355, 54 N. W. 949; *McCullough v. Baker*, 47 Mo. 401; *Ehrlich v. Aetna L. I. Co.*, 88 Mo. 249, 257; *Clark v. Manchester*, 51 N. H. 594; *Clark v. Mayor*, 4 N. Y. 338, 53 Am. Dec. 379; *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182, 48 N. E. 888; *Philadelphia v. Tripple*, 230 Pa. 480, 79 Atl. 703; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80.

But in these jurisdictions the prices fixed in the contract are evidence (though not conclusive) of the value of the work. *Monarch v. Board of School Fund*, 49 La. Ann. 991, 22 So. 259; *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817; *Fitzgerald v. Allen*, 128 Mass. 232, 234; *Eakright v. Torrent*, 105 Mich. 294, 63 N. W. 293.

²⁵ 5 East, 449.

the time when the repairs were to have been done and the lease executed and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account?" *Hunt v. Silk* has been consistently followed.²⁶ It is in accordance with this rule that a buyer is not allowed to rescind a contract for breach of warranty,²⁷ though there is the additional reason in the case of a warranty that it is said to be a collateral contract. In the United States the law is more liberal. It is universally agreed that rescission is not allowable by self-help or in an action at law unless the party seeking to rescind can and does first restore or offer to restore anything he has received under the contract,²⁸ but the construction of this rule is far less severe than in England. Though it is frequently said that "A contract cannot ordinarily be rescinded unless both parties can be reinstated in their original situation in respect of their contract, and if one party have already received benefit from the contract he cannot rescind it wholly, but is put to his action for damages,"²⁹ or the like, yet some courts have gone very far in allowing rescission upon restitution *in specie* of what had been given in spite of benefits derived from temporary possession.³⁰

²⁶ *Beed v. Blandford*, 2 Y. & J. 278; *Street v. Blay*, 2 B. & Ad. 456, 464; *Blackburn v. Smith*, 2 Ex. 783. See also *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451.

²⁷ *Street v. Blay*, 2 B. & Ad. 456; *Gomperts v. Denton*, 1 C. & M. 207; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 523. So provided in the Indian Contract Act, sect. 117.

²⁸ *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247, *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Naugle v. Yerkes*, 187 Ill. 358, 58 N. E. 310; *Summerrall v. Graham*, 62 Ga. 729; *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100; *Clover v. Gottlieb*, 50 La. Ann. 568, 23 So. 459; *Pochè & New Orleans Co.*, 52 La. Ann. 1287, 27 So. 797; *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410; *Miner v. Bradley*, 22 Pick. 457; *Clark v. Baker*, 5 Met. 452; *Snow v.*

Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119; *De Montague v. Bacharach*, 181 Mass. 256, 63 N. E. 435; *Owen v. Button*, 210 Mass. 219, 96 N. E. 333; *Gulich v. Alford*, 61 Miss. 224; *Doughten v. Camden Assoc.*, 41 N. J. Eq. 556, 7 Atl. 479; *Gale v. Nixon*, 6 Cow. 445; *North Dak. Civ. Code*, § 3934; *Brown v. Witter*, 10 Ohio, 142; *Oklahoma Stat.*, § 686; *Code of Virginia*, § 3712; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678, 50 Am. Dec. 674, n.; 74 Am. Dec. 661, n.

²⁹ *Story, Contracts* (5th ed.), § 1337. See also *Peck Co. v. Stratton*, 95 Fed. 741; *Moore v. Bare*, 11 Ia. 198; *Burge v. Cedar Rapids, etc., R. R. Co.*, 32 Ia. 101; *Stevenson v. Polk*, 71 Ia. 278, 32 N. W. 340; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Spencer v. St. Clair*, 57 N. H. 9, 13; *Fay v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764.

³⁰ *In Ankeny v. Clark*, 148 U. S. 345,

It has even been said by the Supreme Court of the United States³¹ in speaking of a partly performed building contract: "The general rule, that a contract for the complete construction of a building for an entire price, payable in instalments as the work progresses, is an entire contract, and that a wilful refusal by the contractor to complete the building entitles the owner to a return of the instalments paid, has been declared by the state courts in a number of cases."³² In the case in question, however, and in all the cases cited by the court, the par-

37 L. Ed. 475, 13 Sup. Ct. 617, the plaintiff was allowed to recover the full value of wheat delivered by him to the defendant, on surrendering possession of land which the defendant had contracted, but failed to convey, though the plaintiff had had possession of the land for over four years, and this possession was admitted to be worth over two thousand dollars. The cases cited by the court in support of its position merely establish the point that if the suit had been reversed the vendor could not have recovered for the use and occupation of the land—a different matter. Contrary to *Ankeny v. Clark*, but not cited in that case, are *Axtel v. Chase*, 77 Ind. 74, 83 Ind. 546, 554; *Fay v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764. Cf., however, *Nothe v. Nomer*, 54 Conn. 326, 8 Atl. 134. In *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. 427, possession by the plaintiff of land for nearly a year was held no bar to rescission. In *Campbell Printing Press, etc., Co. v. Marsh*, 20 Col. 22, 36 Pac. 799, it was held that one who had received and used a printing press might return it and rescind his contract on the failure of the seller to furnish another piece of machinery included in the bargain, though the market value of the press was impaired by the fact that it had been used. Cf. *Aultman & Taylor Co. v. Mead*, 109 Ky. 583, 60 S. W. 294. In *Benson v. Cowell*, 52 Ia. 137, 2 N. W. 1035, the plaintiff was allowed to

rescind on returning money of which he had had the use, without being required to pay interest. In *Barrows v. Harter*, 165 Cal. 45, 130 Pac. 1050, it was held that while under Civ. Code, §§ 1691, 3408, a purchaser upon a rescission by the vendor is ordinarily entitled to a return of payments, as well as allowances for improvements, he was not so entitled where the value of the use of the premises exceeded the payments.

³¹ *United States v. United States Fidelity Co.*, 236 U. S. 512, 525, 59 L. Ed. 696, 35 Sup. Ct. 298.

³² Citing *School Trustees v. Bennett*, 27 N. J. L. 513, 517, 72 Am. Dec. 373, 374; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Bartlett v. Bisbey*, 27 Tex. Civ. App. 405, 408, 66 S. W. Rep. 70, and cases cited. The Supreme Court added, "This court, in a case that has been often cited and followed, where a government contractor, without fault of his own, was prevented from performing his contract owing to the abandonment of the project, held that he was entitled to recover from the United States what he had expended towards performance (less the value of his materials on hand), although he failed to establish that there would have been any profits. *United States v. Behan*, 110 U. S. 338, 344, 28 L. Ed. 168, 4 Sup. Ct. 81. And see *Holt v. United Security Life Ins. Co.*, 76 N. J. L. 585, 597, 72 Atl. 301, 21 L. R. A. (N. S.) 691."

tially completed building had been totally destroyed, and the owner's damages in an action on the contract would have been the same as if there had never been any part performance by the builder.³³ It can hardly be thought a true exception to the rule that benefits received must be restored, that in many of the United States, rescission is allowed for breach of warranty,³⁴ for the temporary possession of the buyer seems negligible if the goods are still uninjured when tendered back, and it is only a formal exception that "a return may be made after the institution of the action in instances where the thing returned is as between the parties a mere promise, or not property, as for instance a check or note of one of the parties."³⁵

The most desirable disposition of many cases where the plaintiff cannot, without any fault on his part, return all he has received, would be to allow the plaintiff to recover subject to a deduction for what he has received and cannot return, and some authorities seem to support such a solution of the problem.³⁶ If the aid of equity is invoked for the rescission or cancellation of a contract there seems no necessity for a preliminary offer to restore what the plaintiff has received, since by its decree equity can impose the condition precedent of restitution, but such an offer seems requisite in many States.³⁷

§ 1461. Rescission for breach of warranty.

Recoupment and an action or counterclaim for damages are

³³ The cases are instructive, however, on the question whether an owner to whose property valuable building materials have been attached as part of a structure can be regarded as having received a benefit if the materials are destroyed before the structure is finished. See *infra*, § 1975.

³⁴ See the following sections.

³⁵ *Owen v. Button*, 210 Mass. 219, 223, 96 N. E. 333; citing *Morse v. Woodworth*, 155 Mass. 233, 249, 27 N. E. 1010, 29 N. E. 525; *Illustrated Card &c. Co. v. Dolan*, 208 Mass. 53, 55, 94 N. E. 299.

³⁶ *Wilson v. Burks*, 71 Ga. 862; *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43; *Putnam v. Bolster*, 216 Mass. 367, 103

N. E. 942; *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146; *Brewster v. Wooster*, 131 N. Y. 473, 30 N. E. 489; *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715; *Mason v. Lawing*, 10 Lea, 264.

In *Higby v. Whittaker*, 8 Ohio, 198, and *Hood v. People's, etc., Assoc.*, 8 Tex. Civ. App. 385, the vendor was allowed to recover land for which he had received part payment without returning what he had received, on the ground that the possession which the vendee had enjoyed equalled in value this part payment. See also *McDaniel v. Gray*, 69 Ga. 433; *Travelers' Ins. Co. v. Redfield*, 6 Col. App. 190, 40 Pac. 195.

³⁷ Sec. 6 Pomeroy's Eq. Jur. § 678.

generally admitted remedies for breach of a warranty of goods sold; but the third remedy, that of rescission, has been the cause of much discussion. More seriously than that the restoration of the *status quo* is impossible, it has been urged that rescission, as it involves a transfer of title back from the buyer to the seller, can be accomplished only by mutual assent and, further, that even if rescission were ordinarily permissible by the act of one party, it cannot properly be allowed where the obligation is collateral to the main contract as a warranty is said to be. As to the first of these objections, it has been shown in another connection that in many cases a transfer of title by the act of one party is allowed.³⁸ As to the other objection, it should be observed that a warranty in the English law is not always collateral—in form at least. A promise which forms part of the description becomes a warranty when title passes.³⁹ Still it is doubtless true that the typical warranty is collateral. Thus, a seller may sue for the price of a horse which he has sold and warranted sound without alleging in his declaration anything about the warranty.⁴⁰ From this the inference may be drawn that the price of the horse is promised in return for the transfer of title, and that the warranty is a collateral promise of which the consideration is not the price but the sale. This is doubtless the form the transaction takes, but the collateral character of the warranty is only formal. After reflection, no one can doubt that in such a bargain the inducement for the payment or promise to pay the price is in part, and in an essential part, the giving of the warranty.⁴¹ The form which the transaction takes justifies the court in applying the rules of pleading and procedure applicable to collateral stipulations and conditions subsequent; that is, the plaintiff need allege nothing about the matter, and the burden is on the defendant to allege

³⁸ See *supra*, §§ 1370–1372.

³⁹ *Supra*, § 969. For this reason in Benjamin, *Sale* (5th Eng. ed.), p. 1003, it is said that the question whether the promise is collateral depends upon whether the property in the goods has passed or not. But if a promise is originally part of the seller's primary obligation, a mere transfer of the property

can hardly change its character in this respect.

⁴⁰ *Parker v. Palmer*, 4 B. & Ald. 387; *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206.

⁴¹ This is often recognized in the cases, *e. g.*, in *McCauley v. Ridgewood*, 81 N. J. L. 86, 79 Atl. 327.

and prove the existence of the collateral stipulation. To go farther than this, however, is to confuse matters of form with matters of substance. The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not received what he bargained for. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price? These are the essential inquiries, and there can be little doubt of the answers. If a sale is induced by fraudulent statements, rescission is admittedly proper.⁴² And if a seller knows of the falsity of the statements he makes which constitute a warranty, he is fraudulent, and the bargain may be rescinded in jurisdictions which deny the remedy of rescission for breach of warranty generally.⁴³ The morality of taking advantage afterward of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale.⁴⁴ It is a difficult question of fact, and one which arises in very many cases of broken warranty, how far the seller knew that his warranty was false. It is a practical advantage if the decision of this question becomes immaterial as it does where rescission is allowed for breach of warranty.⁴⁵

⁴² See *infra*, § 1523.

⁴³ *Dawson v. Pennaman*, 65 Ga. 698; *Johnson v. Harley*, 121 Ga. 83, 48 S. E. 685; *Owens v. Sturges*, 67 Ill. 366; *Freyman v. Knecht*, 78 Pa. St. 141, 144; *Nelson v. Martin*, 105 Pa. St. 229; *Gates v. Bliss*, 43 Vt. 299.

⁴⁴ In *Prewitt v. Trimble*, 92 Ky. 176, 183, 17 S. W. 356, 36 Am. St. Rep. 596, the court said: "It is a settled rule that even when one who brings about a contract by misrepresentation commits no fraud because his representa-

tion was, when made, innocent in the ordinary sense, still, if when the fact of its falsity becomes known he refuses to relinquish the advantage, upon offer of reciprocal relinquishment received by the injured party, it would make him guilty of constructive fraud and the contract subject to rescission by a court of equity."

⁴⁵ An interesting analogy to the allowance of this remedy may be found in the law governing innocent misrepresentation. Though it is not yet

§ 1462. Authorities divided.

The English law clearly denies the right of rescission of an executed sale for breach of warranty.⁴⁶ A diminishing number of the United States also deny it.⁴⁷ But the majority of them allow it.⁴⁸ And the adoption of the Uniform Sales Act in many

perhaps universally established that such misrepresentations give a right of rescission, the recent tendency of the law is strongly in that direction. See *infra*, § 1500.

* *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Dawson v. Collis*, 10 C. B. 523; Sale of Goods Act, §§ 11 (1) (b), 53 (1), 62 (1). Before the decision of *Street v. Blay*, the English law was sometimes supposed to allow rescission; Lord Eldon had so ruled in *Curtis v. Hannay*, 3 Esp. 82, and the law was so stated by Mansfield, C. J., in *Caswell v. Coare*, 1 Taunt. 566, 567. Also in *Starkie*, Evidence, p. 645. But this was criticised in *Long*, Sale, 215.

* *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595; *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847; *Gay Oil Co. v. Roach*, 93 Ark. 454, 125 S. W. 122, 27 L. R. A. (N. S.) 914; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422 (but the law of Connecticut since the passage of the Sales Act allows rescission); *Woodruff v. Graddy*, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33; *Hutchinson Lumber Co. v. Dickerson*, 127 Ga. 328, 56 S. E. 491; *Pound v. Williams*, 119 Ga. 904, 47 S. E. 218; Ga. Code, § 3556; *Crabtree v. Kile*, 21 Ill. 180; *Owens v. Sturges*, 67 Ill. 366; *Sturges & Burn Mfg. Co. v. Smelting Co.*, 248 Ill. 285, 93 N. E. 740; *Tokheim Mfg. Co. v. Stoyles*, 142 Ill. App. 198; *Bender v. Lundberg*, 152 Ill. App. 326 (in Illinois the Sales Act now allows rescission); *Marsh v. Low*, 55 Ind. 271; *Hoover v. Sidener*, 98 Ind. 290; *Wulschner v. Ward*, 115 Ind. 219, 222,

17 N. E. 273; *La Grange v. Coyle*, 50 Ind. App. 140, 98 N. E. 75; *Lightburn v. Cooper*, 1 Dana, 273; *H. W. Williams Transportation Line v. Darius Cole Transportation Co.*, 129 Mich. 209, 88 N. W. Rep. 473, 56 L. R. A. 939 (in Michigan the Sales Act now allows rescission); *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5 (in Minnesota the Sales Act now allows rescission); *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill, 625, 40 Am. Dec. 299; *Muller v. Eno*, 14 N. Y. 597; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753 (in New York the Sales Act now allows rescission); *Kase v. John*, 10 Watts, 107, 36 Am. Dec. 148; *Freyman v. Knecht*, 78 Pa. St. 141; *Eahleman v. Lightner*, 169 Pa. St. 46, 32 Atl. 63 (in Pennsylvania the Sales Act now allows rescission); *Kauffman Milling Co. v. Stuckey*, 40 S. C. 110, 18 S. E. 218; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197 (in Tennessee the Sales Act now allows rescission); *Wright v. Davenport*, 44 Tex. 164; *Hoadley v. House*, 32 Vt. 179, 76 Am. Dec. 167; *Matteson v. Holt*, 45 Vt. 336; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Mooers v. Gooderham*, 14 Ont. 451.

* *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Thompson v. Harvey*, 86 Ala. 519, 5 So. 825; *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Jordan v. Austin*, 161 Ala. 585, 50 So. 70; *Mississippi v. Woolf*, 1 Ala. App. 599, 56 So. 22. (cf. *Hafer v. Cole*, 176 Ala. 242,

American jurisdictions ⁴⁰ seems certain to give increasing prevalence to this view. The decisions which allow rescission do not generally make the right dependent on the importance of

57 So. 757); *Plant v. Condit*, 22 Ark. 454, 458; *Righter v. Roller*, 31 Ark. 170, 173; *Berman v. Woods*, 38 Ark. 351 (but see *Mason v. Bohannon*, 79 Ark. 435, 96 S. W. 181; *Gay Oil Co. v. Roach*, 93 Ark. 454, 125 S. W. 122), 27 L. R. A. (N. S.) 914; *Polhemus v. Heiman*, 45 Cal. 573; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440; *Harron v. Sisk*, 19 Cal. App. 628, 127 Pac. 355 (compare Cal. Civil Code, § 1786); *Collins v. Tigner* (Del. Sup.), 60 Atl. 978; *Dietrich v. Badders*, 27 Del. 490, 90 Atl. 47; *Misell v. Watson*, 57 Fla. 111, 49 So. 149; *Rogers v. Hanson*, 35 Iowa, 283; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621; *Eagle Iron Works v. Des Moines Ry. Co.*, 101 Iowa, 289, 70 N. W. 193; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Mattauch v. Riddell Auto. Co.*, 138 Ia. 22, 115 N. W. 509; *Price &c. Co. v. Sheenan*, 150 Ia. 189, 129 N. W. 836; *Billmeyer v. Queen Mfg. Co.*, 150 Ia. 318, 130 N. W. 115; *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70; *Craver v. Hornburg*, 26 Kans. 94; *Weybrick v. Harris*, 31 Kans. 92, 1 Pac. 271; *Gale Mfg. Co. v. Stark*, 45 Kans. 606, 26 Pac. 8, 23 Am. St. Rep. 739; La. Code, Art. 2520; *Flash v. American Glucose Co.*, 38 La. Ann. 4 (based on the Civil law); *Cutler v. Gilbreth*, 53 Me. 176; *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Tainter v. Wentworth*, 107 Me. 439, 78 Atl. 572; *Taymon v. Mitchell*, 1 Md. Ch. 496; *McKeney v. Duvall*, 21 Md. 166; *Horner v. Parkhurst*, 71 Md. 110, 17 Atl. 1027; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617 com-

pare *Horn v. Buck*, 48 Md. 358, 372; *Columbian Iron Works v. Douglas*, 84 Md. 44, 64, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Dorr v. Fisher*, 1 Cush. 271, 273; *Bryant v. Isburgh*, 13 Gray, 607, 74 Am. Dec. 655; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *Gilmore v. Williams*, 162 Mass. 351, 352, 38 N. E. 976; *Branson v. Turner*, 77 Mo. 489; *Johnson v. Whitman Co.*, 20 Mo. App. 100; *Kerr v. Emerson*, 64 Mo. App. 159; *St. Louis Brewing Assn. v. McEnroe*, 80 Mo. App. 429; *Edwards v. Noel*, 88 Mo. App. 434; *Sinnamon v. Moore*, 161 Mo. App. 168, 142 S. W. 494; *Griffin v. McDonald*, 163 Mo. App. 84, 145 S. W. 505; *Smith v. Means*, 170 Mo. App. 158, 155 S. W. 454; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718, 161 S. W. 298; *Jenkins' Sons Music Co. v. Kindle* (Mo. App.), 180 S. W. 557; *Davis v. Hartlerode*, 37 Neb. 864, 56 N. W. 731; *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567; *Hessig-Ellis Drug Co. v. Harley Drug Co.*, 95 Neb. 267, 145 N. W. 716; *Sloan v. Wolf Co.*, 124 Fed. 196, 59 C. C. A. 612; *Gerli v. Mistletoe Silk Mills*, 80 N. J. L. 128, 76 Atl. 335; *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602; *Robinson v. Huffstetler*, 165 N. C. 459, 81 S. E. 753; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229, 55 N. W. 583 (compare N. Dak. Civil Code, § 3988); *Byers v. Chapin*, 28 Ohio St. 300; *Brachen v. Fidelity Trust Co.*, 42 Okl. 118, 141 Pac. 6; *Scott v. Vulcan*

⁴⁰ It has been enacted in Alaska, Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey,

New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin, Wyoming.

the warranty or the character of the breach of it,⁵⁰ nor does the Sales Act. The Federal courts apply either doctrine which is locally in force, rather than a single rule based on decisions of the Supreme Court of the United States.⁵¹ If several articles are bought for a separate price with a warranty applicable to each article, and the warranty as to one or more articles is broken, it is said that rescission may be had for such articles as do not comply with the warranty.⁵² But it would seem essential

Iron Works, 31 Okl. 334, 122 Pac. 186, 192; *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715; *Oltmanns v. Poland* (Tex. Civ. App.), 142 S. W. 653; *Hill v. Hanan* (Tex. Civ. App.), 146 S. W. 648; *Konnerup v. Allen*, 56 Wash. 292, 105 Pac. 639; *Blake-Rutherford Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418; *Boothby v. Scales*, 27 Wis. 626; *Croninger v. Paige*, 48 Wis. 229, 4 N. W. 106; *Wilson v. Solberg*, 145 Wis. 573, 130 N. W. 472; *Kelsey v. J. W. Ringrose Net Co.*, 152 Wis. 499, 140 N. W. 66; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. 470; *Minnesota Threshing Co. v. Wolfram*, 96 Wis. 481, 71 N. W. 809; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154; *Optenberg v. Skelton*, 109 Wis. 241, 244, 85 N. W. 356. See also *De Forest Radio & C. Co. v. Standard Oil Co.*, 238 Fed. 346, 151 C. C. A. 362; *Walker, Evans & Cogswell Co. v. Ayer*, 80 S. C. 292, 61 S. E. 557; *Southern Brass Co. v. Exeter Mach. Works*, 109 Tenn. 67, 70 S. W. 614; *Mader v. Jones*, 1 Russ. & Chesley, 82.

⁵⁰ In *Gale Mfg. Co. v. Stark*, 45 Kans. 606, 26 Pac. 8, 23 Am. St. Rep. 739, such a distinction was at least suggested, as the court confined its allowance of the remedy to cases "where the property purchased and received is substantially different from what it was warranted to be, and will not answer the purpose for which it was warranted." In Louisiana, which derives its law of sales from the Roman Law, the breach of implied warranty

(or, in the language of the Civil law, the redhibitory defect) must be such as to render the thing sold either useless or its use so imperfect or inconvenient that the buyer would not have purchased it had he known of the defect. In case of an express warranty the requisites for rescission are even more severe. It is necessary that the quality warranted should have been the principal motive for making the purchase. La. Code, Art. 2520.

⁵¹ In *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595, and *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847, the Supreme Court of the United States held that rescission was not allowable, but in these cases the law was still unsettled in the jurisdictions where the cases arose. The Circuit Court of Appeals in recent decisions has followed without comment the local law of Iowa, Nebraska, and Massachusetts, in each of which States rescission is allowed, rather than the rule suggested by the Supreme Court in the cases above referred to. *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70; *Sloan v. Wolf Co.*, 124 Fed. 196, 59 C. C. A. 612; *Lawley & Son Corp. v. Park*, 138 Fed. 31, 70 C. C. A. 399. See also *De Forest Radio & C. Co. v. Standard Oil Co.*, 238 Fed. 346, 151 C. C. A. 362.

⁵² *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91. See also *Womach v. J. I. Case Threshing Mach. Co.*, 62 Wash. 661, 114 Pac. 509.

that a separate contract for each article exist. The mere fact that a separate price was made for each article will not be enough.⁵³ A separate price is evidence, though not conclusive, of a separate contract.⁵⁴

§ 1463. The buyer must put the seller in statu quo.

Though courts which allow rescission for breach of warranty do not regard the temporary use by the buyer necessary to show the defect as such a benefit to the buyer or such an injury to the goods as to preclude the right of rescission, he cannot generally rescind if the goods are injured or destroyed.⁵⁵ Unless the seller was guilty of fraud this is probably true though the destruction or injury is without the buyer's fault.⁵⁶ An exception has, however, been made where the injury to the goods was caused by the very defect against which the seller warranted;⁵⁷ also where the goods were worthless when they were bought;⁵⁸ and where the buyer is induced by the seller to retain

⁵³ *Misell v. Watson*, 57 Fla. 111, 49 So. 149. See also *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; *Roshkoff v. Lieberman's Millinery, Inc.*, 167 N. Y. S. 291, and *supra*, §§ 720, 861.

⁵⁴ See *supra*, § 863.

⁵⁵ *Curtis v. Hannay*, 3 Esp. 82; *Aultman v. Wirth*, 54 Ill. App. 17; *Rice v. Friend Bros. Co.*, 179 Ia. 355, 161 N. W. 310; *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004; *Gerli v. Mistletoe Silk Mills*, 83 N. J. L. 7, 84 Atl. 1065; *Mo-Knight v. Nichols*, 147 Pa. St. 158, 23 Atl. 399.

⁵⁶ *Nutting v. Watson*, 84 Neb. 464, 121 N. W. 582, 25 L. R. A. (N. S.) 823. It is well settled that the risk is on the buyer where a sale is made by the terms of which he has an option to return, until he exercises the option. See *supra*, § 809. There is no reason to suppose that the rule would be otherwise where the right to return depended on a privilege given by the law instead of on agreement of the parties.

⁵⁷ Thus in *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 St. Rep.

485, it was held that a buggy, the springs of which were warranted strong, might be returned though one of the springs had been broken while in the buyer's possession. So in *Lawley & Son Corp. v. Park*, 138 Fed. 31, 70 C. C. A. 399, a yacht warranted of a certain material was held returnable by the buyer though it had been seriously injured, the injury being due to the defective material of which it was constructed. So in *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678, it was held that even though the contract provided as a condition of return that the horse sold should be in as sound condition when returned as when sold it might be returned though in worse condition than when bought, when such unsoundness resulted from the natural development of a disease existing at the time of the sale.

⁵⁸ *Buss v. Allison Glass Co.*, 146 Mo. App. 71, 123 S. W. 949; *Smith v. Means*, 170 Mo. App. 158, 155 S. W. 454; *First Nat. Bank v. Mineral Wells &c. St. Ry.* (Tex. Civ. App.), 133 S. W. 1099.

the property temporarily and attempt to remedy the defect, which is thereby increased.⁶⁰ Moreover, when the buyer has resold a small portion of the goods before discovering the defect, he has been allowed to rescind on offering to return the remainder and the price for what was resold.⁶⁰ In seeking rescission the buyer must take the position of an actor. When the buyer rejects goods because they are not what the contract requires, he is under no obligation to return them; he may simply refuse to regard them as his.⁶¹ But where the property in the goods has passed and the buyer wishes to revest the property in the seller, a return or offer to return the goods is necessary. "It is not sufficient for a buyer who has taken delivery of the

⁶⁰ *Feight v. Thialer*, 84 Kan. 185, 114 Pac. 249.

In *Pleak v. Marks*, 171 Ia. 551, 152 N. W. 63, 65, in speaking of the right of a buyer to rescind an executed sale because of the death of one of the animals sold, through the fault of the seller and breach of his contract to deliver, the court said: "We can hardly think that the defendants were required to carry this putrefying carcass to the plaintiff in order to save their legal rights. The public would have some rights at this point. If the carcass had any money value, the defendants would doubtless owe a commensurate duty to protect the plaintiff to the extent of such value. It is doubtful also whether the defendants were under the necessity of returning the property to the farm of the plaintiff as a condition of rescission. The livery stable was agreed upon at the time of the purchase as the place of delivery, and the property was actually delivered there. So far, therefore, as the declaration of rescission and the return of the property thereunder are concerned, we are disposed to think that they would have been sufficient, provided, of course, that it be found that the defendants were legally entitled to rescind, and, provided further, that they had stood upon

their rescission. But the defendants did not stand upon their rescission. Upon the refusal of the plaintiff to receive the property, the defendants proceeded to put the same upon the market. They were sold in due course upon the Omaha market. The defendants did not in their answer keep their tender good. Their answer contained no tender whatever. We will assume that they were not bound under all circumstances to keep the property for the purpose of keeping their tender good. The circumstances might warrant their disposal of it. Even then they would be required to dispose of it for the benefit of the plaintiff if they proposed to keep their tender good. The answer in this case pleaded only the rescission and the offer to return. It contained no suggestion of present tender either of the property or of its proceeds. The defendants, therefore, are in the position of having abandoned their tender of return, and of having fully appropriated the property to their own use."

⁶⁰ *Wilson v. Solberg*, 145 Wis. 573, 130 N. W. 472. See also *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715. But see *Continental Jewelry Co. v. Pugh*, 168 Ala. 295, 53 So. 324, Ann. Cas. 1912 A. 657.

⁶¹ *Williston, Sales*, §§ 496, 497.

goods at the vendor's place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. But, if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless, upon making the offer so to do, he is relieved of the obligation, as stated, by a refusal to receive them if tendered."⁶² It is no exception to this rule that if the original place of delivery was the buyer's place of business, mere notice to the seller to remove the goods is sufficient.⁶³ The buyer need not, however, actually deliver the goods to the seller unless the seller repays any portion of the price which has been paid. The buyer has a lien on the goods to secure such repayment.⁶⁴

§ 1464. The buyer's remedies are mutually exclusive.

It seems to be generally assumed that if a buyer elects the remedy of rescission for breach of warranty he is thereby precluded from bringing an action for damages and it has been so decided.⁶⁵ The Uniform Sales Act adopts this rule. As an

⁶² *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77, quoted and followed in *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. 670. See also the quotation from *Peak v. Marks*, 171 Ia. 551, 152 N. W. 63, in note 59. *Lake v. Western Silo Co.*, 177 Ia. 735, 158 N. W. 673; *Stevens Tank & Tower Co. v. Berlin Mills Co.*, 112 Me. 336, 92 Atl. 180, 182; *Skillings v. Collins*, 224 Mass. 275, 112 N. E. 938, Ann. Cas. 1918 D. 424; *McKinley v. Small*, 178 Mich. 555, 146 N. W. 230. See also *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567. *Cf.* *Rood v. Priestley*, 58 Wis. 255, 16 N. W. 546. In *Reeves v. Younglove*, 164 Ia. 151, 145 N. W. 502; *Smith v. Means*, 170 Mo. App. 158, 155 S. W. 454; *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295; *Jones v. McGinn*, 70 Oreg. 236, 140 Pac. 994; *J. I. Case Threshing Mach. Co. v. Johnson*, 140 Wis. 534, 122 N. W. 1037, it was held that the clearly announced decision

of the buyer not to accept a return of the goods, made it unnecessary to offer them at the place of delivery.

⁶³ *Fairbanks v. Walker*, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. (N. S.) 558; *P. H. & F. M. Roots Co. v. New York Foundry Co.*, 56 N. Y. Misc. 687, 107 N. Y. S. 742.

⁶⁴ *E. T. Kenney Co. v. Anderson*, 26 Ky. L. Rep. 367, 81 S. W. 663. See also *Weeks v. Robert A. Johnson Co.*, 116 Wis. 105, 92 N. W. 794.

⁶⁵ *Abraham v. Browder*, 114 Ala. 287, 290, 21 So. 818; *Shaw v. Water Supply Co.*, 23 Col. App. 110, 128 Pac. 480; *Heagney v. J. I. Case Mach. Co.*, 4 Neb. (Unof.) 745, 96 N. W. 175; *McCormick Machine Co. v. Brown*, 5 Neb. (Unof.), 356, 98 N. W. 697; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325; *Osborne v. Poindexter* (Tex. Civ. App.), 34 S. W. 299; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.)

original question, at least where a contract preceded the actual sale, it might well be argued with some force that the buyer should have a right to rescind the transfer of property without rescinding the contract, and in this way restore the property to the seller and yet hold him liable in damages for failure to keep his contract.⁶⁶

The right of the buyer, when sued for price, to recoup because of the diminished value of the goods, and yet bring an action later to recover consequential damages for breach of the warranty, has been upheld in England in a leading case.⁶⁷ The court there said "that in the action in which recoupment had been allowed the buyer could not recover consequential damages and that, therefore, recovery should be allowed in the subsequent action on the warranty." It is true that in the former action the consequential damages could not be set up, but if the buyer elects a remedy which deprives him of a right to recover certain damages, the court cannot undo his election. In theory it seems clear that the right of recoupment must be based on the assumption that not simply the sale is rescinded but the whole contract to buy and sell. The buyer may stand on his contract, in which case he is liable for the price agreed, and may sue or counterclaim for the seller's failure to perform his contract, or he may assert in effect that the goods are not what the contract called for, and that he will substitute for his liability on that contract a quasi-contractual obligation to pay the value of what he has received. Accordingly it has been held in the United States that the buyer must elect between these two remedies,⁶⁸ and the American law generally denies the possibility of maintaining an independent action to recover a balance of damages which were not recoverable when the claim was used in recoupment.⁶⁹ Under the Sales Act it is clear that

925; *Blake Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418; *Park v. Richardson*, 81 Wis. 399, 51 N. W. 572.

⁶⁶ This was so contended in the dissenting opinion in *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.), 925, and so held in *Dietrich v. Badders*, 27 Del. 499, 90 Atl. 47.

⁶⁷ *Mondel v. Steel*, 8 M. & W. 858.

⁶⁸ *Jones v. Charles Warner Co.*, 2 Boyce (Del.), 566, 83 Atl. 131; *Impervious Products Co. v. Gray*, 127 Md. 64, 96 Atl. 1 (under Sales Act); *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976; *Berman v. Henry N. Clark Co.*, 194 Mass. 248, 80 N. E. 480.

⁶⁹ *McLane v. Miller*, 12 Ala. 643; *Penny v. Corey*, 147 Ala. 617, 41 So.

the buyer can have but a single remedy for breach of warranty.⁷⁰

In any other kind of bargain than that of a sale of goods by description, there seems even less possibility of question that rescission when rightfully exercised is an exclusive remedy and that the injured party who rescinds can claim nothing beyond restitution.

§ 1465. Where no performance has been rendered.

While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to the contract without more. That he may do this is perhaps intimated by Parke, B., in *Phillpotts v. Evans*;⁷¹ it is expressly stated by Crompton, J., in *Hochster v. De La Tour*,⁷² where the repudiation preceded the time for performance by either party. It was so decided in *King v. Faist*.⁷³ There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The

978; *Edge Moor Iron Co. v. Brown &c. Co.*, 6 Pennw. (Del.) 10, 13, 4 L. R. A. (N. S.) 858; *Britton v. Turner*, 6 N. H. 481, 495, 26 Am. Dec. 713; *Fabbricotti v. Launits*, 3 Sandf. (N. Y.) 743.

⁷⁰ *Impervious Products Co. v. Gray*, 127 Md. 64, 96 Atl. 1; *Gerli v. Mistetoe Silk Mills*, 80 N. J. L. 128, 76 Atl. 335; *Regina Co. v. Gately Furniture Co.*, 154 N. Y. S. 888, 171 App. Div. 817, 157 N. Y. S. 746;

Kaufman v. Levy, 102 N. Y. Misc. 689, 169 N. Y. S. 454.

⁷¹ 5 M. & W. 475, 477. See also *Grimaldi v. White*, 4 Esp. 95.

⁷² 2 E. & B. 678, 685. "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract."

⁷³ 161 Mass. 449, 37 N. E. 456.

plaintiff sued for this failure to perform, but the court held it justified, saying: "Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract."⁷⁴ Indeed, the numerous cases on anticipatory breach largely base their arguments on the premise that an anticipatory repudiation is an offer to rescind.⁷⁵ Though this mode of statement is open to objection,⁷⁶ and when coupled with the statement that the offer includes as part of the proposition that the offeror shall be immediately liable to an action for damages becomes an almost grotesque fiction, the cases on repudiation at least tend to show that the injured party has a right of rescission, whether acquired by mutual assent or (as is the truth) given by the law to the injured party, regardless of the assent of the other. This right may become of great importance if the contract while it exists operates as a threatened liability or a cloud on title. Thus if a contract for the sale of real estate is recorded, the owner has no longer a salable title, and if the purchaser fails to carry out his agreement, the owner, to regain a clear title to his land, will desire the rescission of the contract. In order that there may be recorded evidence of this a court of equity will decree the rescission and cancellation of such a contract.⁷⁷ So one who has given negotiable paper in return for a promise which has been broken is entitled to proceed affirmatively for the rescission of the contract and the surrender of the negotiable paper, lest it should be negotiated by the holder to a *bona fide* purchaser for value without notice, to whom the maker would be liable.⁷⁸ And wherever necessary in order to do justice between the parties the aid of a court of equity may be invoked to decree rescission.⁷⁹

⁷⁴ *Ib.* at p. 457. See also *Howe v. Smith*, 27 Ch. D. 89, 105; *Munsey v. Butterfield*, 133 Mass. 492; *Warters v. Herring*, 2 Jones L. (N. C.), 46.

⁷⁵ See *supra*, §§ 1297 *et seq.*

⁷⁶ See *supra*, § 1302.

⁷⁷ *Howe v. Hutchison*, 105 Ill. 501; *Nelson v. Hanson*, 45 Minn. 543, 48 N. W. 410; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

⁷⁸ See *Randolph on Commercial Paper* (2d ed.), §§ 1686, 1687; *Campbell Printing Press Co. v. Marsh*, 20 Col. 22, 36 Pac. 799; *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357.

⁷⁹ *Neenan v. Otis Elevator Co.*, 194 Fed. 414, 114 C. C. A. 376; *Crowe v. Oscar Barnett Foundry Co.*, 213 Fed. 864, 219 Fed. 450, 135 C. C. A. 162.

§ 1466. Repudiation without breach sufficient.

There seems to be no doubt that repudiation without any actual failure to perform the contract is enough to give rise to the right. This point is covered by the remark of Crompton, J., just referred to. So, in a Massachusetts case,⁸⁰ the court say: "Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and therefore it did not amount to breach of covenant." And again, "It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."⁸¹

§ 1467. Breach without repudiation sufficient.

Question is more likely to be made whether breach of contract without repudiation justifies rescission than whether repudiation without actual breach is sufficient. There are many expressions, chiefly in English cases, which seem to mean that repudiation or abandonment of the contract is essential to give rise to the right of rescission. Thus, in *Ehrensperger v. Anderson*, Parke, B., said, "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying 'I rescind this contract,' . . . a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'" ⁸² In accordance with this doctrine it was

⁸⁰ *Ballou v. Billings*, 136 Mass. 307, 308.

⁸¹ P. 309. See also *Drake v. Goree*, 22 Ala. 409; *Cabrera v. Payne*, 10 Cal. App. 675, 103 Pac. 176; *Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10; *Festing v. Hunt*, 6 Manitoba, 381. But where a contract of service was terminated by

the plaintiff's illness before compensation became due under the contract, the court refused to allow recovery on a *quantum meruit* at an earlier day than that on which the contract required payment. *Tebo v. Ballard*, 36 Vt. 612.

⁸² 3 Ex. 148, 158. This is quoted in *Keener on Quasi-Contracts*, 304, as a correct exposition of the law. Similar expressions may be found in *Fay v.*

held that failure by the defendant to remit a bill of exchange did not permit the plaintiff to treat the contract as rescinded and sue in money had and received for restitution of what the defendant had received. In another case³³ the court, and particularly Lord Coleridge, laid stress on the question whether the breach of contract amounted to an "abandonment of the contract or a refusal to perform it on the part of the person so making default;" and in *Mersey Steel and Iron Co. v. Naylor, the Earl of Selborne*, citing Lord Coleridge's statement, expressed the same view even more explicitly.³⁴ This doctrine,

Oliver, 20 Vt. 118, 122, 49 Am. Dec. 764.

³³ *Freeth v. Burr*, L. R. 9 C. P. 208, 214. Reliance was placed on earlier expressions in *Withers v. Reynolds*, 2 B. & Ad. 882, and *Jonassohn v. Young*, 4 B. & S. 296. See also the language of Coleridge, J., in *Franklin v. Miller*, 4 A. & E. 599.

³⁴ 9 App. Cas. 434, 438. In both *Freeth v. Burr* and *Mersey Steel and Iron Co. v. Naylor*, the question was not directly as to the right of rescission, but as to the right of a party to maintain an action on the express contract when himself in default. In both these cases such an action was held maintainable, in part at least, because the default relied on did not show an intention to abandon the whole contract. It seems clear, however, that a default which is not sufficient to warrant the other party in refusing to perform his promise, and is no answer to an action on that promise, will not entitle him to treat the contract as rescinded. These cases may, therefore, be cited in this connection. For a criticism of the doctrine so far as it relates to the sufficiency of the plaintiff's non-performance without repudiation or abandonment of the contract as a defence to an action upon it, see *supra*, §§ 865 *et seq.*

In some American cases, also, it has been said that mere breach of contract does not justify rescission unless an

intention is manifested to be no longer bound by the contract, or unless the wrongdoer has prevented performance by the other party. *Monarch Cycle Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523; *Wright v. Haskell*, 45 Me. 489 (see also *Dixon v. Fridette*, 81 Me. 122, 16 Atl. 412); *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; *Blackburn v. Reilly*, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Graves v. White*, 87 N. Y. 463; *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 47, 2 N. E. 470 (cp. *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522); *Suber v. Pullin*, 1 S. C. 273. Yet it is to be noticed that it is much easier to find cases where such expressions are used, than it is to find cases where it was actually held that a breach so material as to make the partial performance of a contract different in substance from the performance promised was insufficient ground for rescission because no intention was manifested to refuse absolutely to perform in the future. Thus, in spite of the remarks in some New York cases, it was held in *Welsh v. Gessler*, 89 N. Y. 540, that a contract to ship in May or June might be rescinded for non-performance of this requirement, though there was so far from an absolute repudiation that shipment was actually made in July and the cargo tendered. This was

though perhaps it is that of the English law to-day,⁸⁵ both as to the right of the injured party to rescind and his closely connected but different right to refuse further performance himself and nevertheless hold the other party liable on the contract,⁸⁶ must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify a rescission of the contract, mutual assent of the parties must be established—an offer by the party in default accepted by the other party.⁸⁷ In almost any case this can be established only by resorting to the baldest fiction.⁸⁸ As matter of theory a man who repudiates a contract no more than one who negligently breaks it offers to rescind it, and if he did, his offer could only be construed as expressing a willingness to drop matters as they stood at the time, not with

followed in *Hill v. Blake*, 97 N. Y. 216. See also *Mansfield v. New York Central R. R. Co.*, 102 N. Y. 205, 6 N. E. 386.

⁸⁵ See in addition to the cases cited in the previous note, *Cornwall v. Henson*, L. R. [1900] 2 Ch. 298; *Rhymney Ry. Co. v. Brecon, etc., Ry. Co.*, 83 L. T. 111; *In re Phoenix, etc., Co.*, 4 Ch. D. 108; *Bloomer v. Bernstein*, L. R. 9 C. P. 588. There are strong expressions to the same effect in Colonial decisions. In *Bradley v. Bertoumieux*, 17 Victorian L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." So in *Osten v. Stanley*, 19 Victorian L. R. 553, 555. "The point is whether the person who committed the breach meant to abandon the contract." And see, to similar effect, *Prendergast v. Lee*, 6 Victorian L. R. (Law) 411; *Hacker v. Australian, etc., Co.*, 17 Victorian L. R. 376; *Moroney v. Roughan*, 29 Vict. L. R. 541; *Midland Ry. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677. See, however, *Muston v. Blake*, 11 S. C. New South Wales, 92.

⁸⁶ See *supra*, § 865.

⁸⁷ Thus, Coleridge, J., in *Franklin v. Miller*, 4 A. & E. 599, says: "The rule is that, in rescinding, as in making a contract, both parties must concur," and, "therefore, the refusal which is to authorize the rescission of the contract must be an unqualified one." See also the reasoning of Lord Esher in *Johnstone v. Milling*, 16 Q. B. D. 460, 467. And in an American case it is said: "Where one of the contracting parties absolutely refuses to perform, such refusal . . . will be regarded as equivalent to a consent on his part to a rescission of the contract, and the other contracting party may, if he choose, so treat it, rescind the contract, and if he have done anything under it, may immediately sue for compensation on a *quantum meruit*." *Shaffner v. Killian*, 7 Ill. App. 620. So in *Cromwell v. Wilkinson*, 18 Ind. 365, 370; *Stevens v. Cushing*, 1 N. H. 17, 18, 8 Am. Dec. 27; *Dow v. Harkin*, 67 N. H. 383, 29 Atl. 846, and other cases.

⁸⁸ The preceding three sentences, originally published in 14 Harv. L. Rev. 318, are quoted with approval in *Rafferty v. World Film Corp.*, 180 N. Y. App. D. 477, 479, 167 N. Y. S. 1027.

the addition imposed by the court of making restitution of what he had received.⁸⁹ And as a practical question the only important consideration is how defective the performance of a contracting party has been or is likely to be, not whether it was negligence or wilfulness on his part that led him to break his promise. In truth rescission is imposed *in invitum* by the law at the option of the injured party,⁹⁰ and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as would constitute a defence to an action brought by the party in default for a refusal to proceed with the con-

⁸⁹ How inadequate any doctrine of mutual consent is to account for even the English cases may be seen from the decision in *Clay v. Yates*, 1 H. & N. 73. The plaintiff contracted to print for the defendant a second edition of a treatise with a new dedication, which had not then been written. After the treatise was printed the plaintiff discovered that the dedication which had been furnished him was libellous and refused to complete the fulfilment of the contract. He was held entitled to recover for the printing he had done. Here the defendant, so far from assenting to a rescission of the contract, demanded that it should be performed. The plaintiff recovered because the defendant had given ground for, though not assented to, the interruption of the contract.

Rescission by mutual consent is, of course, an entirely possible solution for parties to elect when they are disputing over a contract. Instances of it may be found in *Skillman Hardware Co. v. Davis*, 53 N. J. L. 144, 20 Atl. 1080; *Deno v. Hersh*, 158 Wis. 502, 149 N. W. 145. The court found from the conduct of the parties that there had been rescission by mutual consent. See also *Vider v. Ferguson*, 88 Ill. App. 136; *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109, 31 N. E. 756; *Beal v. Minneapolis, etc., Co.*, 84 Mo. App. 539; *Swarts v. Narragansett &c. Co.*, 26 R.

I. 436, 59 Atl. 77, 111. Neither party is entitled to damages in such a case without special agreement. *Lamburn v. Cruden*, 2 M. & G. 253; *Natalisio v. Valentino*, 71 N. J. L. 500, 502, 59 Atl. 8; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Bailey v. Bourn Rubber Co. (R. I.)*, 67 Atl. 427; *Deno v. Hersh*, 158 Wis. 502, 149 N. W. 145. See *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389. It is true that in several American cases of rescission of a contract of service by mutual assent it has been said that the servant may recover for any services which have been rendered. *White v. Gray*, 4 Ill. App. 228; *Burnetta v. Marcoline Coal Co.*, 180 Mo. 241, 79 S. W. 136; *Bowdish v. Briggs*, 5 N. Y. App. D. 592, 39 N. Y. S. 371. But it is obvious the question is one of fact, what were the terms of the agreement to rescind, and no universal rule of law or even inference of fact can be admitted. *Lamburn v. Cruden*, 2 M. & G. 253; *Natalisio v. Valentino*, 71 N. J. L. 500, 502, 59 Atl. 8.

⁹⁰ Therefore, it will not prevent rescission for breach of contract and recovery of an advance payment that the contract provided that the payment should be returned only if an order was not accepted. *Martin v. Cunningham*, 231 Mass. 280, 121 N. E. 21.

tract.⁹¹ Where no time is fixed by the contract or where time is not of the essence, the injured party may by notice fix a reasonable time after which the contract, if not performed, will be treated as abandoned.⁹²

§ 1468. One guilty of the first breach cannot rescind.

A party who has himself been guilty of a substantial breach of contract cannot rescind the contract because of subsequent

⁹¹ The preceding sentence, originally published in an article in 14 Harv. L. Rev. was quoted and applied in *Rafferty v. World Film Corp.*, 180 N. Y. App. D. 475, 479, 167 N. Y. S. 1027. In further support of the proposition see *Panama, etc., Co. v. India, etc., Co.*, L. R. 10 Ch. 515, 532 (*semble*); *Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Farmers' L. & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. Ed. 573; *Watson v. Ford*, 93 Fed. 359, 35 C. C. A. 345; *Powell v. Sammons*, 31 Ala. 552; *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *San Francisco Bridge Co. v. Dumbarton Co.*, 119 Cal. 272, 51 Pac. 335; *Campbell Printing Press Co. v. Marsh*, 20 Col. 22, 36 Pac. 799; *Bacon v. Green*, 36 Fla. 325; *Code of Georgia*, § 3712; *Harrison Machine Works v. Miller*, 29 Ill. App. 567; *Wolf v. Schlacks*, 67 Ill. App. 117; *Cromwell v. Wilkinson*, 18 Ind. 365; *Anderson v. Haskell*, 45 Ia. 45; *Wernli v. Collins*, 87 Ia. 548, 54 N. W. 365; *Canfield Lumber Co. v. Kint Lumber Co.*, 148 Ia. 207, 127 N. W. 70; *Horne v. Richards*, 113 Me. 210, 93 Atl. 290; *Baltimore & Ohio R. Co. v. Carter*, 133 Md. 551, 105 Atl. 760; *Bullard v. Eames*, 219 Mass. 49, 106 N. E. 584; *Palmer v. Guillow*, 224 Mass. 1, 112 N. E. 493, 494; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 529; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Nelson v. Hanson*, 45 Minn. 543, 48 N. W. 410; *Gulich v. Alford*, 61 Miss. 224; *Mugan v. Regan*, 48 Mo.

App. 461; *Oliver v. Goets*, 125 Mo. 370, 28 S. W. 441; *Drew v. Claggett*, 39 N. H. 431; *Foster v. Bartlett*, 62 N. H. 617; *Patridge v. Gildermeister*, 1 Keyes, 93; *Welsh v. Gossler*, 89 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216; *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268, 92 N. E. 747; *North Dak. Civ. Code*, § 3932; *Rummington v. Kelley*, 7 Ohio, pt. 2, 97; *Higby v. Whittaker*, 8 Ohio, 198; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Oklahoma Stat.*, § 866; *Miller v. Phillips*, 31 Pa. 218; *Greene v. Haley*, 5 R. I. 260; *Bennett v. Shaughnessy*, 6 Utah, 273, 22 Pac. 156; *Fletcher v. Cole*, 23 Vt. 114; *Preble v. Bottom*, 27 Vt. 249; *Brown v. Aitken*, 88 Vt. 148, 92 Atl. 22; *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148; *School District v. Hayne*, 46 Wis. 511, 1 N. W. 170. Many earlier decisions are cited in the cases above.

In *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 69, 119 N. W. 969, the court said; "Whether plaintiff by his language really intended to assent to such rescission or whether the defendants understood him as so assenting may be a question of fair dispute; but, if he furnished a legal ground of rescission by his breach of the contract, his assent to it was not necessary."

⁹² *Green v. Sevin*, 13 Ch. Div. 589; *Cover v. McLaughlin*, 18 N. S. Wales, L. R. (Eq.) 107, and decisions, *supra*, § 852.

refusal or failure to perform by the other party.⁸³ This principle, however, is only accepted with much qualification in many States. The right of one who is himself in default to recover compensation for what he has done must necessarily be considered, for if one who has unjustifiably failed to perform his contract fully, can nevertheless recover the value of what he has done, though no breach of promise has been committed by the other party, *a fortiori* the same redress may be had where the latter has subsequently refused to perform. But even in such jurisdictions, as elsewhere, the original wrongdoer remains liable in damages for breach of his contract. This liability he cannot escape.⁸⁴ Where an intolerable hardship would otherwise be caused a court of equity may likewise decree rescission in spite of the plaintiff's breach.⁸⁵

§ 1469. Manifestation of election.

As rescission is only an alternative remedy, and is in derogation of the contract, it is said that a party who wishes to avail himself thereof must manifest his election in some way.⁸⁶ The

⁸³ *Howe v. Smith*, 27 Ch. D. 89; *Sumpter v. Hedges*, [1898] 1 Q. B. 673; *Forman v. The Liddesdale*, [1900] A. C. 190; *Kane v. Jenkinson*, 10 Nat. B. R. 316; *Fairchild-Gilmore-Wilton Co. v. Southern Ref. Co.*, 158 Cal. 264, 110 Pac. 951; *North American Dredging Co. v. Outer Harbor &c. Co. (Cal.)*, 173 Pac. 756; *Johnson Forge Co. v. Leonard*, 3 Pennw. (Del.) 342, 350, 51 Atl. 305, 94 Am. St. Rep. 86; *Baston v. Clifford*, 68 Ill. 67, 18 Am. Rep. 547; *Purcell v. Sage*, 200 Ill. 342, 65 N. E. 723; *Downey v. Riggs*, 102 Ia. 88, 70 N. W. 1091; *Getty v. Peters*, 82 Mich. 661, 46 N. W. 1036, 10 L. R. A. 465; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Green v. Green*, 9 Cow. 46; *Ketchum v. Evertson*, 13 Johns. 359, 364, 7 Am. Dec. 384; *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287; *Ashbrook v. Hite*, 9 Ohio St. 357, 75 Am. Dec. 468; *J. K. Armsby Co. v. Grays Harbor Comm. Co.*, 62 Oreg. 173, 123 Pac. 32. See also *Hickock v.*

Hoyt, 33 Conn. 553; *Wilkinson v. Blount*, 169 Mass. 374, 47 N. E. 1020; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

⁸⁴ See cases in the preceding note; also *supra*, § 871.

⁸⁵ *Crowe v. Oscar Barnett Foundry Co.*, 213 Fed. 864, 219 Fed. 450, 135 C. C. A. 162. See also *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750.

⁸⁶ *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *Cornwall v. Henson*, L. R. (1900) 2 Ch. 298; *Hennessy v. Bacon*, 137 U. S. 78, 34 L. Ed. 605, 11 Sup. Ct. 17; *Carney v. Newberry*, 24 Ill. 203; *Sanford v. Emory's Adm'r*, 34 Ill. 468; *Graham v. Holloway*, 44 Ill. 385; *Mullin v. Bloomer*, 11 Ia. 360; *Supple v. Iowa State Ins. Co.*, 58 Ia. 29, 11 N. W. 716; *Weeks v. Robie*, 42 N. H. 316; *Swasey v. Choate Mfg. Co.*, 48 N. H. 200; *Andrews v. Cheney*, 62 N. H. 404. *Cf. Dow v. Harkin*, 67 N. H. 383, 29 Atl. 846; *Levy v. Loeb*, 89 N. Y. 386, 390; *Higby v. Whittaker*,

way in which election must be manifested may vary in different cases. Formal notice is certainly not always requisite, and bringing an action promptly for restitution is generally held sufficient.⁹⁷ It is also said that one who wishes to rescind must manifest his election to do so without undue delay, or the right will be lost.⁹⁸ It seems probable, however, that this is true only where the party seeking rescission has received money or property which he must restore as a condition of relief,⁹⁹ or where there is further performance due under the contract from the other party which in the absence of notice he might suppose would be accepted in spite of his prior breach. The cases though containing broader statements generally fall in these classes. There seems no reason why a plaintiff who has paid a sum of money for the defendant's promise to give him a horse,

8 Ohio, 198; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857. See also cases on anticipatory breach, *supra*, § 1322, where the courts refer habitually to the necessity of manifesting an election to treat repudiation as a rescission plus a right of action.

⁹⁷ *Thresher v. Stonington Bank*, 68 Conn. 201, 36 Atl. 38; *Graham v. Holloway*, 44 Ill. 385; *Brown v. St. Paul, etc., Ry. Co.*, 36 Minn. 236, 31 N. W. 941; *Graves v. White*, 87 N. Y. 463. And see *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677. In New Hampshire, however, it is held some manifestation of election must precede such an action. See New Hampshire cases cited in the preceding note. In Texas it is laid down, at least in cases of sales of real estate, that "where there has been part performance by the vendee, as paying a portion of the purchase money or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. The reason of this rule is obvious. He may be able to give a reasonable excuse for his failure to fully perform that would entitle him in equity to protection to the extent he

had performed. If the vendee has actually abandoned the contract or has so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee." *Kennedy v. Embry*, 72 Tex. 387, 390, 10 S. W. 88.

⁹⁸ *Fennessy v. Bacon*, 137 U. S. 78, 34 L. Ed. 605, 11 Sup. Ct. 17; *Collins v. Tigner*, 5 Del. 345, 60 Atl. 978; *Mixell v. Watson*, 57 Fla. 111, 49 So. 149; *Harden v. Lang*, 110 Ga. 392, 395, 36 S. E. 100; *Carney v. Newberry*, 24 Ill. 203; *Axtel v. Chase*, 77 Ind. 74, 83 Ind. 546, 554; *Olson v. Brison*, 129 Ia. 604, 106 N. W. 14; *Mills v. Osawatomie*, 59 Kans. 463, 53 Pac. 470; *World Pub. Co. v. Hull*, 81 Mo. App. 277; *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Caswell v. Black River Mfg. Co.*, 14 Johns. 453; *North Dakota Civ. Code*, § 3934; *Oklahoma Stat.*, § 868; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161, 74 Am. Dec. 662, *n.*, and see cases cited, *supra*, § 1462, in which rescission was held permissible for breach of warranty.

⁹⁹ As under an executed sale rescinded for breach of warranty. See cases on rescission of warranty, *supra*, § 1462.

may not, after breach of his promise by the defendant, wait any period short of that fixed by the Statute of Limitations before deciding whether to sue for the value of the horse or for the recovery of the price.¹ Where a plaintiff seeks rescission and restitution, he must not only restore what he has received but his offer of restitution must be kept good.² Election once made determines the plaintiff's rights.³ Judgment based on the assertion of one alternative is necessarily a conclusive election;⁴ and the beginning of an action for one form of relief or the other is generally held so.⁵

§ 1470. Rescission of sealed contracts.

The right of rescission is frequently stated as if it were confined to simple contracts;⁶ and it is obviously inconsistent with the early common-law doctrines in regard to dissolution of sealed contracts to allow matter *in pais* to afford ground for their rescission.⁷ But in many jurisdictions in this country a seal no longer has its common-law effect, and it is probable that in most jurisdictions also where a seal still retains its old importance so far as to make consideration for a promise unnecessary, a contract under seal may be rescinded or avoided for breach of promise by one party at the suit of the other, and a recovery had by the latter on a quasi-contractual basis for what he has given or its value. This was so held in *Ballou v. Billings*.⁸ Holmes, J., in delivering the opinion of the court,

¹ See Woodward, Quasi-Contracts, §§ 266, 267. Cf. the analogous question of rescission for fraud, *infra*, § 1526.

² *Pleak v. Marks*, 171 Ia. 551, 152 N. W. 63; *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11.

³ *Goodman v. Pocock*, 15 Q. B. 576; *Routledge v. Hialop*, 29 L. J. M. Cas. (N. S.) 90; *Cole v. Hines*, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; *Daley v. People's Assoc.*, 178 Mass. 13, 59 N. E. 452; *Wolff v. Pickering*, 12 S. C. of Cape of Good Hope, 429. Cf. *Savage v. Canning*, Ir. R. 1 C. L. 434.

⁴ *Goodman v. Pocock*, 15 Q. B. 576; *Graham v. Holloway*, 44 Ill. 385.

⁵ *Brown v. St. Paul & Co. R. Co.*, 36

Minn. 236, 31 N. W. 941; *Graves v. White*, 87 N. Y. 463; *Holman v. Updike*, 208 Mass. 466, 94 N. E. 689.

⁶ See, e. g., *Ankeny v. Clark*, 148 U. S. 345, 353, 37 L. Ed. 475, 13 Sup. Ct. 617, quoting from *Smith's Leading Cases*; *Western v. Sharp*, 14 B. Mon. 177; *Weart v. Hoagland's Adm'r*, 2 Zab. 517, 519; *Fay v. Oliver*, 20 Vt. 118, 122, 49 Am. Dec. 764; *Brown v. Ralston*, 9 Leigh, 532, 545; *Festing v. Hunt*, 6 Manitoba, 381, 384. See also *supra*, § 1456.

⁷ See *supra*, §§ 1834 *et seq.*

⁸ 136 Mass. 307. To the same effect is *Horne v. Richards*, 113 Me. 210, 93 Atl. 290.

refers to earlier Massachusetts decisions which had decided that a contract under seal might be rescinded by parol, and adds, "Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side."⁹ In other jurisdictions, however, such relaxation of common-law doctrines has not as yet been sanctioned.¹⁰

§ 1471. Minor inconsistencies.

There are a few minor inconsistencies in applying or failing to apply the rule allowing restitution as an alternative remedy

⁹This was allowed also in 1803 in *Weaver v. Bentley*, 1 Caines, 47, and see the following note. So money paid under a contract broken by the defendant was held recoverable in *Briggs v. De Peiffer*, 214 Mass. 52, 58, 100 N. E. 1085, and the court said: "And that is so even if it comes into the hands of the defendant under a written or sealed contract." See also *Webster v. Enfield*, 10 Ill. 298; *American L. Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256.

¹⁰*Atty v. Parish*, 1 B. & P., N. R. 104; *Middleditch v. Ellis*, 2 Ex. 623; *McManus v. Cassidy*, 66 Pa. 260. (But see *American L. Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256.)

Keener, *Quasi-Contracts* (p. 308), draws the distinction from the cases cited above in this and the two preceding notes, that where money has been paid by the plaintiff it may be recovered from a defendant who is in default though the contract was under seal, but where services have been rendered or property other than money delivered the plaintiff's only remedy is on the contract, if it is under seal. Possibly the case of *Greville v. Da Costa*, Peake, A. C. 113, taken in connection with the English cases cited above, may lend some support to this view, but the American cases certainly do not seem to warrant the distinction.

On the one hand, in *Weaver v. Bentley*, the plaintiff, who had given notes, money, and farm stock, was apparently allowed to recover for the property as well as the money; and later New York cases make it evident that the law of that State made no such distinction. See *Jewell v. Schroepel*, 4 Cow. 564; *Allen v. Jaquish*, 21 Wend. 628. Certainly, also, the court in *Ballou v. Billings*, 136 Mass. 307, indicate no intention to rest that case on the fact that the plaintiff had paid money instead of rendering services or delivering property, but rather broadly decide that contracts under seal generally may be rescinded or avoided for breach. This was decided also in regard to a contract for work and labor in *Webster v. Enfield*, 10 Ill. 298. See also *Wolf v. Schlacks*, 67 Ill. App. 117, 118. A dictum by Redfield, J., in *Myrick v. Slason*, 19 Vt. 121, 128, points in the same direction. On the other hand, though the cases where the plaintiff was not allowed to recover were in fact actions for the value of services or property, there is nothing to indicate that the courts so deciding would have treated the plaintiff better had he been suing for money paid. Indeed, a contrary inference seems justified. It is obvious that there is no merit in the distinction.

for breach of contract. Thus, one who has sold goods to another who has agreed to give a bill or note made by himself payable at a future day and who has failed to do so, cannot, it is generally held, recover in *indebitatus assumpsit* the value of the goods delivered until the stipulated period of credit has expired.¹¹ Yet the failure to give the promised bill or note is surely a material breach, and the plaintiff's right to sue for the value of his goods has been recognized by some courts.¹²

If a bill or note signed by a third person should have been given, it is generally admitted that the contract may be rescinded and action brought at once.

Another ruling inconsistent with the general principle is that a plaintiff cannot recover the money value of goods or services given to the defendant if by the contract he was to receive not money but land, goods or services.¹³ But here again there is contrary authority.¹⁴ These inconsistencies are unfortunate, as they not only are at variance with logical theory, but seem to rest on no adequate foundation of practical convenience. They should, therefore, where it is possible, be swept away by future decisions.

¹¹ *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Manton v. Gammon*, 7 Ill. App. 201 (cf. *Dunsworth v. Wood Machine Co.*, 29 Ill. App. 23); *Carson v. Allen*, 6 Dana, 395; *Hanna v. Mills*, 21 Wend. 90, 34 Am. Dec. 216.

¹² *Stocksdale v. Schuyler*, 29 N. Y. St. Repr. 380; affd., 130 N. Y. 674, 29 N. E. 1034; *Tyson v. Doe*, 15 Vt. 571; *Foster v. Adams*, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120. That breach of a contract to execute a promissory note payable in the future gives rise to an immediate right of action on the contract seems unquestioned. *Deering v. Johnson*, 86 Minn. 172, 90 N. W. 363; *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634; *Standard Lumber Co. v. Deer Park Lumber Co.* (Wash.), 175 Pac. 578, 176 Pac. 332. See *supra*, § 1411, *ad fin.*

¹³ *Harrison v. Luke*, 14 M. & W. 139 (cf. *Keys v. Harwood*, 2 C. B. 905);

Anderson v. Rice, 20 Ala. 239; *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607; *Bernard v. Dickins*, 22 Ark. 351; *Baldwin v. Lessner*, 8 Ga. 71; *Hall v. Hunter*, 4 G. Greene (Ia.), 539; *Cochran v. Tatum*, 3 T. B. Mon. 404; *Slayton v. McDonald*, 73 Me. 50; *Pierson v. Spaulding*, 61 Mich. 90, 27 N. W. 865; *Mitchell v. Gile*, 12 N. H. 390; *Weart v. Hoagland's Adm'r*, 2 Zab. 517; *Osterling v. Cape May Hotel Co.*, 82 N. J. L. 650, 83 Atl. 887; *Brooks v. Scott's Exec.*, 2 Munf. 344; *Bradley v. Levy*, 5 Wis. 400.

¹⁴ *Sullivan v. Boley*, 24 Fla. 501, 5 So. 244; *Stone v. Nichols*, 43 Mich. 16, 4 N. W. 545; *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. 407; *Brown v. St. Paul Ry. Co.*, 36 Minn. 236, 31 N. W. 941; *Clark v. Fairchild*, 22 Wend. 576; *Way v. Wakefield*, 7 Vt. 223; *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675; *Butcher v. Carlile*, 12 Gratt. 520. See *Jackson v. Hall*, 53 Ill. 440.

§ 1472 Rescission in the Civil law as a remedy for breach of warranty.

It is interesting to observe in the Civil law the same tendency that is to be found in the common law. In the law of sales the Roman law, like the English, started with the doctrine *caveat emptor*. The seller was not liable for defective quality unless he made express representations in regard to the goods or warranted them.¹⁵ Under the Empire, however, it became established that certain material defects in the property sold would give rise to a right of rescission.¹⁶ It will be noticed that for such defects, which would be included in the common law under the head of implied warranties, the Roman law imposed no liability on the seller other than to take back what he had sold and return the price. The situation was looked upon as we should look upon a sale induced by mistake, rather than as a case where the seller had been guilty of a breach of contract. It was true in both the earlier and the later classical Roman law, however, that for mere breach of a contract in regard to the property, the buyer had no right of rescission.¹⁷ The modern Civil law has, however, widely extended the buyer's right of rescission. Not only has the seller the right in all Civil law countries to return goods sold with an implied warranty if they have material defects, but a failure of the goods to conform to representations or promises now generally gives the same right. In France rescission is allowed broadly as a remedy for breach of any mutual obligation,¹⁸ and the wide influence of French law on the legislation of other countries makes it probable that the law is similar in most countries on the Continent of Europe and in South America.¹⁹ In Germany the buyer has a similar right.²⁰ The same tendency may be observed in another direction. The Indian Contract Act, though supposed to be gener-

¹⁵ Moyle, *Sale in the Civil Law*, 189.

¹⁶ *Ibid.* 194.

¹⁷ *Ibid.* 201; Hunter, *Roman Law*, 498; Larombière, *Obligations* (ed. 1885), III, 85.

¹⁸ See *supra*, §§ 899 *et seq.*

¹⁹ See *supra*, § 907.

²⁰ See *supra*, §§ 908 *et seq.*; Bürgerliches Gesetzbuch, § 462. The provisions of the German Civil Code as

to remedies for breach of warranties are as follows: "§ 462. On account of a defect for which the seller is responsible under the provisions of sections 459, 460, the purchaser may demand annulment of the sale [i. e. rescission]. The purchaser may elect either the one or the other remedy, unless the law provides otherwise, as in the case of a sale of cattle,

ally a codification' of the English law of contracts, seems to go beyond the law of England in allowing rescission.²¹

§ 1473. Recovery by one who has broken his contract.

Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without excuse to recover for such benefit as he may have conferred on the other party by part performance of an indivisible contract (or an indivisible fraction of a divisible portion of a contract). A satisfactory solution is not easy, for two rules of fundamental legal policy seem here to come in conflict. On the one hand, it seems a violation of the terms of a contract to allow a plaintiff in default to recover—to allow a party to stop when he pleases and sell his part performance at a value fixed by the jury to the defendant who has agreed only to pay for full performance. On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff. It may be supposed that the

§§ 481, 487.] § 463. If a promised quality in the thing sold was absent at the time of the purchase [not 'at the time when the risk passes,' as in the case provided for by section 459], the purchaser may demand compensation for non-performance, instead of rescission or reduction. The same rule applies if the seller has fraudulently concealed a defect. § 464. If the purchaser accepts a defective thing although he knows of the defect, he is entitled to the claims specified in sections 462, 463, only if on acceptance he reserves his rights on account of the defect. § 465. Rescission or reduction is affected if the seller, on demand [such a demand amounts to a proposal which is binding on the purchaser, § 145] by the purchaser, declares his consent thereto. § 466. If the purchaser asserts against the seller a defect of quality, the seller may offer rescission and require him to declare within a fixed reasonable period whether he demands rescission. In

such a case rescission may be demanded only before the expiration of the period. [After the expiration of the period reduction is the only remedy open to the purchaser, except in the case of the sale of a thing designated by species. § 480.] "

²¹ Sect. 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

See also sect. 53, which allows rescission because of prevention of performance, and sect. 107, which allows a vendor who has parted with title but retained a lien to make a resale of the goods.

It should be said, however, that the court in *Sooltan Chund v. Schiller*, 4 Indian L. R. (Calcutta Series), 252, showed a tendency to restrict the effect of sect. 39.

plaintiff in partial performance of his obligations has given the defendant land, goods, labor and materials, money or services. The first case supposed is not of common occurrence, but it is entirely possible. Except that recovery of the land by equitable proceedings may be possible, there is no reason why it should not be dealt with in the same way as a case where goods have been delivered; and the cases relating to personal property discussed in the following section may serve as guiding authority. Generally the purchaser of land will still be in a position to return the land or its proceeds when it becomes apparent that the plaintiff will not make full performance.

§ 1474. Recovery for defaulting seller's part performance.

In case the seller's obligation is either by its terms or by the buyer's permission performable in instalments it may happen that the buyer, not supposing the seller is going to be guilty of a breach of contract, accepts one or more instalments, assuming that the rest are to follow. If the buyer was to pay a lump price after all the instalments had been delivered, it is obvious that the acceptance of the early instalments could not bind him to pay the full agreed price; delivery of the later instalments would be a condition precedent to his obligation to pay.²² Even if the price of each instalment was payable separately, the buyer should have relief. It is true that his acceptance of a part indicates an assent to take title to the goods offered, and to pay for them at the contract rate, but this assent was given in the justifiable expectation of receiving an additional quantity of goods. The buyer may, therefore, on finding out that the contract is not going to be fully performed by the seller, return the goods in his possession and refuse to pay the price, if not already paid, and, if already paid, recover it back.²³ If, however, the buyer when he accepts the partial delivery is aware that the seller proposes to make no other delivery, it is clear that the buyer should pay for the goods; and, similarly,

²² *Oxendale v. Wetherell*, 9 B. & C. 386, 387; *Waddington v. Oliver*, 2 B. & P. (N. S.) 61; *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138, 140; *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

²³ *Benjamin, Sale* (5th Eng. ed.), 697; *Polhemus v. Heiman*, 45 Cal. 573; *Bamberger v. Burrows*, 145 Ia. 441, 124 N. W. 333. *Cf. Bigelow v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L. R. A. (N. S.) 203.

if he retains them after he knows that no future delivery is to be made, even though at the time the partial delivery was accepted he had no reason to suppose the contract was not to be fully performed.²⁴ If then the contract is divisible and a price, therefore, due according to the terms of the contract for what has been delivered and accepted, there can be no doubt of the seller's right to recover the price fixed by the contract unless the buyer can and does return what he has received.²⁵ It may, however, be supposed that the contract was entire and that no part of the price was due until full performance by the seller. Even in such a case, if the buyer accepted a portion of the goods knowing that no more were to be delivered, there is no difficulty in finding a real contract to pay for them, as distinguished from a quasi-contractual obligation, since the partial delivery was in effect a new offer.²⁶ But if the deficient quantity of the goods was delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here accordingly, if the seller recovers payment for what he has furnished, it must be on principles of quasi-contract. It has often been laid down that a contract will not be implied by the law in favor of one who is in default under an express contract, but owing to the injustice of allowing the seller to retain the benefit of goods without paying for them, by the weight of authority in the United States, the seller may recover the value of his goods.²⁷ But in New York by a long series of deci-

²⁴ *Oxendale v. Wetherell*, 9 B. & C. 386. In this case the plaintiff delivered 130 bushels of wheat and though he was bound to deliver 250 bushels and failed to deliver the residue, the court held that after the expiration of the time within which delivery should by the contract have been made, recovery could be had for the 130 bushels. Parke, J., said: "If the buyer retained the part delivered after the seller had failed in performing his contract, the latter may recover the value of the goods which he so delivered."

²⁵ *Bowker v. Hoyt*, 18 Pick. 555.

The court held in this case that retention of the goods after knowledge of the seller's default made the buyer liable for the contract price; but the buyer, it was said, might recoup the damages that he suffered from the seller's failure completely to fulfil his contract. As to the question of the seller's liability where incomplete performance has been accepted, see *supra*, §§ 700 *et seq.*

²⁶ See *Georgia Pine Co. v. Central Lumber Co.*, 6 Ala. App. 211, 60 So. 512.

²⁷ *Richards v. Shaw*, 67 Ill. 222; *Holden Mill v. Westervelt*, 67 Me.

sions relief has been denied.²⁸ The New York view has been accepted in a few other States,²⁹ some of which at least would probably allow recovery if the seller's default was not wilful or morally culpable. The measure of damages in such an action is not necessarily the contract price even if the contract fixes a price by number, weight, or measure. If the buyer retained the goods, having it in his power to redeliver them after he knew that the seller was going to make default in delivering the whole amount, it seems just that the buyer should pay the contract price. This result seems supported by the decisions which hold the buyer liable under such circumstances. It is commonly said that the retention operates as a severance of the contract.³⁰ The buyer, however, may in good faith have dealt with the goods in such a way as to make it impossible for him to return them, and yet the value of the portion received may not be so large a proportion of the total price as the goods are of the total amount of goods which should have been delivered. As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received. The seller, being a wrongdoer in failing to deliver the whole amount, can certainly claim no more than this; and so it is provided in the Uniform Sales Act.³¹

446; *Viles v. Kennebec Lumber Co.*, (Me. 1919), 106 Atl. 431; *Rodman v. Guilford*, 112 Mass. 405; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Brown v. Morris*, 83 N. Car. 257; *Clark v. Moore*, 3 Mich. 55; *Shaw v. Badger*, 12 S. & R. 275. See also *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658; *McCurry v. Purgason*, 170 N. Car. 463, 87 S. E. 244, Ann. Cas. 1918 A. 907.

²⁸ *Champlin v. Rowley*, 13 Wend. 258, 18 Wend. 187; *Mead v. Degolyer*, 16 Wend. 632; *Baker v. Higgins*, 21 N. Y. 397; *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183; *Kein v. Tupper*, 52 N. Y. 550; *Nightingale v. Eiseman*, 121 N. Y. 238, 24 N. E. 475; *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364. If there are any facts tending to show waiver or prevention of full performance, the New York court is quick to seize upon these facts as a

ground of liability. *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

²⁹ *Haslack v. Mayers*, 26 N. J. L. 284; *Witherow v. Witherow*, 16 Ohio St. 238; *Petersburg Fire Brick Co. v. American Clay Mach. Co.*, 89 Ohio St. 365, 106 N. E. 33, L. R. A. 1915 B. 536. See also *Miller v. Mantik*, 116 Md. 279, 281, 81 Atl. 797; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 43, 115 N. E. 42. In Maryland, Massachusetts, New York, New Jersey and Ohio the Uniform Sales Act is now in force, and in any future dealing with the subject, the effect of the section quoted, *infra*, n. 31 should be taken into consideration.

³⁰ See cases cited *supra*, n. 27.

³¹ Sec. 44. Delivery of wrong quantity.—(1) Where the seller delivers

§ 1475. Recovery for labor and materials by party in default.

The element of forfeiture in wholly denying recovery to a plaintiff who is materially in default is most strikingly exemplified in building contracts. It has already been seen ²² how, under the name of substantial performance, many courts have gone beyond the usual principles governing contracts in allowing relief in an action on the contract. But many cases of hardship cannot be brought within the doctrine of substantial performance, even if it is liberally construed; and the weight of authority strongly supports the statement that a builder whose breach of contract is merely negligent, can recover the value of his work less the damages caused by his default; ²³ but that

to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

This section is borrowed from section 30 of the English statute with some changes. In subsection (1), the last sentence is not contained in the English act, nor are the words in the first sentence "knowing that the seller is not going to perform the contract in full."

²² *Supra*, § 805.

²³ *Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442; *Thomas v. Ellis*, 4 Ala. 108; *Davis v. Badders*, 95 Ala. 348, 10 So. 422; *Bertrand v. Byrd*, 5 Ark. 651; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; *Bush v. Finucane*, 8 Colo. 192, 6 Pac. 514; *Pinches v. Swedish Church*, 55 Conn. 183, 10 Atl. 264; *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969; *Ætna Iron, etc., Works v. Kossuth County*, 79 Ia. 40, 44 N. W. 215; *Keys v. Garben*, 149 Ia. 394, 128 N. W. 337; *White v. Oliver*, 36 Me. 92; *Cormier v. Brock*, 212 Mass. 292, 98 N. E. 1038; *Hooper v. Cuneo*, 227 Mass. 37, 116 N. E. 237; *Sherman v. Buffinton*, 228 Mass. 139, 117 N. E. 33; *Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Germain v. Union School Dist.*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; *Yeats v. Ballentine*, 56 Mo. 530; *Decker v. School Dist.*, 101 Mo. App. 115, 74 S. W. 390; *McMillan v. Malloy*, 10 Neb. 228, 4 N. W. 1004, 35 Am. Rep. 471;

one who has wilfully abandoned or broken his contract cannot recover.³⁴ The classical English doctrine, it is true, has denied recovery altogether where there has been a material breach even though it was due to negligence rather than wilfulness;³⁵ and a few decisions in the United States follow this rule; where the builder has not substantially performed.³⁶ But the English court has itself abandoned it, and now holds,³⁷ that where a builder has supplied work and labor for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished. It seems probable that

Danforth v. Freeman, 69 N. H. 466, 43 Atl. 621; *Eckes v. Luce*, (Okl. 1918), 173 Pac. 219; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069; *Gove v. Island City, etc., Co.*, 19 Or. 363, 24 Pac. 521; *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

³⁴ *Sumpter v. Hedges*, [1898] 1 Q. B. 673; *Maxwell & Delehomme v. Moore*, 163 Ala. 490, 50 So. 882 (cf. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658); *Fish v. Correll*, 4 Cal. App. 521, 88 Pac. 489; *McGonigle v. Klein*, 6 Colo. App. 306, 40 Pac. 465; *Gill v. Vogler*, 52 Md. 663; *Oldewurtel v. Bevan*, 117 Md. 645, 84 Atl. 66; *Bowen v. Kimbell*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N. S.) 1069; *Wooten v. Read*, 2 Smedes & M. (10 Miss.) 585; *Robinson v. De Long* (Miss.), 79 So. 95; *Stroeh v. McClintock*, 128 Mo. App. 368, 107 S. W. 416; *Macpherson v. Mackay*, 91 N. J. L. 473, 103 Atl. 36; *Jennings v. Camp*, 13 Johns. 94, 7 Am. Dec. 367; *Cunningham v. Jones*, 20 N. Y. 486; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Norton v. U. S. Wood Co.*, 89 App.

Div. 237, 85 N. Y. S. 886; *Winstead v. Reid*, Busb. L. (44 N. C.) 76, 57 Am. Dec. 571; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Malbon v. Birney*, 11 Wis. 107; *Manitowac Steam, etc., Works v. Manitowac Glue Works*, 120 Wis. 1, 97 N. W. 515.

³⁵ *Sinclair v. Bowles*, 9 Barn. & Cr. 92; *Munro v. Butt*, 8 El. & Bl. 738.

³⁶ *Serber v. McLaughlin*, 97 Ill. App. 104; *Simpson Cons. Co. v. Stenberg*, 124 Ill. App. 322; *Morford v. Mastin*, 6 T. B. Mon. 609, 17 Am. Dec. 168; *Presbyterian Church v. Hoopes, etc., Co.*, 66 Md. 598, 8 Atl. 752; *Meyer v. Frenkil*, 113 Md. 45, 77 Atl. 769 (see also *Oldewurtel v. Bevan*, 117 Md. 645, 84 Atl. 66); *Riddell v. Peck-Williamson, etc., Co.*, 27 Mont. 44, 69 Pac. 241; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Pullman v. Corning*, 9 N. Y. 93; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Steel Storage &c. Co. v. Stock*, 225 N. Y. 173, 121 N. E. 786. It is interesting to observe that New York which follows the strictest theory here is the typically lenient State in allowing recovery on the contract.

³⁷ *H. Dakin & Co., Ltd., v. Lee*, [1916] 1 K. B. 566.

the tendency of decisions will favor a builder who has not unjustifiably abandoned his contract or been guilty of conscious moral fault in its performance.³⁸

§ 1476. Recovery of money paid by party in default.

Where money has been paid under a contract by a party who subsequently makes default in the performance due from him the question of his right to recover so much of the payment which he has made as exceeds the damage suffered by the other party, is often complicated by a circumstance not present where the part performance is property or services,—namely, the creation of a relation in essence the same as that of the parties to a purchase money mortgage. This is true where the part payment is made by one who agrees to buy land or goods and who is put in possession. Such cases have been previously treated.³⁹ It is true that the special rules applicable to mortgages have not always been applied to such cases, but they should be, and to some extent they are. The question ceases to be governed by the principles which control the right of a party in default to recover for goods or services given in part performance. But one who pays money under a contract is not always in the position of a mortgagor, and in such a case it might seem easier to grant relief to the party in default than where he has given property or services; for the extent of the benefit which a defendant has derived from a partial payment of money is not as doubtful as where property or services have been contributed. Recovery has been allowed in some cases,⁴⁰ but it would probably be more commonly denied,⁴¹ and no em-

³⁸ How far acceptance of the builder's work involves a liability to pay for it, which would not otherwise have existed is considered, *supra*, § 724.

³⁹ For the rights of one who has thus contracted to buy land, see *supra*, § 791. For the rights of a conditional buyer of goods, *supra*, §§ 734 *et seq.*

⁴⁰ *Cherry Valley Iron Works v. Florence Iron Co.*, 64 Fed. 569, 12 C. C. A. 306 (contract to buy ore); *Michigan Yacht Co. v. Busch*, 143 Fed. 929, 75 C. C. A. 109 (contract to buy a

yacht); *Hickock v. Hoyt*, 33 Conn. 553 (contract to buy wire); *Sabas v. Gregory*, 91 Conn. 26, 98 Atl. 293 (contract to buy an automobile).

⁴¹ This seems probable from the cases concerning land, § 791, and conditional sales of chattels, § 734. See also *Bernsweig v. Hyman Levin Co.*, (Supr. Ct. App. Term), 172 N. Y. S. 437. In the land cases the essential relation of mortgagee and mortgagor does not always exist, and even where it does frequently the principles of mortgage

phasis placed upon the reason why the plaintiff had made default, whether it involved wilfulness or merely misfortunes as unexpected as those of Antonio in the Merchant of Venice.

§ 1477. Recovery by an employee in default.

Decisions have gone farther in allowing an employee who has performed a part of his contract of employment, for which no divisible portion of compensation is provided by the contract,⁴² to recover reasonable compensation though his failure to render further performance was due to his wilful abandonment of the contract or to his discharge for good cause. In an early and leading New Hampshire decision⁴³ an employee who had wilfully abandoned his contract before substantial performance had been rendered, was thus allowed to recover on a *quantum meruit*; and this decision has been followed in a number of American jurisdictions.⁴⁴ But in England and a majority of American States it is held that such an employee can recover nothing.⁴⁵ Jurisdictions which allow recovery to one who has

law have not been applied. The cases where one insured by a policy has paid the premium and subsequently during the term has broken a warranty, and thereafter has been denied recovery of any portion of the premium, *supra*, § 757, may also be considered.

⁴² As to recovery on the contract, see *supra*, § 1028.

⁴³ *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

⁴⁴ *Ricks v. Yates*, 5 Ind. 115; *Pixler v. Nichols*, 8 Ia. 106, 74 Am. Dec. 298; *Byerlee v. Mendel*, 39 Ia. 382; *Porter v. Whitlock*, 142 Ia. 66, 120 N. W. 649; *Barnes v. Bradford* (Ia. 1917), 165 N. W. 306; *Duncan v. Baker*, 21 Kan. 99; *Asher v. Tomlinson*, 22 Ky. L. Rep. 1494, 60 S. W. 714; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Williams v. Crane*, 153 Mich. 89, 116 N. W. 554; *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366; *Murphy v. Sampson*, 2 Neb. (Unof.) 297, 96 N. W. 494; *Laton v. King*, 19 N. H. 280; *Clough v. Clough*, 26 N. H. 24; *Bedow*

v. Tonkin, 5 S. Dak. 432, 59 N. W. 222; *Stolle v. Stuart*, 21 S. Dak. 643, 114 N. W. 1007; *Carroll v. Welch*, 26 Tex. 147. See also *Chamblee v. Baker*, 95 N. C. 98; *McCurry v. Purgason*, 170 N. Car. 463, 87 S. E. 244, Ann. Cas. 1918 A. 907.

⁴⁵ *Huttman v. Boulnois*, 2 C. & P. 510; *Saunders v. Whittle*, 33 L. T. (N. S.) 816; *Gregson v. Watson*, 34 L. T. (N. S.) 143; *Mallory v. Mackaye*, 92 Fed. 749, 34 C. C. A. 653; *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016 (*cf.* *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658); *Latham v. Barwick*, 87 Ark. 328, 113 S. W. 646; *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236; *Ransome Const. Co. v. Von Schroeder*, 34 Cal. App. 475, 167 Pac. 1144; *Henderson v. Stiles*, 14 Ga. 135 (but see *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200); *Hansell v. Erickson*, 28 Ill. 257; *Hofstetter v. Gash*, 104 Ill. App. 455; *Callahan v. Stafford*, 18 La. Ann. 556; *Miller v. Goddard*, 34 Me. 102, 56 Am.

wilfully abandoned his employment will naturally also allow recovery where he has been discharged for any cause not involving dishonesty or intentional injury of the employer; for to give other cause even wilfully for discharge can hardly be worse than wilful abandonment; but the converse is not equally true. An employee may give cause for discharge while honestly endeavoring to fulfil the contract. Consequently recovery has sometimes been allowed to a discharged employee in jurisdictions which would deny it to one who had been guilty of wilful abandonment.⁴⁶ In other jurisdictions it is held broadly that a rightfully discharged employee cannot recover.⁴⁷

Dec. 638; *Stark v. Parker*, 2 Pick. 267, 13 Am. Dec. 425; *Dougherty v. Gring*, 89 Md. 535, 544, 43 Atl. 912; *Townes v. Cheney*, 114 Md. 362, 79 Atl. 590; *Olmstead v. Beale*, 19 Pick. 528; *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160, 212 Mass. 113, 98 N. E. 697; *Frati v. Jannini*, 226 Mass. 430, 115 N. E. 746; *Nelichka v. Esterly*, 29 Minn. 146, 12 N. W. 457; *Peterson v. Mayer*, 46 Minn. 468, 469, 49 N. W. 245, 13 L. R. A. 72; *Timberlake v. Thayer*, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231; *Earp v. Tyler*, 73 Mo. 617; *Dempsey v. Dorrance*, 151 Mo. App. 429, 132 S. W. 33; *Isaacs v. McAndrew*, 1 Mont. 437; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736; *State v. Brokaw*, 43 N. J. L. 587; *Natalizio v. Valentino*, 71 N. J. L. 500, 59 Atl. 8; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Lantry v. Parks*, 8 Cow. 63; *Turner v. Kouwenhoven*, 100 N. Y. 115, 2 N. E. 637; *Seaburn v. Zachman*, 99 N. Y. App. Div. 218, 90 N. Y. S. 1005; *Atkinson v. Heine*, 134 N. Y. App. D. 406, 119 N. Y. S. 122; *Chamblee v. Baker*, 95 N. C. 98; *Larkin v. Buck*, 11 Ohio St. 561; *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705; *Wuchter v. Fitzgerald*, 83 Or. 672, 163 Pac. 819; *Hughes v. Cannon*, 1 Sneed, 622; *Winn v. Southgate*, 17 Vt. 355; *Patnote v. Saunders*, 41 Vt. 66, 98 Am. Dec. 564; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43

Am. Rep. 719; *Walah v. Fisher*, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. 865; *Blake v. Shaw*, 10 U. C. Q. B. 180; *Knox v. Munro*, 13 Manitoba L. R. 16.

⁴⁶ In the following cases it was held that a rightfully discharged employee might recover compensation. *Newman v. Reagan*, 63 Ga. 755 (cf. *Physioc v. Shea*, 75 Ga. 466; *Parker v. Farlinger*, 122 Ga. 315, 50 S. E. 98); *Abendpost Co. v. Hertel*, 67 Ill. App. 501; *Fulton v. Heffelfinger*, 23 Ind. App. 104, 54 N. E. 1079; *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875; *Lawrence v. Gullifer*, 38 Me. 532; *Pungs v. American Brake-Beam Co.*, 124 Mich. 344, 82 N. W. 1066; *Robinson v. Sanders*, 24 Miss. 391; *Wuchter v. Fitzgerald*, 83 Or. 672, 163 Pac. 819; *Byrd v. Boyd*, 4 McCord L. 246, 17 Am. Dec. 740; *Massey v. Taylor*, 5 Coldw. 447, 98 Am. Dec. 429; *Levy v. Jarrett* (Tex. Civ. App.), 198 S. W. 333; *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274; *Hildebrand v. Amer. Fine Art Co.*, 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826. See also *Selig v. Botts*, 128 Ark., 167 193 S. W. 534.

⁴⁷ *Turner v. Robinson*, 5 Barn. & Ad. 789; *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171; *Boston Deep Sea Fishing & Ice Co. v. Ansell*, 39 Ch. D. 339, 364; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581 (see Cal. Civil Code,

The test of honest purpose to fulfil the obligations of the contract which has been so generally applied in building contracts seems to furnish the best rule also for contracts of employment. Under such a test either abandonment of the contract or rightful discharge might not bar recovery for services actually rendered if the employee had acted in good faith though under a mistaken view of his rights. It should be observed in this connection that it is generally recognized law that if an employee who is a fiduciary is guilty of disloyalty to his employer, he forfeits all right in any form of action, to compensation for the services during the performance of which the disloyalty occurred.⁴⁸ This principle will not, however, preclude recovery for services in another and separate transaction;⁴⁹ nor presumably for a divisible sum due prior to the lack of fidelity for services rendered, although all the services prior and subsequent were part of a continuous transaction.

§ 1478. Measure of recovery in actions for restitution.

If property or services given by the plaintiff to a defendant could be restored in specie as in the case of land, or had necessarily always the same value to both parties to the transac-

§ 2002); *Peterson v. Mayer*, 46 Minn. 468, 469, 49 N. W. 245, 13 L. R. A. 72; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Lindner v. Cape Brewery, etc., Co.*, 131 Mo. App. 680, 111 S. W. 600 (*cf.* *Anstee v. Ober*, 26 Mo. App. 665; *Paul v. Minneapolis Threshing Mach. Co.*, 87 Mo. App. 647); *Lane v. Phillips*, 6 Jones L. 455 (*cf.* *Pullen v. Green*, 75 N. C. 215, 218).

⁴⁸ *Stubbs v. Slater*, [1910] 1 Ch. 195; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984, 11 Sup. Ct. 303; *Shaeffer v. Blair*, 149 U. S. 243, 37 L. Ed. 721, 13 Sup. Ct. 856; *Quirk v. Quirk*, 155 Fed. 199; *Doss v. Long Prairie Levee District*, 96 Ark. 451, 132 S. W. 443; *Jeffries v. Robbins*, 66 Kan. 427, 71 Pac. 852; *Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; *Ranney v. Henry*, 160 Mich. 597, 125 N. W. 693; *Harrison v. Craven*, 188 Mo. 590, 87 S. W. 962; *Witte v. Storm*,

236 Mo. 470, 139 S. W. 384; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Quinn v. Le Duc* (N. J. Eq.), 51 Atl. 199; *Whaples v. Fahys*, 87 N. Y. App. D. 518, 84 N. Y. S. 793; *Lichtenstein v. Case*, 99 N. Y. App. D. 570, 91 N. Y. S. 57; *Abramson v. Dry Goods Refolding Co.* (N. Y. Misc.), 166 N. Y. S. 771; *Wilkinson v. McCullough*, 196 Pa. 205, 46 Atl. 357, 79 Am. St. 702; *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573; *Hutchinson v. Fleming*, 40 Can. Supr. 134. And see *supra*, § 1022, *ad fin.* But see *Rathenberger v. Jacob*, 167 Wis. 273, 167 N. W. 271.

⁴⁹ *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671. It may be questioned whether the plaintiff's recovery in *Hippisley v. Knee*, [1905] 1 K. B. 1, can be justified on the facts. See *Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046.

tion, as in the case of money, the only problem in measuring the extent of a plaintiff's claim for restitution, when once it had been admitted that he had a valid claim, would be concerned with deductions because of (1) possible advantages received by the plaintiff from the part performance which had taken place, or (2) a possible right of recoupment on the part of the defendant for the plaintiff's failure completely to fulfil his contract. But when the plaintiff has given the defendant something other than land or money the necessity of putting a money value on his performance as a basis for judgment in his favor introduces two further problems; (1) Is the market value or the cost to the plaintiff of what he has rendered the criterion, or the benefit which the defendant has received? and (2) If the parties had fixed by contract a value for full performance by the plaintiff, how far does this limit his right to recover on a quasi-contractual basis a different value for full performance or a different ratable value for partial performance?

§ 1479. Rescission and restitution where there is no liability on the contract.

The matter directly under consideration is the right of rescission as a means of recovering the value of what has been given prior to a breach of contract; but there are other cases where this or an analogous right is allowed. Indeed, wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract, restoration of the value of what has been given must be allowed. Instances of this have been considered in other portions of this book, namely, the right to recover the value of necessities furnished infants,⁵⁰ insane persons,⁵¹ intoxicated persons,⁵² married women,⁵³ the right to recover benefits furnished under an *ultra vires* contract with a corporation,⁵⁴ or under contracts voidable because of the Statute of Frauds.⁵⁵ Other instances where the contract between the parties is unenforceable because of impossibility⁵⁶ or void-

⁵⁰ § 240.

⁵¹ § 255.

⁵² § 262.

⁵³ § 270.

⁵⁴ § 271.

⁵⁵ §§ 534-538.

⁵⁶ §§ 1972 *et seq.*

able for fraud,⁵⁷ duress,⁵⁸ mistake,⁵⁹ or illegality,⁶⁰ will be hereafter considered. In the present connection, however, the right may be considered of one who has failed to fulfil his contract, either (1) because of his own wrong or (2) because of an unjustified breach or repudiation by the other party, to recover for incomplete performance of an indivisible obligation.

§ 1480. Cost to the plaintiff or benefit to the defendant.

Where the plaintiff is in default under a contract, and is allowed a quasi-contractual recovery in order to prevent an unjust enrichment of the defendant and the infliction of a penalty upon the plaintiff out of proportion to the wrong he has committed, it seems clear that the law can impose no greater liability upon the defendant than to give up any benefit which he may have derived from the plaintiff's performance. To go further than this would be to penalize a defendant who has been guilty of no legal or moral wrong,⁶¹ and even though the immediate cause of the non-performance of a contract is the defendant's refusal to perform, the same result seems necessary, if the defendant has been given by the plaintiff's fault a defense for refusal.⁶² The use of common counts in *quantum meruit* and *quantum valebat* for the enforcement of both obligations has tended to confuse with the quasi-contractual obligations here under discussion, certain obligations based on actual contracts, namely, those where there is a real promise whether express or implied in fact to pay the reasonable value of goods or services. In such cases and on a fair construction of the parties' contract it is reasonable to suppose that if there is a market value for what the plaintiff is requested to furnish, that value is the measure of the promised price. If there is no market price, that it is at least the cost or worth from the plaintiff's standpoint, not limited by the benefit which must accrue to the defendant, that

⁵⁷ § 1525.

⁵⁸ § 1623.

⁵⁹ § 1542.

⁶⁰ §§ 1787-1791.

⁶¹ *Easton v. Quackenbush*, 86 Or. 374, 168 Pac. 631. This is so provided in the Uniform Sales Act. See *supra*, § 1474, *ad fin.*

⁶² See for analogous questions, as to infants, *supra*, § 240, as to lunatics, § 255, as to intoxicated persons, § 262, as to married women, § 270, as to *ultra vires* contracts, § 271, as to contracts unenforceable because of the Statute of Frauds, § 536, as to impossibility, §§ 1972 *et seq.*

the parties intended, and that must be taken as the test.⁶³ Again, even though the defendant's liability is imposed by law irrespective of the agreement of the parties, and may therefore be called quasi-contractual, where the defendant is a wrongdoer the plaintiff may well be preferred, and if a complete restoration of the *status quo* or its equivalent is impossible the plaintiff should at least be replaced in as good a position as he originally was in, although the defendant is thereby compelled to pay more than the amount which the plaintiff's performance has benefited him.⁶⁴ That is, the law should impose on the

⁶³ Cases of this sort are *White v. Dougherty*, 1 Boyce (Del.), 355, 76 Atl. 609; *Bluemner v. Garvin*, 120 N. Y. App. D. 29, 104 N. Y. S. 1009; *Edington v. Pickle*, 1 Sneed, 122; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068. See also *Bradley v. Rea*, 14 Allen, 20. The plaintiff's recovery is not limited to the cost to himself. *Hyde v. Moxie Nerve Food Co.*, 160 Mass. 559, 560, 36 N. E. 585; *Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413; *Bradley Heating Co. v. Thomas M. Sayman & Co.*, (Mo. 1918), 201 S. W. 864, 868.

⁶⁴ *Sedgwick on Damages* (9th ed.), § 655 a. The application of this principle to a contract of service was considered in *Rogers v. Becker-Brainard Machine Co.*, 211 Mass. 559, 98 N. E. 592. A contractor had agreed to blast from a ledge, at a price per cubic yard, such an amount of stone as the owner might desire, and the owner had agreed to have one-half of the rock removed before stopping the work. The contractor before removing the rock, acting as a reasonable man and under the supervision of the owner's agent, continued at work and made preparation for the removal of the remainder of the rock until he was notified by the owner to cease work. In an action on a common count, it was held that the contractor might recover not only the contract price for the rock removed, but for the value of work done and

materials used in preparation for further blasting. The court said: "The measure of the plaintiff's damages is the fair value of the work which is additional to that covered by the contract. This is not a case where one has substantially but not fully performed an express contract and seeks to recover upon a *quantum meruit*; and cases like *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268, cited by the defendant, are not applicable. It may be that the work in question is of little immediate value to the defendant, but this is due to its failure to give timely notice of its decision to remove only a portion of the stone, and cannot lessen the amount to which the plaintiff is entitled. *Stowe v. Buttrick*, 125 Mass. 449; *Fitzgerald v. Allen*, 128 Mass. 232; *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810."

In *Mooney v. York Iron Co.*, 82 Mich. 263, 46 N. W. 376, an action on a *quantum meruit* where the defendant had prevented the plaintiffs from completely performing, the trial judge charged the jury that the plaintiffs might recover "what his services were worth. That does not mean what they were worth to the employer. It is the fair value." On exception to this charge, on the ground that the true measure of damages was the value of the product of the plaintiffs' labor, the charge was upheld, but the court added (p. 264), "If the plaintiffs had aban-

defendant a duty to restore the plaintiff's former status, not merely to surrender any enrichment or benefit that he may unjustly hold or have received; though if the market value or benefit to the defendant of what has been furnished exceeds the cost or value to the plaintiff, there is no reason why recovery of this excess should not be allowed.⁶⁵ These different possible situations, as has been said, have often been confused with one another, because the form of action in each of them was identical at common law—general assumpsit on a *quantum meruit* or *quantum valebat* count; and this tended to induce courts and others to inquire what is the rule of damages under such counts—a question not susceptible of a single answer. Frequently also it is not perceived that there is an important distinction between cost or detriment to the plaintiff and benefit to the defendant, because often (perhaps generally) the value of the performance which the plaintiff has rendered is identical from whichever standpoint it is regarded. Again, the assumption that the benefit to the defendant if the contract were fully completed is necessarily the contract price, is frequently made. Probably for these reasons a majority of decisions, speaking of the damages which a plaintiff in default in the performance of his contract who is nevertheless allowed to recover for his part performance should recover, say that he is entitled to the contract price less such damage as the defendant has suffered from the breach,⁶⁶ or less the cost of com-

doned the work, without being directed to do so by the defendant, and the defendant had appropriated the work to its own use, the rule contended for would have been correct."

In *Cosad v. Elam*, 115 Mo. App. 136, 91 S. W. 434, and *Fabian v. Wasatch Orchard Co.*, 41 Utah, 404, 125 Pac. 860, L. R. A. 1916 D. 892, the court applied the same principle against a defendant who had repudiated a contract voidable under the Statute of Frauds. So where a vendor wrongfully refuses a conveyance to a vendee in possession, the latter may recover what he has paid the vendor and also what he has expended in improvements

on the land (not merely the increased value of the land by virtue of the improvements). *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82; *McClure v. Lewis*, 72 Mo. 314; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *McIndoe v. Mormon*, 26 Wis. 588, 592, 7 Am. Rep. 96.

⁶⁵ *Bradley Heating Co. v. Thomas M. Sayman & Co.*, (Mo. 1918), 201 S. W. 864, 867.

⁶⁶ *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831; *Richards v. Shaw*, 67 Ill. 222 (sale of goods); *Byerlee v. Mendel*, 39 Ia. 382, 386 (contract of employment); *Viles v. Kennebec Lumber Co.*, (Me. 1919), 106 Atl. 431 (contract for

pletion;⁶⁷ or where the work is inferior, but not unfinished so as to be readily capable of completion, that "there should be deducted from the contract price the amount by which the value of the [performance rendered by the plaintiff falls] short of what that value would have been if the contract had been exactly performed;"⁶⁸ or "the value of the labor and materials less any deductions necessary to complete the work but not to exceed the contract price."⁶⁹

§ 1481. Criticism of proposed tests.

The same court not infrequently in different decisions suggests measures of damages which are inconsistent with each other. The matter may be illustrated with actual figures. Let it be supposed that a contract for building a house is made and the contract price is \$10,000. Owing to a rise in the cost of building or to the contract being originally an unfortunate one for the builder, the cost of labor and materials to fulfil the contract is such that the total cost would be \$12,000. The builder is compelled by lack of means to stop when the work has been 9/10 completed. If the builder recovers the contract price less the cost of completion he will get \$8,800. If such damages as the defendant has suffered from the breach are deducted from the

sale and delivery of logs); *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268 (building contract); *McMillan v. Malloy*, 10 Neb. 228, 234, 4 N. W. 1004, 35 Am. Rep. 471 (contract for threshing); *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 179, 85 N. W. 268, 53 L. R. A. 826 (services). Cf. *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Murphy v. Sampson*, 2 Neb. (Unof.), 297, 96 N. W. 494.

⁶⁷ *Ætna Iron Works v. Kossuth County*, 79 Ia. 40, 46, 44 N. W. 215 (building contract); *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475 (contract of employment).

⁶⁸ *Pelatoski v. Black*, 213 Mass. 428, 430, 100 N. E. 831; *Gove v. Island City &c. Co.*, 19 Or. 363, 24 Pac. 521. The cases cited above relate to building contracts. See also a similar rule ap-

plied to other contracts. *United States v. Molloy*, 144 Fed. 321, 75 C. C. A. 283, 11 L. R. A. (N. S.) 487; *McKnight v. Bertram Heating &c. Co.*, 65 Kan. 859, 70 Pac. 345; *Bedow v. Tonkin*, 5 S. Dak. 432, 59 N. W. 222; *Carroll v. Welch*, 26 Tex. 147.

⁶⁹ *Burke v. Coyne*, 188 Mass. 401, 404, 74 N. E. 942. The court here presumably means to apply the test which is applicable to cases where the defendant is the wrongdoer, with the addition of a right of recoupment. Somewhat similar statements are made in *Davis v. Badders*, 95 Ala. 348, 10 So. 422; *Pinches v. Swedish Church*, 55 Conn. 183, 10 Atl. 264; *White v. Oliver*, 36 Me. 92; *Decker v. School District*, 101 Mo. App. 115, 74 S. W. 390; *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621.

contract price the result will often be the same, but if the building is defectively built instead of partially built, the results may be quite different. The latter form of statement is the better because the more universal in its application, but it is an accurate statement of damages in an action on the contract, not on a quasi-contractual obligation. If there be deducted from the contract price (\$10,000) the amount by which the value of the plaintiff's performance (9/10 of the total value of the agreed performance, *i. e.*, \$12,000) falls short of what that value would have been if the contract had been exactly performed (\$12,000) the figures obtained for the plaintiff's recovery are again \$8,800. In each of these forms of statement the defendant's right of recouping his damage for breach of the contract is recognized, and they are each sufficiently accurate if the contract were the cause of action. But if the value of the labor and materials is assumed to be 9/10 of \$12,000, and from this there be deducted the expense necessary to complete the work (1/10 of \$12,000) the plaintiff will recover \$9,600. Again if the plaintiff recovers such a part of the contract price as his actual performance bears to his agreed performance he will get 9/10 of \$10,000 or \$9,000.

§ 1482. Benefit to the defendant is the proper test.

The tests which are most commonly applied, and which have been criticised in reality allow the plaintiff to recover on the contract. For a court to assert that a plaintiff cannot recover on the contract but must sue on a *quantum meruit*, and then to apply in an action based on a *quantum meruit* the identical rule of damages applicable to an action on the contract is an odd anomaly. The reasoning of a leading Massachusetts decision ⁷⁰ is unanswerable where a plaintiff in default seeks to recover: "Because, being in default in the performance of the contract, or what is the same thing, because, being unable to prove that he did perform the contract, he has no rights under it, he has not the same right to recover for the value of the work done and materials furnished by him, that a person has

(⁷⁰ *Gillis v. Cobe*, 177 Mass. 584, 59 Mass. 247, 88 N. E. 835, 26 L. R. A. N. E. 455, *Loring, J.*, delivering the opinion. *Cf. Vickery v. Ritchie*, 202 (N. S.) 810.

who has done work and furnished materials as he has been requested to do. In the latter case it is immaterial whether the result of his work is of any value to the defendant or not.⁷¹ But one who has done work under a special contract, and resorts to a recovery under the principle of *Hayward v. Leonard*,⁷² recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant; he comes into court admitting that he has not done what he agreed to do and that he cannot hold the defendant on his promise to pay him the contract price; more than that, he admits that the part, which he has failed to perform, is one, that so far goes to the essence of the contract, that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform, and did not perform, was of slight importance, it is not a condition precedent; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action, in which the burden is on him, the defendant, to prove the damage he has suffered from its non-performance. The only ground, on which a plaintiff, who resorts to a recovery under the principle of *Hayward v. Leonard*,⁷³ is entitled to recover anything is, that, though, so far as his contract rights are concerned, he is entirely out of court, yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his, the plaintiff's, expense, and therefore if the structure, which, for the purposes of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is, nevertheless, a thing of some value, the defendant ought to make him compensation therefor." "His sole claim to be paid anything is that if he is not paid, the defendant will profit at his expense. Until he has proved that the defendant will in that case profit at his expense, he has not made out a *prima facie* case to be paid anything, and until he has proved how much that profit will be, his *prima facie* case is not complete. When the fact appears in evidence that the

⁷¹ Citing *Austin v. Foster*, 9 Pick. 341; *Stowe v. Buttrick*, 125 Mass. 449; *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674.

⁷² 7 Pick. 181, 19 Am. Dec. 268.

⁷³ *Ibid.*

work for which money is sought was done under a special contract, and that the plaintiff cannot recover under the special contract, but still seeks a recovery, there is no question of the value of his work and materials, proved in the usual way, and he does not make out a *prima facie* case by proving their value according to regular rules; to make out a case for recovery for such work and materials so furnished, he must prove how much the result of his work had benefited the defendant, he must prove what the fair market value of the thing produced by his misdirected work is, and, until he has done that, he has not made out even a *prima facie* case on which he is entitled to recover anything." ⁷⁴

§ 1483. How benefit to the defendant is to be calculated.

No doubt the contract price is important evidence of the value of the performance to the defendant. The cost of the labor

⁷⁴ The opinion continues: "If authority is needed for the general proposition that in case work is improperly done, the plaintiff has not the same right to recover the value of his work plus the value of his materials, that he has when it is properly done, and that what he is entitled to in such a case is the value of the thing produced by his work, it may be found in *Farnsworth v. Garrard*, 1 Camp. 38; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Huntley v. Bulwer*, 6 Bing. (N. C.) 111; *Bracey v. Carter*, 12 A. & E. 373; *Thornton v. Place*, 1 Mood. & Rob. 218; *Denew v. Daverell*, 3 Camp. 451; *Cutler v. Close*, 5 C. & P. 337; *Duncan v. Blundell*, 3 Stark. 6. *Farnsworth v. Garrard* was cited with approval in *Snow v. Inhabitants of Ware*, 13 Met. 42." See further to the effect that the benefit to the defendant, not the value to the plaintiff is the test. *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 66 Atl. 714; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Germain v. Union School Dist.*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; *Dyer v. Jones*, 8 Vt. 205; *Kelly v. Bradford*, 33 Vt. 35;

Viles v. Barre &c. Co., 79 Vt. 311, 65 Atl. 104.

In *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 331, 66 Atl. 714, the court said: "In some of these and other similar cases, reference is made to the 'deduction' 'recoupment' or 'set off' of the defendant's damages for the obvious purpose of indicating a convenient process or method of ascertaining what the services rendered by the plaintiff were reasonably worth, and not with the intention of casting upon the defendant the burden of proving the value of the plaintiff's services. It is incumbent upon the plaintiff in such cases to prove the value of the work done or materials furnished by him. The question of recoupment, properly so termed, is not involved. But if the plaintiff's breach of the contract be such as to subject the defendant to consequential damage, that may be the foundation for a legitimate claim in recoupment, with respect to which the burden of proof would be upon the defendant." *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

and the materials is also important evidence, but by no means the only evidence. The value of part performance of a contract of service may be largely destroyed because the contract is not completed. The value of a building erroneously built may bear no particular relation to either contract price or cost. The benefit to the defendant here is "the fair market value of the thing produced."⁷⁵ To this statement it has been objected:⁷⁶ "Whether the investment in the building turns out profitably or unprofitably to the owner, is of no consequence. The value of the building to the owner, apart from other considerations, cannot affect the price to be paid. If, through bad management, miscalculation or misfortune for which the builder is not responsible, the owner is unable profitably to use the building for the purpose for which it was intended, this cannot be shown to diminish the sum to be recovered. A building may be so constructed for use in a particular kind of business that it would be worth but little for any other use, and before it is completed the business may become unprofitable, and the building be of little value on that account. No one will contend that in such a case the recovery of the builder is to be limited by the value of the building to the owner. If a house is erected by a contractor on foundations provided by the owner, and the foundations settle so that it becomes unsafe and must be taken down, it will hardly be contended that the *quantum meruit* to be recovered by the contractor who has substantially performed his contract but has fallen short of complete performance of it is to be reduced to nothing because the building is worth little or nothing to the owner." But if unsalable personal property were made upon a special order the buyer could refuse to take title, and if in ignorance of its defects he took title, according to the more general view he could rescind,⁷⁷ and the seller would have to bear the loss. In the case of a building it is the owner's misfortune that he cannot return it *in specie*, but the builder's wrong is the cause of the situation which has arisen, and there seems no reason why the owner who from the necessity of the case is compelled to buy something he never agreed to, should

⁷⁵ *Gillis v. Cobe*, 177 Mass. 584, 594, 59 N. E. 455.

Cobe, 177 Mass. 584, 602, 59 N. E. 455.

⁷⁶ Knowlton, J., diss. in *Gillis v.*

⁷⁷ See *supra*, § 1462.

pay him for it more than it is worth to him. The same argument is applicable to a partly performed contract of service.

§ 1484. Defendant's recoupment or counterclaim.

Since the plaintiff has wrongfully broken his contract, the defendant may by recoupment or counterclaim get appropriate damages deducted from the plaintiff's recovery. If the measure of the plaintiff's damages is based, as it has been argued it should be, on the benefit which the defendant receives from the plaintiff's performance, the situation is that the defendant pays for something different from what the contract called for, such a sum as that something is worth, and the contract stands as totally unperformed. The defendant then has a cross right for the same damages he would have had the plaintiff repudiated his contract without any performance—the difference between the contract price of the building, and the cost in the market of making such a building.

§ 1485. Effect of the contract price on quasi-contractual recovery.

Where the plaintiff's failure to fulfil completely his obligations under the contract is due to the defendant's default there is no reason for imposing any limitation on the amount which he may recover on a *quantum meruit* or *quantum valebat* for what he has done, other than that set by the principles of fair value previously stated. Though the amount or rate of compensation stated in the contract is evidence of this,⁷⁸ it does not set a conclusive limit on the plaintiff's right.⁷⁹ There are indeed con-

⁷⁸ *Fitzgerald v. Allen*, 128 Mass. 232; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

⁷⁹ *Lodder v. Slowey*, 1904 A. C. 442 (affirming 20 New Zealand L. R. 321); *Valente v. Weinberg*, 80 Conn. 134, 67 Atl. 369, 13 L. R. A. (N. S.) 448; *Rodemer v. Gonder*, 9 Gill, 288; *Fitzgerald v. Allen*, 128 Mass. 232; *Connolly v. Sullivan*, 173 Mass. 1, 53 N. E. 143; *Kearney v. Doyle*, 22 Mich. 294; *Hemminger v. Western Assurance Co.*, 95 Mich. 355, 54 N. W. 949 (*cf.* *Eakright v. Torrent*, 105 Mich. 294,

63 N. W. 293); *Johnston v. Star Bucket Co.*, 274 Mo. 414, 202 S. W. 1143; *Smith v. Keith & Perry Coal Co.*, 36 Mo. App. 567; *Joern v. Bang*, (Mo. App. 1918), 200 S. W. 737; *Thompson v. Gaffey*, 52 Neb. 317, 72 N. W. 314; *Clark v. Manchester*, 51 N. H. 594; *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379; *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182, 48 N. E. 888; *Philadelphia v. Tripple*, 230 Pa. 480, 79 Atl. 703; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80. See also *United States v. Behan*, 110

trary decisions;⁸⁰ but they seem opposed to sound principle. Where, however, the defendant is not in default under the contract the plaintiff's right must be limited. *Non constat* that the defendant would have agreed to pay the fair value for what the plaintiff contracted to perform. Perhaps the unreasonably low price demanded by the plaintiff originally was what led the defendant to make the contract. While these considerations should have no weight where it is the defendant's fault that the contract is not fulfilled they must be regarded where it is not his fault. The plaintiff should then be limited to such a fraction of the contract price as what he performed bears to the whole. He is not necessarily entitled to as much as this if the defendant has not received so much benefit, but he should never recover more.⁸¹ In a Massachusetts case the parties had in fact made no agreement, but owing to the fraud of an architect each in good faith supposed that a certain building which the plaintiff was to erect was to be completed under the terms of a writing in his hands. Owing to the architect's fraud the price named in the two writings (which were otherwise alike) differed. The court held that there was no contract, but allowed the plaintiff to recover an amount based on the detriment to him which largely exceeded both the benefit to the defendant and the price for which he supposed the work was being done.⁸²

U. S. 338, 345, 28 L. Ed. 168, 4 Sup. Ct. 81. In *Knotts v. Clark Const. Co.*, 249 Fed. 181, 161 C. C. A. 217, the court while declining to pass upon the question whether the plaintiff could ever recover more than the contract price, held that the fact that the contract could only have been completed at a loss to the plaintiff did not preclude or limit recovery of the fair value of what had been done.

⁸⁰ *Wiegel v. Boone*, 64 Ark. 228, 41 S. W. 763; *Dobbins v. Higgins*, 78 Ill. 440; *Rice v. Partello*, 88 Ill. App. 52; *Hoyle v. Stellwagen*, 28 Ind. App. 681, 63 N. E. 780; *Western v. Sharp*, 14 B. Mon. 177; *Kehoe v. Rutherford*, 58 N. J. L. 23, 27 Atl. 912; *Doolittle v. McCullough*, 12 Ohio St. 360 (much qualified by *Wellston Coal Co. v.*

Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888); *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548.

⁸¹ See *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Reifschneider v. Beck*, 148 Mo. App. 725, 129 S. W. 232; *Manning v. School Dist.*, 124 Wis. 84, 102 N. W. 356, and see *supra*, § 1480, n. 61.

⁸² *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810. A case involving somewhat similar mistake is *Turner v. Webster*, 24 Kans. 38, 36 Am. Rep. 251, and the plaintiff was allowed to recover the fair value of his work, but it did not appear that the benefit to the defendant was less than the detriment to the plaintiff.

It is hard to see how one who has done work or furnished materials without any contractual right to compensation can be entitled to recover from a defendant who has been guilty of no fault a sum in excess both of what he was willing to pay and of any benefit which he has received.

BOOK VII

INVALIDATING CIRCUMSTANCES

CHAPTER XLI

FRAUD

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§ 1486. Nature of invalidating circumstances.

Agreements may lack none of the essentials of a contract, and, if within the Statute of Frauds, may be in the form that the law requires, but, nevertheless, be subject to affirmative defences which render them unenforceable. Such defences may be divided into two classes—those which operate as soon as they arise to prevent any legal obligation from arising, and those which enable one or both parties to avoid their obligations by appropriate manifestation of intention. The division cannot be made wholly exact. Illegal agreements for instance cannot be placed as a whole in any one category, but for purpose of dividing the chapters of a treatise, the classification is sufficiently accurate, and such defences as do not ordinarily of their own force immediately deprive a contract of legal validity or even prevent an agreement from having legal force, will first be considered. Perhaps the most important of these is fraud.

§ 1487. Definition of fraud.

Fraud may become important either for the purpose of giving the defrauded party a right to sue the fraudulent person for damages in an action of deceit, or its equivalent, or to enable the defrauded person to rescind the transaction. The requirements of the law for these two purposes are not always identical. It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or rescission of the contract. The converse is not, however, true. There are cases where the belief of the deceived person is not

due to such a positive or such a fraudulent misrepresentation as would justify an action of deceit;¹ and a claim to relief if it exists must be based on the law governing mistake. The essential element of fraud that must exist in any case properly brought within that designation is a mistake of one party as to a material fact, induced by the other in order that it might be acted upon, or (in cases where there is a duty of disclosure) at least taken advantage of with knowledge of its falsity to secure action. Generally all of the requirements of the action of deceit will be found to exist. These are: (1) A false representation of material facts. (2) Knowledge of the falsity of the representations by the person making them.² (3) Ignorance of the falsity on the part of the person to whom the representations were made. (4) Intent or at least reason to expect that the representations will be acted on by the person to whom they were made. (5) Action by such person to his damage.³ If the mistake of one party is induced by the other with neither knowledge of the error nor wilful indifference in regard to it there is misrepresentation but not fraud. And there is simply mistake if the erroneous belief was not induced by the other party.

¹ In *Peek v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns said: "Mere nondisclosure of material facts, however morally censurable, however that nondisclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false." And, in *Derry v. Peek*, 14 A. C. 337, 359, Lord Herschell said: "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however

free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit."

² This is not requisite in all jurisdictions. See *infra*, § 1509.

³ Bigelow, Torts, § 110.

§ 1488. When fraud renders a transaction void.

Fraud may induce a person to assent to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case the act of the defrauded person is effectual though voidable; in the second case the act of the defrauded person is void. This distinction most commonly arises in the law of negotiable paper. It originated, however, in the law of sealed instruments; and is still of general application.⁴ Where a person is fraudulently induced to sign or indorse a bill or note in the reasonable belief that he is signing something else, he cannot really be said to have made or indorsed the bill or note.⁵ If, however, the signer has been negligent a holder in due

⁴ In Pollock & Maitland's History (2d ed.), II, 536, it is said: "Taking the execution of a charter as the typical 'act in the law,' we are warranted in believing that the person whose seal it bore might defend himself by alleging that he was tricked into sealing an instrument of one kind while he thought that it was an instrument of another kind." Citing Bracton, fol. 396 b; Fleta, p. 424; Y. B. 30 Edw. III, f. 31; and for later law, Thoroughgood's Case, 2 Coke, 9a.

⁵ Foster v. McKinnon, L. R. 4 C. P. 704, is the leading case for this doctrine. In this case the defendant signed a bill of exchange under the belief fraudulently induced that he was signing a guaranty. It was held that the instrument was void even in the hands of a *bona fide* purchaser, Byles, J., saying: "The defendant never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature." Numerous other decisions bring out the same principle. Burroughs v. Pacific Guano Co., 81 Ala. 255, 1 So. 212; Folmar v. Siler, 132 Ala. 297, 31 So. 719; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404; Wood v. Cincinnati, etc., Co., 96 Ga. 120, 22 S. E. 909; Vanbrunt v. Singley,

85 Ill. 281; Auten v. Gruner, 90 Ill. 300; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Webb v. Corbin, 78 Ind. 403; Mitchell v. Tomlinson, 91 Ind. 167; Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471; Hopkins v. Insurance Co., 57 Ia. 203, 10 N. W. 605; Green v. Wilkie, 98 Ia. 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184; Freedley v. French, 154 Mass. 339, 28 N. E. 272; Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Anderson v. Walter, 34 Mich. 113; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Aultman v. Olson, 34 Minn. 450, 26 N. W. 451; Briggs v. Ewart, 51 Mo. 245, 11 Am. Rep. 445; Martin v. Smylee, 55 Mo. 577; First Nat. Bank v. Lierman, 5 Neb. 247; Willard v. Nelson, 35 Neb. 651, 53 N. W. 572, 37 Am. St. Rep. 455; Alexander v. Brogley, 62 N. J. L. 584, 41 Atl. 691, 63 N. J. L. 307, 43 Atl. 888; Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694; Porter v. Hardy, 10 N. Dak. 551, 88 N. W. 458; DeCamp v. Hamma, 29 Ohio St. 467; Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Griffiths v. Kellogg, 39 Wis. 290, 20 Am. Rep. 48; Lord v. American Assoc., 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815; Keller v. Ruppold, 115 Wis. 636, 92 N. W. 364, 95 Am. St.

course should be allowed to recover and it seems that one who relies without investigation of his own on the representations of the person at whose request he signs, is guilty of negligence.⁶ Signatures to written contracts of other kinds obtained by fraud of this sort are equally invalid.⁷ And where the instrument is non-negotiable the signer's negligence will not make him liable to a purchaser;⁸ for even though it were granted that the agreement is voidable, not void, the purchaser would be subject to the defence of fraud on the part of his assignor.⁹ With these cases where the mistake of the signer of the document was induced by fraud must be contrasted cases where his own negligent failure to read the document or to have it read to him was the sole cause of his mistake, no misrepresentation of the other party, whether innocent or fraudulent contributing thereto. In such a case the signer is liable.¹⁰

Error produced by deception in regard to the person of the other contracting party,¹¹ and conceivably also of the existence of the subject-matter of the contract, may make a transaction void, but such instances are less common

Rep. 974. *Cf.* *Bedell v. Herring*, 77 Cal. 572, 20 Pac. 129; *Bank v. Johns*, 22 W. Va. 520; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14. Fraud is not a necessary element of the defence, though it almost invariably exists. Mistake without negligence is enough. *Bank of Ireland v. M'Manamy*, [1916] 2 Ir. R. 161.

⁶ *Leach v. Nichols*, 55 Ill. 273; *Nebecker v. Cutsinger*, 48 Ind. 436; *Ruddell v. Dillman*, 73 Ind. 518, 38 Am. Rep. 152; *Baldwin v. Barrows*, 86 Ind. 351; *Yeagley v. Webb*, 86 Ind. 424; *Douglas v. Mattin*, 29 Ia. 498, 4 Am. Rep. 238; *Fayette Co. Savings Bank v. Steffes*, 54 Ia. 214, 6 N. W. 267; *Ort v. Fowler*, 31 Kans. 478, 2 Pac. 580, 47 Am. Rep. 501; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864; *Mackey v. Peterson*, 29 Minn. 298, 13 N. W. 132; *Shirts v. Overjohn*, 60 Mo.

305; *Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872; *Bank v. Smith*, 55 N. H. 593; *Chapman v. Rose*, 56 N. Y. 137, 15 Am. Rep. 401; *DeCamp v. Hamma*, 29 Ohio St. 467, 471; *Ross v. Doland*, 29 Ohio St. 473.

⁷ *Thoroughgood's Case*, 2 Coke, 9b; *Carlisle Banking Co. v. Bragg*, [1911] 1 K. B. 489 (guarantee); *Indiana &c. R. Co. v. Fowler*, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158 (release); *Eldorado Jewelry Co. v. Darnell*, 135 Ia. 555, 113 N. W. 344 (order for goods); *Bank of Ireland v. McManamy*, [1916] Ir. Rep. K. B. 161 (guarantee). See also *Babcock v. Farwell*, 245 Ill. 14, 40, 91 N. E. 683, 137 Am. St. Rep. 284.

⁸ *Carlisle Banking Co. v. Bragg*, [1911] 1 K. B. 489.

⁹ See *supra*, § 432.

¹⁰ See *supra*, § 35.

¹¹ See *infra*, § 1517.

§ 1489. Distinction between fraudulent acquisition of possession and of title where property is obtained by fraud.

It is important to observe whether the fraudulent person induces the defrauded person to assent to a transfer of title or merely to assent to a transfer of possession. In the latter case the fraudulent person can transfer no better title even to a *bona fide* purchaser for value without notice than any possessor of goods without title.¹²

§ 1490. Materiality of representation.

It is laid down in the cases that a misrepresentation must be material in order that the law may take notice of it as a fraud.¹³

¹² The distinction was brought out in *Levy v. Cooke*, 143 Pa. St. 607, 614, where Sterett, C. J., said: "If the owner intended to transfer the property in the goods, as well as their possession, the transaction is a sale, and the property passes, however fraudulent the device may have been; but if he intended to part with nothing more than the bare possession, there is no sale and no property passes. In the former case the contract is not void *ab initio*, but voidable at the election of the vendor. Such voidable contracts may be affirmed and enforced, or they may be rescinded by the vendor at his election; but in the meantime, and until he does elect, if his vendee transfers the goods, in whole or in part, to an innocent third person for a valuable consideration, the right of the original vendor will be subordinate to that of such innocent third person." This language was quoted with approval in *Canadian Bank v. Baum*, 187 Pa. St. 48, 52, 40 Atl. 975. See also *Baehr v. Clark*, 83 Iowa, 313, 49 N. W. 840, 13 L. R. A. 717; *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Heilbronn v. McAleenan*, 1

N. Y. S. 875; *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. 460; *McDonald v. Humphries* (Tex. Civ. App.), 146 S. W. 712.

¹³ *Smith v. Chadwick*, 20 Ch. D. 27; *McGar v. Williams*, 26 Ala. 469, 62 Am. Dec. 739; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; *Sprague v. Taylor*, 58 Conn. 542, 20 Atl. 612; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Ruff v. Jarrett*, 94 Ill. 475; *Fuchs & Lang Mfg. Co. v. Kittredge*, 242 Ill. 88, 89 N. E. 723; *Clem v. Newcastle, etc.*, R. R. Co., 9 Ind. 488, 68 Am. Dec. 653; *Wright v. Shelby R. R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522; *Long v. Woodman*, 58 Me. 49; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Cook v. Gill*, 83 Md. 177, 34 Atl. 248; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884; *Stone v. Robie*, 66 Vt. 245, 29 Atl. 257. It was held in *Penn Ins. Co. v. Crane*, 134 Mass. 56, that it was a question of law for the court whether a misrepresentation was material. But the contrary decisions of *Sharp v. Ponce*,

If, however, a party to a bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations, it seems that the former should not be allowed to deny that misrepresentations which have effectively served a fraudulent purpose were material.¹⁴ This in effect is saying that any misrepresentations which were intended to bring about a particular result and which do bring about that result are sufficiently material. It is probable that in cases where the question of materiality has been regarded as vital the question whether the misrepresentation was an essential inducement to enter into the transaction has also generally been in the mind of the court.

§ 1491. Matters of opinion.

Two questions arise in regard to fraudulent statements of opinion. The first question involves the dividing line between statements of fact and opinion. The second question concerns the liability of one who fraudulently expresses what is confessedly an opinion in order to induce action by the other party. Closely analogous questions arise in the law of warranty¹⁵ concerning the liability of a seller who makes statements in regard to goods which may be regarded as matters of opinion. The dividing line separating statements of fact from statements of opinion is confessedly hard to draw. In a doubtful case the determination of it is one of fact for the jury.¹⁶ The question to be determined is whether the speaker must properly have been understood as asserting absolutely the truth of his statements, or only a belief that the facts corresponded with his statements. In determining this question, not simply the form of speech used but also the subject-matter of the remark must be considered. Any statement may be put in the form of an expression of opinion by the use of such words as "I think," or, "I believe." But even when statements positive in form are made, the hearer may often know perfectly well that the expression is necessarily

74 Me. 470, and *Davis v. Davis*, 97 Mich. 419, 56 N. W. 774, seem better.

¹⁴ *Smith v. Kay*, 7 H. L. C. 750; *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121; *Brown v.*

Search, 131 Wis. 109, 111 N. W. 210.

¹⁵ See *supra*, § 971.

¹⁶ *Dawson v. Graham*, 48 Iowa, 378; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113.

one of opinion. Statements that things are "good," or "valuable," or "large," or "strong," necessarily involve to some extent an exercise of individual judgment, and even though made absolutely, the hearer must know, can only be based on the speaker's opinion.¹⁷ It is plain, however, that though the boundaries of quality asserted by such statements are indeterminate—often so indeterminate as necessarily to preclude relief—they cannot be stretched indefinitely. A false statement that "the mill is doing well" when the mill was hopelessly insolvent, was rightly held an actionable fraud.¹⁸

§ 1492. Illustrations in contracts for the sale of goods.

In contracts for the sale of goods the question whether a statement is one of fact or opinion will arise in regard to statements of the quantity, quality, or value of the goods; or statements in regard to the pecuniary responsibility of the buyer. Illustrations of such cases are given in the note below.¹⁹ All

¹⁷ Such a statement as that a piece of goods is the "Best piece of cloth in the market," is not a warranty. *Strauss v. Salzer*, 58 N. Y. Misc. 573, 109 N. Y. S. 734.

¹⁸ *Henry v. Dennis*, 93 Me. 106, 44 Atl. 369. See also *Sherman v. Smith* (Ia.), 169 N. W. 216.

¹⁹ QUANTITY.—*Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086 (the seller agreed to sell a herd of cattle running on the range which, as the buyer knew, had not been rounded up for a long time, and a number of which were confessedly unknown. It was held that an action of deceit would not lie for a misrepresentation of the number); *Brockhaus v. Schilling*, 52 Mo. App. 73 (on the sale of a quantity of liquor open to inspection it was held that an inaccurate statement that it would last a certain length of time could not form the basis of a claim for fraud). QUALITY.—A statement by a seller that a patent is valid, or that a machine is effective, are statements of opinion. *Chalmers v. Harding*, 17 L. T. (N. S.) 571; *Reeves v. Corning*,

51 Fed. 74; *Huber v. Guggenheim*, 89 Fed. 598; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Hunter v. McLaughlin*, 43 Ind. 38; *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Bigler v. Flickinger*, 55 Pa. St. 279. Cf. *Smith & Nixon Co. v. Morgan*, 152 Ky. 430, 153 S. W. 749. See also *Fuchs & Lang Mfg. Co. v. Kittredge*, 242 Ill. 88, 89 N. E. 723. Many illustrations in regard to expression of opinion in regard to quality of goods are collected under the head of warranty. Williston, *Sales*, § 203. See also *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 Fed. 853, 161 C. C. A. 7, cert. denied 247 U. S. 507, 62 L. Ed. 1241, 38 S. Ct. 427; *Gleason v. McPherson*, 175 Cal. 594, 166 Pac. 332. VALUE.—*Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Reid v. Shaffer*, 249 Fed. 553, 161 C. C. A. 479; *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015; *Wegerer v. Jordan*, 10 Cal. App. 362, 101 Pac. 1066; *Schramm v. O'Connor*, 98 Ill. 539; *Evans v. Gerry*, 174 Ill. 595, 51 N. E. 615; *Cronk v. Cole*, 10 Ind. 485; *Kennedy v. Richardson*, 70 Ind. 524;

these matters, however, may sometimes be the subject of statements of fact as distinguished from opinion. It is obvious that the quantity of goods may usually be exactly determined and a false statement to the effect that it has been determined to be a certain amount is fraudulent.²⁰ So statements of the quality of goods may often relate to characteristics subject to exact determination.²¹ So any false statements in regard to the basis of value, as the cost or price paid by a third person,²² or the

Bolts v. O'Conner, 45 Ind. App. 178, 90 N. E. 496; *Burns v. Mahannah*, 39 Kans. 87, 17 Pac. 319; *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. 244; *Face v. Hall*, 177 Mich. 495, 143 N. W. 622; *Boasberg v. Walker*, 111 Minn. 445, 127 N. W. 467; *Vath v. Wiechmann*, 138 Minn. 87, 163 N. W. 1028; *Moody v. Baxter*, 167 Mo. App. 521, 152 S. W. 117; *Realty Inv. Co. v. Shafer*, 91 Neb. 798, 137 N. W. 873; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Uhler v. Sample*, 20 N. J. Eq. 288; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467; *Romaine v. Excelsior Carbide & Co.*, 54 Wash. 41, 103 Pac. 32; *Billups v. Montenegro-Rheims Music Co.*, 69 W. Va. 15, 70 S. E. 779. **PECUNIARY RESPONSIBILITY.**—*Haycraft v. Creesy*, 2 East, 92; *Gainsford v. Blackford*, 7 Price, 544; *People's Savings Bank v. James*, 178 Mass. 322, 59 N. E. 807; *Lyons v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372; *Jude v. Woodburn*, 27 Vt. 415.

²⁰ *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454 (where a knowingly false statement of the number of yards of carpet on the floors of a house was held ground for an action of deceit. Nor was it ma-

terial that the buyer might have measured the carpets had he chosen to do so); *Birdsey v. Butterfield*, 34 Wis. 52 (in this case the sellers of cattle asserted that they would weigh on the average over 900 pounds. In fact the average weight was about 835 pounds. It was held that the buyer might recoup damages for the deceit in an action on a note given for the price). See also *Worcester v. Cook*, 220 Mass. 539, 108 N. E. 511 (land).

²¹ *Jackson v. Collins*, 39 Mich. 557. See also s. c., *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947. The defendant sold a stock of goods representing them as new, well-selected, and salable, and that old goods in the stock had been removed. It was also represented that the stock contained over \$3,000 worth of new goods and that they had been bought at the lowest market price. It was held these representations furnished ground for an action of deceit. So in *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496, representations that goods were "clean and desirable" and that they were of "good styles and salable" were held to render the seller liable. The numerous decisions under the law of warranty may also be referred to.

²² *Gluckstein v. Barnes*, [1900] A. C. 240, 247; *Zang v. Adams*, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249; *Green v. Bryant*, 2 Ga. 66; *Douglas v. Treat*, 246 Ill. 593, 92 N. E. 976;

past income from property²³ may amount to fraud. Even statements of value without specification of the basis of the estimate have been in some cases held actionable, especially when made by one supposed to have expert knowledge.²⁴ A

Teachout v. Van Hoesen, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; *Dorr v. Cory*, 108 Iowa, 725, 78 N. W. 682; *Johnson v. Gavitt*, 114 Iowa, 183, 86 N. W. 256; *Potter v. Potter*, 65 Ill. App. 74; *Caswell v. Hunton*, 87 Me. 277, 32 Atl. 899; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *Mo-Aleer v. Horsey*, 35 Md. 439; *Kilgore v. Bruce*, 166 Mass. 136, 138, 44 N. E. 108; *Stony Creek Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722; *Pratt v. Allegan Circuit Judge*, 177 Mich. 558, 143 N. W. 890; *Van Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314; *Sandford v. Handy*, 23 Wend. 260; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279; *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467; *Nanes v. Peck & Mack Co.*, 181 N. Y. App. D. 760, 169 N. Y. S. 224; *National Bank of Anadarko v. Oldham*, 26 Okl. 139, 109 Pac. 75. See also *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074; *Conlan v. Roemer*, 52 N. J. L. 53, 57, 18 Atl. 858; *Edelman v. Latschaw*, 180 Pa. St. 419, 36 Atl. 926. In *Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561, the statement of a selling agent that the price asked was cheaper than the buyer could procure the goods elsewhere was held merely a statement of opinion. Cf. *Stout v. Caruthersville Hardware Co.*, 131 Mo. App. 520, 110 S. W. 619. Some early cases in Massachusetts and Maine treated statements of cost as similar to statements of value and, therefore, as not constituting fraud, though made with intent to deceive, but this doctrine

has been discredited by the cases cited above; and although followed in a few jurisdictions must be regarded as erroneous. See *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Bishop v. Small*, 63 Me. 12; *Richardson v. Noble*, 77 Me. 390; *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409; *Hemmer v. Cooper*, 8 Allen, 334; *Cooper v. Lovering*, 106 Mass. 77; *Way v. Ryther*, 165 Mass. 226, 42 N. E. 1128; *Gassett v. Glasier*, 165 Mass. 473, 43 N. E. 193; *Boles v. Merrill*, 173 Mass. 491, 494, 53 N. E. 894, 73 Am. St. Rep. 308. See also *Mackenzie v. Seeberger*, 76 Fed. 108, 40 U. S. App. 188, 22 C. C. A. 83; *Tuck v. Downing*, 76 Ill. 71; *Elerick v. Reid*, 54 Kans. 579, 38 Pac. 814; *Sowers v. Parker*, 59 Kans. 12, 51 Pac. 888; *Peck v. Morgan* (Tex. Civ. App.), 156 S. W. 917.

²³ *Cross v. Bouck*, 175 Cal. 253, 165 Pac. 702; *Vouros v. Pierce*, 226 Mass. 175, 115 N. E. 297.

²⁴ *Zimmern v. Blount*, 238 Fed. 740, 151 C. C. A. 590; *Southern Trust Co. v. Lucas*, 245 Fed. 286, 157 C. C. A. 478; *Cruess v. Fessler*, 39 Cal. 336; *Loaiza v. Superior Court*, 85 Cal. 11, 30, 24 Pac. 707, 9 L. R. A. 376; *Edmonds v. Wilcox*, 178 Cal. 222, 172 Pac. 1101; *McDowell v. Caldwell*, 116 Iowa, 475; *Evans v. Palmer*, 137 Ia. 425, 114 N. W. 912; *Dawe v. Morris*, 149 Mass. 188, 191, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Welch v. Olmstead*, 90 Mich. 492, 51 N. W. 541; *Marted v. Fowler*, 94 Mich. 106, 53 N. E. 921; *Griffin v. Farrier*, 32 Minn. 474, 21 N. W. 553; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Schmidt v. Thompson*, (Minn. 1918), 167 N. W. 543; *Giles v. Horner*, 97 Neb. 162, 149 N. W. 333; *Henry v. Collier*, (Okl. 1918),

false statement by a broker that his principal would not take less than a certain price, so far as it involves a statement of present fact, is equivalent only to a false statement of the estimate of value placed upon the property by the principal.²⁵ But statements as to the pecuniary condition of a buyer, even though expressed in somewhat indefinite language, may involve the assertion as a fact that he has sufficient means to make his payment for what he buys sure.²⁶

§ 1493. Illustrations in contracts for the sale of real estate.

The same principles are applicable to representations in sales of real estate as in sales of chattels. A statement by a vendor of real estate concerning his title, when stated as his conclusion from facts equally within the knowledge of the purchaser, is matter of opinion.²⁷ But an assertion of title may be made as a fact.²⁸ So statements in regard to particular incumbrances,²⁹ or taxes,³⁰ are statements of fact; as is a positive statement of

169 Pac. 636; *Ward v. Jensen*, 87 Or. 314, 170 Pac. 538; *Byrne v. Stewart*, 124 Pa. St. 450, 17 Atl. 19. See also *Adan v. Steinbrecher*, 116 Minn. 174, 133 N. W. 477; *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275; *Vaughan v. Exum*, 161 N. C. 492, 77 S. E. 679; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748.

²⁵ The statement was therefore held not actionable in *Bradley v. Oviatt*, 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828. Cf. *Henry v. Collier*, (Okl. 1918), 169 Pac. 636.

²⁶ Thus a statement falsely made that a man was doing a "safe business" and that his "note was sure to be paid" is fraud. *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121. So a statement that a note indorsed by the firm of the speaker was as "good as the Bank of England," when in fact the firm was insolvent, was a fraud and it was held immaterial whether the speaker knew of the insolvency or not. *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726. Statements in regard to a corporation that it was

doing a good business and making money were held actionable deceit when made by one who knew that the business was being carried on at a loss. *Sherman v. Smith* (Ia.), 169 N. W. 216. In Vermont, however, it was held that the false statement of a buyer that he was "safe to be trusted and given credit" did not amount to fraud. *Jude v. Woodburn*, 27 Vt. 415. But cf. *Corey v. Boynton*, 82 Vt. 257, 72 Atl. 987.

²⁷ *Martin v. Wharton*, 38 Ala. 637; *Fitzhugh v. Davis*, 46 Ark. 337; *Choate v. Hyde*, 129 Cal. 580, 62 Pac. 118; *Drake v. Latham*, 50 Ill. 270; *Conwell v. Clifford*, 45 Ind. 392; *Hoyt v. Bradley*, 27 Me. 242; *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *Herman v. Hall*, 140 Mo. 270, 41 S. W. 733; *Fellows v. Evans*, 33 Ore. 30, 53 Pac. 491.

²⁸ *Carr v. Sanger*, 138 N. Y. App. Div. 32, 122 N. Y. S. 593.

²⁹ *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798.

³⁰ *Wright v. United States Mtge. Co.* (Tex. Civ. App.), 42 S. W. 789. See

the area of the land.³¹ Even though the boundaries are pointed out this is true.³² A peculiar Massachusetts view to the contrary on this last point,³³ has been held inapplicable where the representation of area is accompanied by a further representation express or implied that the contents have been determined by survey.³⁴ Representations of the value of land stand on the same footing as similar statements in regard to goods,³⁵ and are generally not actionable, but may be if accompanied by false statements of the basis of opinion, or even otherwise under the principles stated in the following section.³⁶ The statement that wells on the land will supply water sufficient for a stated number of cattle,³⁷ or that the growing timber would make a stated quantity of lumber,³⁸ have been held statements of

also *Matlack v. Shaffer*, 51 Kan. 208, 32 Pac. 890, 37 Am. St. 270.

³¹ *Morris v. Courtney*, 120 Cal. 63, 52 Pac. 129; *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Peake v. Walton*, 52 Ill. App. 90; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744; *Moore v. Harmon*, 142 Ind. 555, 41 N. E. 599; *Worcester v. Cook*, 220 Mass. 539, 108 N. E. 511; *Stearns v. Kennedy*, 94 Minn. 439, 103 N. W. 212; *Beardsley v. Duntley*, 69 N. Y. 577; *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. 878; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

³² *Lovejoy v. Isbell*, 73 Conn. 368, 47 Atl. 682; *O'Neill v. Conway*, 88 Conn. 651, 92 Atl. 425; *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; *Starkweather v. Benjamin*, 32 Mich. 305; *McGhee v. Bell*, 170 Mo. 121, 135, 150, 70 S. W. 493, 59 L. R. A. 761; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216.

³³ *Medbury v. Watson*, 6 Met. 246,

39 Am. Dec. 726; *Mooney v. Miller*, 102 Mass. 217. These cases were followed in *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487, 132 Am. St. Rep. 484, on the principle of *stare decisis*, though the court admitted the doctrine was opposed to the weight of authority and probably undesirable. It may be questioned whether those who are trying to commit what is certainly a moral fraud can fairly complain if the previously existing law is tightened sufficiently to catch them.

³⁴ *Worcester v. Cook*, 220 Mass. 539, 108 N. E. 511.

³⁵ *McCabe v. Kelleher* (Oreg.), 175 Pac. 608, and see the preceding section.

³⁶ See *Van Vliet & Co. v. Crowell* (Ia.), 149 N. W. 861; *Thaler v. Niedermeyer*, 185 Mo. App. 257, 170 S. W. 378; *Howard v. Duncan*, 94 Neb. 685, 144 N. W. 169; *Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835; *Sleeper v. Smith*, 77 N. H. 337, 91 Atl. 866; *Mount v. Loizeaux*, 86 N. J. 511, 92 Atl. 593; *Pate v. Blades*, 163 N. C. 267, 79 S. E. 608; *Robertson v. Frey*, 72 Oreg. 599, 144 Pac. 128.

³⁷ *Bondurant v. Crawford*, 22 Ia. 40. Cf. *Hill v. Wilson*, 88 Cal. 92, 25 Pac. 1105.

³⁸ *Longshore v. Jack*, 30 Ia. 298.

opinion; and doubtless they might be phrased in such a way or the circumstances might be such that the holding would be right. But a positive statement that a certain amount of hay had been cut,³⁹ that minerals were found on the premises,⁴⁰ that the land is "rich,"⁴¹ or as good and productive as another farm,⁴² have been held sufficiently definite statements of fact to afford basis for relief.

§ 1494. Liability for fraudulent statements of opinion.

There is a growing unwillingness on the part of the courts here as in the law of warranty to allow statements to be made without liability, which are calculated to induce, and do induce, action on the part of the hearer. Where the statement is made with fraudulent intent, there is the greater reason for regarding it as a ground of liability if the natural impression given by the statement is that certain matters of fact are true, even though the statement is couched in the form of an opinion or relates to a matter as to which certainty is impossible.⁴³ Moreover, even if a statement is confessedly merely an opinion, and is understood to be such, nevertheless, it is an assertion of a fact; namely, that the speaker has a certain opinion, and this fact may be one upon which the other party relies, and perhaps justifiably, in entering into the bargain.⁴⁴ It has been held that even a prom-

Cf. Glaspie v. Keator, 56 Fed. 203, 5 C. C. A. 474; *Chase v. Boughton*, 93 Mich. 285, 54 N. W. 44.

³⁹ *Coon v. Atwell*, 46 N. H. 510.

⁴⁰ *Green v. Turner*, 80 Fed. 41; *Hasse v. Freud*, 119 Mich. 358, 78 N. W. 131.

⁴¹ *Boltz v. O'Conner*, 45 Ind. App. 178, 90 N. E. 496.

⁴² *Stonemets v. Head*, 248 Mo. 243, 154 S. W. 108.

⁴³ The remarks of Bowen, L. J., in *Smith v. Land, etc., Corporation*, 28 Ch. D. 7, 15, are worth observing: "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of

them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the conditions of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." See also *Stone v. Pentecost*, 296 Mass. 505, 92 N. E. 1021; *Noyes v. Meharry*, 213 Mass. 598, 100 N. E. 1090.

⁴⁴ See *Spoad v. Tomlinson*, 73 N. H. 69, 59 Atl. 381, 68 L. R. A. 432; *Sleeper v. Smith*, 77 N. H. 337, 91 Atl. 866

ise amounts to a representation of fact that the promisor is of a certain state of mind.⁴⁵ Still more clearly an expression of opinion is an assertion that the speaker is of a certain state of mind. The authorities recognize that if an opinion is falsely and fraudulently rendered by one professing to have expert skill, or special knowledge, it is legal fraud.⁴⁶ And a few decisions hold with logical correctness that a dishonest statement of opinion is always a dishonest statement of fact.⁴⁷ It may fairly be urged, therefore, that if a misstatement of opinion does not ordinarily amount to actionable fraud it cannot be because the statement is one of opinion merely, for misstatements of opinion may be actionable; but rather because it is unreasonable to place reliance on such statements unless made by one who has, or purports to have, expert knowledge or peculiar means of information not accessible to the other party; and that it is assumed that no reliance was placed on the statements unless made by such a person.

Ouilette v. Theobald, 78 N. H. 547; 103 Atl. 306, also *infra*, § 1488.

⁴⁵ *Ibid.*

⁴⁶ *McGar v. Williams*, 26 Ala. 469, 62 Am. Dec. 739; *Jarratt v. Langston*, 99 Ark. 438, 138 S. W. 1003; *Edwards Barron Est. Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125; *Worley v. Moore*, 77 Ind. 567; *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739; *Picard v. McCormick*, 11 Mich. 68; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Kost v. Bender*, 25 Mich. 515; *Coulter v. Minion*, 139 Mich. 200; *Griffin v. Farrier*, 32 Minn. 474, 21 N. W. 553; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053; *Estell v. Myers*, 54 Miss. 174; *Champion Funding & Foundry Co. v. Hesket*, 125 Mo. App. 516, 102 S. W. 1050; *People v. Peckens*, 153 N. Y. 576, 591, 47 N. E. 883; *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *O'Brien v. Von Lienen* (Tex. Civ. App.), 149 S. W. 723. See also *King v. Doolittle*, 1 Head, 77, 84.

⁴⁷ *Phelps v. Grady*, 168 Cal. 73, 141

Pac. 926; *Macdonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73; *Sleeper v. Smith*, 77 N. H. 337, 91 Atl. 866. See also *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015. In the New Hampshire case above cited, the court quoting from one of its earlier decisions said: "When a person gives his opinion, the statement that it is his opinion includes one that he believes what he has said to be the truth; in other words, that what he has stated as his opinion is his opinion. Every expression of opinion contains at least that one statement of fact; consequently a person can state what he knows to be false, for the purpose of inducing another to change his position, when he pretends to express his opinion as to any matter, as well as when he pretends to state facts in relation to it. In such a case the falsity of the statement consists in stating something as his opinion which is not his opinion." *Spead v. Tomlinson*, 73 N. H. 46, 62, 59 Atl. 376, 381, 68 L. R. A. 432.

§ 1495. **Matters of law.**

It is well settled that statements of domestic law though false and fraudulent do not generally constitute actionable fraud.⁴⁸ And on this principle, a conscious misstatement of the meaning of certain terms in a written contract has been held immaterial.⁴⁹ The ground upon which this rule properly rests is well expressed as follows: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."⁵⁰ In some cases

⁴⁸ *Hirschfield v. London, etc., Ry.*, 2 Q. B. D. 1; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693 (C. A.); *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 S. Ct. 906, 43 L. Ed. 1088; *Reeves v. Corning*, 51 Fed. Rep. 774; *Beall v. McGehee*, 57 Ala. 438; *Jordan v. Pickett*, 78 Ala. 331; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Fish v. Cleland*, 33 Ill. 243; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Burt v. Bowles*, 69 Ind. 1; *Grant v. Grant*, 56 Me. 573; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Jaggar v. Winslow*, 30 Minn. 263, 15 N. W. 242; *Easton-Taylor Trust Co. v. Loker* (Mo. App.), 205 S. W. 87; *Wiebke v. De Wyngaert*, 88 N. J. Eq. 41, 101 Atl. 410; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Cartwright v. Dickinson*, 88 Tenn. 476, 489, 12 S. W. 1030, 19 Am. St. Rep. 910; *Gormely v. Gymnastic Assn.*, 55 Wis. 350, 13 N. W. 242.

⁴⁹ *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N. W. 343,

112 N. W. 708; *Providence Jewelry Co. v. Bailey*, 159 Mich. 285, 123 N. W. 1117.

⁵⁰ *Fish v. Cleland*, 33 Ill. 243; quoted with approval in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203. The importance of a just understanding of the reason of the rule is illustrated by the case of *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 21. In that case a misrepresentation of the Statute of Limitations in another State was held actionable, and the court said that "a misrepresentation which includes the opinion of a law of another State is without the rule," which governs misrepresentations of law generally. See also *Upton v. Englehart*, 3 Dill. 496, 501; *Bethell v. Bethell*, 92 Ind. 318. It may be thought that the difference between a misstatement of foreign law and a misstatement of domestic law is rather a difference in degree than of kind. See *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 341, 20 S. Ct. 906, 44 L. Ed. 1088. The question in any case should be, Was the reliance of the injured party justified by the relation between the parties or the expert knowledge which the maker of the statement purported to have?

the reason for the rule will fail, and in such cases misrepresentation of law, like misrepresentation of opinion, will be actionable. A misrepresentation of law by a lawyer to a layman, or by any one who has or purports to have expert knowledge and, therefore, is enabled to impose on another, is fraudulent;⁵¹ and in cases within the jurisdiction of courts of equity relief has been given for mistake of law fraudulently induced or connived at by the other party.⁵² It should also be observed that statements of law (resembling in this respect statements of opinion) which literally taken are merely an expression of a conclusion of law may, in effect, amount to an assertion of the truth of certain facts. Thus an assertion that goods have been attached, though involving a statement of law, also involves a statement of seizure in fact.⁵³

A statement of the law of a foreign jurisdiction is a statement of fact and, therefore, if false may be fraudulent;⁵⁴ but it should still be asked whether reliance was justified.

⁵¹ See *Townsend v. Cowles*, 31 Ala. 428; *Cowles v. Townsend*, 37 Ala. 77; *Stephens v. Collison*, 249 Ill. 225, 94 N. E. 664; *Peter v. Wright*, 6 Ind. 183; *Lamb v. Lamb*, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227; *Titus v. Rochester Ins. Co.*, 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 426; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135; *Cooke v. Nathan*, 16 Barb. 342; *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958; *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206; *Moreland v. Atchison*, 19 Tex. 303; *Shuttler v. Brandfass*, 41 W. Va. 2011.

⁵² See *infra*, § 1591.

⁵³ *Burns v. Lane*, 138 Mass. 350. The following illustration was put by Jessel, M. R., in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693, "Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is 'You may; she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the

lady had gone through a ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterward turned out that they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story and all the facts, and said, 'Now you see the lady is single,' that would have been a misrepresentation of law."

⁵⁴ *Travelers' Protective Assoc. v. Smith*, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917 E. 1088; *Schneider v. Schneider*, 125 Ia. 1, 98 N. W. 159; *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 21; *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467. See *supra*, n. 50.

§ 1496. Promises and predictions.

It is frequently said that a promissory statement cannot be the basis of an action for deceit; and a prediction of future events is at best a statement of opinion.⁵⁵ It is undoubtedly true that failure to perform a promise cannot amount to fraud.⁵⁶ And in many jurisdictions, without consideration of the question whether a promise was made with an intention not to perform it, it is held that the making of the promise cannot be an actionable fraud.⁵⁷ It has been pointed out, however, that when a promise is made with intention not to perform it, the promisor is guilty of misrepresentation.⁵⁸ And in a number of

⁵⁵ *Pritchard v. Dailey*, 168 N. C. 330, 84 S. E. 392.

⁵⁶ *Piedmont Land Co. v. Piedmont Foundry Co.*, 96 Ala. 389, 11 So. 332; *Hirsch v. Hirsch*, 21 Ark. 342; *Burton v. Platter*, 53 Fed. 901, 10 U. S. App. 657, 4 C. C. A. 95; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283; *Dickinson v. Atkins*, 100 Ill. App. 401; *Hayes v. Burkam*, 51 Ind. 130; *Blaul v. Wandel*, 137 Ia. 301, 114 N. W. 899; *Sherman v. Smith (Is.)*, 169 N. W. 216; *Hubbard v. Long*, 105 Mich. 442, 63 N. W. 644; *Witt v. Cuenod*, 9 N. Mex. 143, 50 Pac. 328; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10.

⁵⁷ *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105; *Church v. Swetland*, 243 Fed. 289, 156 C. C. A. 69; *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *Gage v. Lewis*, 68 Ill. 604; *Grubb v. Milan*, 249 Ill. 456, 94 N. E. 927; *Murray v. Smith*, 42 Ill. App. 548; *Chambers v. Mitchell*, 123 Ill. App. 595; *Ingersoll v. Brown*, 205 Ill. App. 537; *Bethell v. Bethell*, 92 Ind. 318; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Brown v. Pierce*, 229 Mass. 44, 118

N. E. 66; *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316; *Missouri Loan &c. Co. v. Federal Trust Co.*, 175 Mo. App. 646, 158 S. W. 111; *Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601; *Perkins v. Lougee*, 6 Neb. 220; *Gallager v. Brunel*, 6 Cow. 346; *Fisher v. N. Y. Common Pleas*, 18 Wend. 608; *Barbrick v. Carrero*, 171 N. Y. S. 447; *Watkins v. West Wytheville Co.*, 92 Va. 1, 22 S. E. 554; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Milwaukee Brick Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838; *James Music Co. v. Bridge*, 134 Wis. 510, 114 N. W. 1108. And in *Burrill v. Stevens*, 73 Me. 395, 399, 40 Am. Rep. 366, the court said that "a design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud."

⁵⁸ "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a

cases, generally of recent date, the doctrine seems broadly accepted that a promise which the promisor does not intend to carry out may be a misstatement of material fact.⁵⁹ The question becomes important chiefly where the buyer of goods at the time of the purchase intends not to perform his express or implied promise to pay for them.⁶⁰ Though a prediction or gratuitous promise, when fraudulently made, involves a misrepresentation of mental condition similar to that when the promise is made for legal consideration, a difference is to be observed in the justification of the defrauded person in relying on the deceptive statements. Ordinarily predictions or promises wholly without consideration do not justify reliance.⁶¹

§ 1497. Silence—general rule.

It has been said that "there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not in-

misstatement of fact." *Edgington v. Fitzmaurice*, 29 Ch. D. 459, per Bowen, L. J.

⁵⁹ *Rogers v. Virginia-Carolina Chemical Co.*, 149 Fed. 1, 78 C. C. A. 615; *Mamaux v. Cape May Real Est. Co.*, 214 Fed. 757, 131 C. C. A. 63; *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; *Southern L. & T. Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Russ Lumber Co. v. Muscupiable Land Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 188; *Langley v. Rodriguez*, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70; *Sollies v. Johnson*, 85 Conn. 77, 81 Atl. 974; *McLaughlin v. Thomas*, 86 Conn. 252, 85 Atl. 370; *Hight v. Richmond Park Imp. Co.*, 47 App. Dist. Col. 518; *National Bank v. Mackey*, 5 Kans. App. 437, 49 Pac. 324; *Holdham v. Bentley*, 6 B. Mon. 428; *Price v. Reed*, 2 Harr. & G. 291; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *Cox v. Edwards*, 120 Minn. 512, 139 N. W. 1070; *Laswell v. National Handle Co.*, 147 Mo. App. 497, 126 S. W. 969; *Cerny*

v. Paxton & Gallagher Co. (Neb.), 110 N. W. 882, 10 L. R. A. (N. S.) 640; *Ivanovich v. Stern*, 14 Nev. 341; *Goodwin v. Horn*, 60 N. H. 485; *Hill v. Chamberlain*, 64 N. Y. App. Div. 609, 71 N. Y. S. 639, *affd.*, 170 N. Y. 595, 63 N. E. 1117; *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127; *Troxler v. Building Co.*, 137 N. C. 51, 49 S. E. 58; *White Sewing Mach. Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Herndon v. Durham & c. Ry. Co.*, 161 N. C. 650, 77 S. E. 683; *Hellebust v. Bonde*, (N. Dak. 1919), 172 N. W. 812; *Blackburn v. Morrison*, 29 Okl. 510, 118 Pac. 402; *McFarland v. McGill*, 16 Tex. Civ. App. 298, 41 S. W. 402. (See also *Lott Town & Imp. Co. v. Harper*, [Tex. Civ. App.] 204 S. W. 452); *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374.

⁶⁰ The decisions on this point are collected in *infra*, § 1521.

⁶¹ *Bellairs v. Tucker*, 13 Q. B. D. 562; *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394; *Romaine v. Excelsior Carbide & c. Co.*, 54 Wash. 41, 103 Pac. 32.

duced by the act of the vendor.”⁶² And it is undoubtedly the general rule, at least in courts of law, that it is not necessarily fraudulent for one party to a bargain consciously to take advantage of the ignorance or mistake of the other party, provided no words or acts of the former contribute to the mistake, and there is no duty of disclosure arising from a special relation of the parties.⁶³ Even silence when a direct question is asked has been

⁶² *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, per Blackburn, J. *Cf. supra*, § 1426.

⁶³ The leading case for this doctrine is *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214. This was an action by the buyer of tobacco against the sellers to gain possession of it. There was evidence that before the sale the buyer, upon being asked by one of the sellers whether there was any news calculated to enhance its value, was silent although he had received news which the seller had not of the treaty of Ghent which terminated the War of 1812. The court below, on the ground that there was no evidence that the plaintiff had asserted or suggested anything to the sellers, calculated to impose upon them in regard to this news, directed a verdict for the plaintiff. On exceptions, the direction of the court was held erroneous. The question whether any imposition was practiced by the buyer upon the seller it was held should have been submitted to the jury. Though the actual decision of the case thus tends to the enlargement of the rights of the deceived party, the case is usually cited for the statement of Marshall, C. J., that it could not be laid down as matter of law that intelligence of extrinsic circumstances which might influence the price of the commodity and were exclusively within the buyer's knowledge must have been communicated to the seller. The case of *Smith v. Hughes*, L. R. 6 Q. B. 597, from which a quotation has been made in

the text, is even more explicit. This was an action for the price of oats. The defendant (the buyer) refused to accept the oats or pay the price because he had been under the impression when he agreed to buy the oats that they were old oats, whereas, in fact, they were new oats. The jury found that the seller believed the defendant to be under this impression. The judge at the trial directed the jury on this finding to return a verdict for the defendant. It was held by the Court of Appeals that there must be a new trial. The self-deception of the buyer did not enable him to avoid the contract even though known to the seller. See also *Turner v. Green*, [1895] 2 Ch. 205; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Cleveland v. Richardson*, 132 U. S. 318, 329, 10 S. Ct. 100, 33 L. Ed. 384; *Blydenburgh v. Welsh*, Baldwin (U. S.), 331; *Wilson v. Higbee*, 62 Fed. 723; *Heydenfeldt v. Osmont* (Cal.), 175 Pac. 1; *Morris v. Thompson*, 85 Ill. 16; *Dayton v. Kidder*, 105 Ill. App. 107; *Phinney v. Friedman*, 224 Mass. 531, 113 N. E. 285, 286; *Redfield v. Engel*, 171 Mich. 207, 137 N. W. 60; *Benoit v. Perkins* (N. H.), 104 Atl. 254; *Beninger v. Corwin*, 24 N. J. L. (4 Zab.) 257; *Paul v. Hadley*, 23 Barb. 521; *People's Bank v. Bogart*, 81 N. Y. 101; *Smith v. Alpin*, 150 N. C. 425, 64 S. E. 210; *Kintzing v. McElrath*, 5 Pa. St. 467; *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992; *Rose v. Barclay*, 191 Pa. St. 594, 43 Atl. 385, 45 L. R. A. 392; *Fisher v. Budlong*, 10 R. I. 525, 527; *Fell v.*

regarded as not in itself a fraud,⁶⁴ though it would seem that a gesture or even an expression of the face might be enough in such a case to constitute actionable deceit.⁶⁵ And one who after making an innocent misrepresentation discovers the truth, yet thereafter silently allows another to act on the misrepresentation is guilty of fraud.⁶⁶ "In effect he is continuing the representation with knowledge of its falsity."⁶⁷ It is necessary, especially where a written contract is in question of which equity might take jurisdiction, to consider in connection with such cases not only whether the party who keeps silent has in effect made a fraudulent representation which will afford ground for an action of deceit as well as a right of rescission, but whether even if this is not true there is such a mistake as to justify rescission. Unilateral mistake even apart from knowledge of the other party to the transaction of the mistake, has been held in some cases to justify relief;⁶⁸ and it has been held with obvious justice that mistake by one party and knowledge of the mistake by the other, will justify relief as fully as mutual mistake.⁶⁹ The importance of distinguishing whether the transaction can be called fraudulent as distinguished from one based on mistake without fraud, even where no other remedy than rescission is sought, lies in the fact that fraud as to any circumstances actually inducing a bargain may justify re-

Lloyd, 4 Comm. (Australia) 572. A contrary decision is *Davis v. Reisinger*, 120 N. Y. App. Div. 766, 105 N. Y. S. 603, where one who had agreed to buy Bassein rice like a sample which owing to the seller's mistake was Java rice, a more valuable kind, was not allowed to enforce the contract because he knew the sample was Java rice. The Civil Code of Georgia provides that "where one party knows that the other party is laboring under a delusion in respect to the property sold or the condition of the other party, and yet keeps silence" such silence amounts to fraud. See *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, 61 S. E. 149.

⁶⁴ *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214.

⁶⁵ A false denial of knowledge is unquestionably fraudulent. *Dunlap v. Richmond & Co. R.*, 81 Ga. 136, 7 S. E. 283.

⁶⁶ *Reynell v. Sprye*, 1 D. M. & G. 656, 660, 709, 712; *Davies v. London Ins. Co.*, 8 Ch. D. 469, 475; *Redgrave v. Hurd*, 20 Ch. D. 1, 12, 13; *Loewer v. Harris*, 57 Fed. 368, 6 C. C. A. 394; *Mudsill Min. Co. v. Watrous*, 61 Fed. 163, 189, 9 C. C. A. 415. Cf. *Pettigrew v. Chellis*, 41 N. H. 95.

⁶⁷ *Wald's Pollock Cont.* (3d Am. ed.), 682.

⁶⁸ See *infra*, § 1578.

⁶⁹ See *infra*, §§ 1548, n. 47, 1557, n. 89.

lief,⁷⁰ while mistake must be as to a matter which formed a fundamental basis of the bargain.⁷¹

§ 1498. Silence as to quality of goods sold may be fraudulent.

There are exceptions to the general rule that silence cannot amount to fraud. While it is nowhere held that collateral circumstances tending to enhance the value of the subject of the sale must be disclosed in the absence of some special relation between the parties, it is held in many States that if the subject-matter of the sale is materially defective to the knowledge of the seller, and the defect is latent, an action of deceit or other remedy based on fraud will lie in favor of a buyer who purchases the goods on the assumption that they are what they seem.⁷² One who knowingly transfers for value the negotiable paper of an insolvent,⁷³ or pays a debt with a worthless check⁷⁴ or counterfeit money,⁷⁵ is similarly chargeable. On the other hand, it has been held that a person who knows that there is a mine on the land of another, of which the latter is ignorant, may, nevertheless, buy the land without disclosing the existence of the mine;⁷⁶ though such nondisclosure may afford ground for

⁷⁰ See *supra*, § 1490.

⁷¹ See *infra*, § 1544.

⁷² *Armstrong v. Huffstutler*, 19 Ala. 51; *Turner v. Huggins*, 14 Ark. 21; *Parrish v. Thurston*, 87 Ind. 437; *Rae v. Hamm*, 87 Ia. 720, 54 N. W. 1079; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Marsh v. Webber*, 13 Minn. 109; *Barron v. Alexander*, 27 Mo. 530; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Joplin Water Co. v. Bathe*, 41 Mo. App. 285; *Hanson v. Edgerly*, 29 N. H. 343; *Wheeler v. Metropolitan Stock Exchange*, 72 N. H. 315, 320, 56 Atl. 754; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Nichthaus v. Friedman*, 161 N. Y. S. 199, 200; *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502; *Puls v. Hornbeck*, 24 Okl. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202; *Salmonson v. Hornsby*, 39 S. Dak. 402, 164 N. W. 973; *Cardwell v. Mc-*

Clelland, 3 Sneed, 150; *Paddock v. Strobbridge*, 29 Vt. 470; *Maynard v. Maynard*, 49 Vt. 297. See also *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439; *Marcotte v. Allen*, 91 Me. 74, 77, 39 Atl. 346, 40 L. R. A. 185; *Elliott v. Clark* (Tex. Civ. App.), 157 S. W. 437. But see *contra*, *Ward v. Hobbs*, 3 Q. B. D. 150, 4 A. C. 13; *Morris v. Thompson*, 85 Ill. 16; *Paul v. Hadley*, 23 Barb. 521.

⁷³ See *supra*, § 1162, *infra*, § 1572.

⁷⁴ *Ibid.* See also *Commercial Bank v. Varnum*, 176 Mo. App. 78, 162 S. W. 1080.

⁷⁵ *Ibid.*

⁷⁶ *Fox v. Mackreth*, 2 Bro. Ch. 400, 420; *Falcke v. Gray*, 38 L. J. Ch. 28, 31; *Smith v. Beatty*, 2 Ir. Eq. 456; *Caples v. Steel*, 7 Or. 491; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661. And see *Williams v. Spurr*, 24 Mich. 335; *Burt v. Mason*, 97 Mich. 127, 56 N. W. 365; *Guaranty &c. Trust Co. v.*

a court of equity to refuse specific performance of a contract.⁷⁷ It may perhaps fairly be said that the offer of goods which appear to be of a certain character is itself a representation that they are what they seem.⁷⁸ But it is more difficult, where the buyer is guilty of fraudulent concealment, to regard his offer as a representation that the seller's property is what it seems, and it is impossible to say that an offer by either party amounts to a representation that all collateral circumstances are what the other party supposes. It is certainly true that any active conduct or words which tend to produce an erroneous impression may amount to fraud, and half the truth may be a lie in effect.⁷⁹

§ 1499. Other instances where silence may be fraudulent.

Active concealment of the facts, also, would be held fraudulent by some courts which would not hold mere silence sufficient, though it may seem difficult to make out an actual misrepresentation from acts of concealment unknown to the other party.⁸⁰

Liebold, 207 Pa. 399, 56 Atl. 951; Crompton v. Beedle, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748. In the Pennsylvania and in the second Michigan case cited the purchaser knew of collateral facts likely to increase largely the value of the lands. The law is otherwise between partners. Hanley v. Sweeney, 109 Fed. 712, 48 C. C. A. 612.

⁷⁷ See *supra*, § 1426.

⁷⁸ Paddock v. Strobidge, 29 Vt. 470, and cases cited. *Supra*, n. 72.

⁷⁹ Peck v. Gurney, L. R. 6 H. L. 377, 392, 403; Gluckstein v. Barnes, [1900] A. C. 240; Stevenson v. Marble, 84 Fed. 23; Fay v. Hill, 249 Fed. 415, 161 C. C. A. 389; Macdonald v. Roeth (Cal.), 176 Pac. 38; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615; Coles v. Kennedy, 81 Ia. 360, 46 N. W. 1088, 25 Am. St. 503; Henry v. Vance, 23 Ky. L. Rep. 491, 63 S. W. 273; State v. Fox, 79 Md. 514, 29 Atl. 601, 24 L. R. A. 679, 47 Am. St. Rep. 424; Potts v. Chapin, 133 Mass. 276; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Van Houten

v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373; Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; Melick v. Metropolitan L. Ins. Co., 84 N. J. L. 437, 87 Atl. 75; Wegenaar v. Dechow, 33 N. Y. App. Div. 12, 53 N. Y. S. 240; Hadley v. Clinton Importing Co., 13 Ohio St. 502, 513, 82 Am. Dec. 454; Gidney v. Chapple, 26 Okl. 737, 110 Pac. 1099; Croyle v. Moses, 90 Pa. St. 250, 35 Am. Rep. 654; George v. Johnson, 6 Humph. 36, 44 Am. Dec. 288; Mallory v. Leach, 35 Vt. 156, 168, 82 Am. Dec. 625; Crompton v. Beedle, 83 Vt. 287, 75 Atl. 331; Tolley v. Poteet, 62 W. Va. 231, 57 S. E. 811.

⁸⁰ "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of

In some contracts, such as insurance⁸¹ and, to a less extent, guaranty⁸² failure to disclose material facts is already recognized by the law as fraudulent, and the tendency in the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, especially where the opportunities for information are not equally open to both parties.⁸³ In case a fiduciary relation exists between the parties, as that of trustee and *cestui que trust*, guardian and ward, lawyer and client, there is a positive duty, a failure to observe which is constructively fraudulent;⁸⁴ and the nature of the transaction or the relation of the parties may be such that as to the particular transaction in question, the duties of a fiduciary are imposed upon one or the other party,

sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383, 388, 9 S. Ct. 101, 32 L. Ed. 439, per Gray, J. See also *Tooker v. Alston*, 159 Fed. 599, 86 C. C. A. 425; *Roseman v. Canovan*, 43 Cal. 110; *Kenner v. Harding*, 85 Ill. 264; *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827; *Raeseide v. Hamm*, 87 Iowa, 720, 54 N. W. 1079; *Sherman v. Smith (la.)*, 169 N. W. 216; *Singleton's Admr. v. Kennedy*, 9 B. Mon. 222; *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067; *Barrett v. Lewiston &c. R.*, 110 Me. 24, 85 Atl. 306; *Sockman v. Keim*, 19 N. Dak. 317, 124 N. W. 64; *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. Rep. 654.

⁸¹ In marine insurance non-disclosure of a material fact though without fraudulent intent vitiates the policy. *Ionides v. Pender*, L. R. 9 Q. B. 531, 537; *McLanahan v. Insurance Co.*, 1 Pet. 170, 185, 7 L. Ed. 96; *Hart v. British Ins. Co.*, 80 Cal. 440, 22 Pac. 302; *Fiske v. New England Ins. Co.*, 15 Pick. 310, 316. The rule is the same in fire insurance, though applied less strictly. *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 12 L. Ed. 1061; *Daniels v. Hudson River F. Ins. Co.*, 12 Cuah. 416, 59 Am. Dec. 192; *Clarkson v. Western Assur. Co.*, 33 N. Y. App. D. 23, 53 N. Y. S. 508; *McFaul v. Montreal Inland Ins. Co.*, 2 U. Can. Q. B. 59. In life insurance the universal practice of requiring answers to a great number of questions seems to have made the only duty of the insured to answer fully and truthfully. See *Phenix Ins. Co. v. Raddin*, 120 U. S. 183, 192, 30 L. Ed. 644.

⁸² See *supra*, § 1249.

⁸³ See *Gottschalk v. Kiroher*, 109 Mo. 170, 184, 17 S. N. 905.

⁸⁴ *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958. As to how far the position of betrothed persons brings them within the same principle, see *In re Malchow's Est.*, (Minn. 1919), 172 N. W. 915.

and such a relation involves a duty of disclosure.⁸⁵ In many cases where the silence of a party to the contract is not such as to amount to actionable fraud or to justify the rescission of contract, a court of equity will, nevertheless, refuse to enforce specific performance of the contract, since this relief is in many cases denied where the bargain is inequitable even though legally enforceable.⁸⁶

§ 1500. Rescission is allowable for honest misrepresentation.

It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such representations.⁸⁷ This is

⁸⁵ *Moody v. Cox*, [1917] 2 Ch. 71; *Smith v. Sweeney*, 69 Ala. 524; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232. Compare *Fletcher v. Bartlett*, 157 Mass. 113, 31 N. E. 760. See further in connection with undue influence, *infra*, § 1627. In *Ennis v. Borner*, 100 Fed. 12, 40 C. C. A. 249, the seller sold three cargoes of ore, the price to be fixed on the basis of an analysis made by either of two chemists. The seller requested the buyer to submit a sample for analysis to either chemist he chose. The buyer had a sample analyzed by each chemist and sent a copy of the analysis which proved most favorable to himself to the seller with a check based thereon which the seller accepted. The buyer resold the ore in accordance with the other analysis. The court held the buyer was bound to report both analyses, and his failure to do so gave the seller a right to rescind his acceptance of the buyer's check as full payment. See also the remarks of *Brewer, J.*, in *Graffenstein v. Epstein*, 23 Kans. 443, and *Jenkins v. Jenkins*, 66 Oreg. 12, 132 Pac. 542.

⁸⁶ See *supra*, § 1425.

⁸⁷ *Redgrave v. Hurd*, 20 Ch. D. 1; *Smith v. Chadwick*, 9 A. C. 187; *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42; *Penn Mut. L. Ins. Co. v. Mechanics'*, etc., Trust Co., 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 38 L. R. A. 33, 70; *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 97 C. C. A. 486; *Pritchett v. Fife*, 8 Ala. App. 462, 62 So. 1001; *Black v. Walton*, 32 Ark. 321; *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200; *Lathrop v. Maddux*, 58 Col. 258, 144 Pac. 870; *Shelton v. Ellis*, 70 Ga. 297; *Newman v. Claffin*, 107 Ga. 89, 32 S. E. 943; *Day v. Lown*, 51 Iowa, 364, 1 N. W. 786; *Maine v. Midland Inv. Co.*, 132 Ia. 272, 109 N. W. 801; *Matthey v. Wood*, 12 Bush, 293; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Montgomery Door Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N. E. 71; *Bates v. Cashman*, 230 Mass. 167, 119 N. E. 663; *Drake v. Fairmont, etc., Co.*, 129 Minn. 145, 151 N. W. 914; *Helvetia Copper Co. v. Hart-Parr Co.*, 137 Minn. 321, 163 N. W. 665; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *Post v.*

often called a doctrine of courts of equity as distinguished from courts of law, and doubtless in its origin it was such; but, at the present time, it is rather a distinction between a right of rescission on the one hand whether that right is asserted in a court of equity, in a court of law, or without the aid of a court,⁸⁸ and an action for damages on the other hand. It is, however, a modern doctrine, and though its justice and the weight of authority already in its favor make it clear that it will prevail, there is no little authority for the statement that a right of rescission cannot be established because of misrepresentation, if the misrepresentation though false was made with belief on reasonable grounds in its truth.⁸⁹ It is to be remembered also

Liberty, 45 Mont. 1, 121 Pac. 475; *Foulks, etc., Co. v. Thies*, 26 Nev. 158, 65 Pac. 373, 99 Am. St. Rep. 684; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Kountse v. Kennedy*, 147 N. Y. 124, 129, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. 651; *Bloomquist v. Farson*, 222 N. Y. 375, 118 N. E. 855; *Leary v. Geller*, 224 N. Y. 56, 120 N. E. 31; *Zagarino v. Kurzrok*, 135 N. Y. App. Div. 763, 119 N. Y. S. 907; *Simpson v. J. I. Case Threshing Mach. Co.*, 170 N. Y. S. 166; *Pierce v. Tiersch*, 40 Ohio St. 168; *United States Gypsum Co. v. Shields*, 101 Tex. 473, 108 S. W. 1165; *Altgelt v. Gerbie* (Tex. Civ. App.), 149 S. W. 233; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720; *Smith v. Columbus Buggy Co.*, 40 Utah, 580, 123 Pac. 580; *Ogden Valley Co. v. Lewis*, 41 Utah, 183, 125 Pac. 687; *Lowe v. Trundle*, 78 Va. 65; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201.

Most of the foregoing decisions relate to sales of real or personal property, but the principle is generally applicable. A case which frequently arises involves the validity of a release signed by an injured person induced by

misrepresentation of a physician employed by the person liable for the injury. In *Clark v. Northern Pacific Ry. Co.*, 36 N. D. 503, 162 N. W. 406, 407, L. R. A. 1917 E. 399, the court said:—"At 50 L. R. A. (N. S.) 1091, a supplemental note is given, and from an examination of the cases therein cited it is at once apparent that the courts have swung strongly in favor of rescission of the release if the physician made any false representations whether it was his honest opinion or not. Something over twenty cases were decided from the time of the first note in 1906 to the time of the second note in 1914, and since the printing of the note we have found several cases following the law therein announced. The latest of these is *Jacobson v. Chicago, etc., Ry. Co.*, 132 Minn. 181, 156 N. W. 251, L. R. A. 1916 D. 144."

⁸⁸ As to this, see *supra*, § 1370.

⁸⁹ This was so stated by Fuller, C. J., for the court in *Southern Development Co. v. Silva*, 125 U. S. 247, 250, 31 L. Ed. 678, 8 Sup. Ct. 881; and to the same effect see *Crooker v. White*, 162 Ala. 476, 50 So. 227; *Wainwright v. Occidental Assoc.*, 98 Cal. 253, 33 Pac. 88; *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196; *J. I. Case Threshing Mach. Co. v. McKay*, 161 N. C. 584, 77 S. E. 848;

that rescission presupposes a restoration of the *status quo*, and this may be impossible, *e. g.*, where after the death of one whose life was insured, the insurer discovers innocent misrepresentations made by the insured in procuring the policy.⁹⁰

1. In England the right of rescission for innocent misrepresentation is limited where a contract has been executed on both sides. It is said by a learned English writer,⁹¹ that rescission is allowed in such cases only where there has been fraud or "essential error."⁹² No such limitation seems imposed by the American decisions,⁹³ and clearly if the parties can be put in *statu quo*, there is no sound reason for refusing relief merely because the transaction has been executed.

§ 1501. Liability in damages for honest misrepresentation.

Though the right to rescind for honest misrepresentation seems in a fair way to be generally accepted, other effects of such misrepresentation are not so easily dealt with. It is com-

Poppleton v. Bryan, 36 Or. 69, 58 Pac. 767; Franz v. Hansen, 36 Dom. L. R. 349.

⁹⁰ Such misrepresentations of health were held no defence to the insurer in Moulor v. American Life Ins. Co., 111 U. S. 335, 28 L. Ed. 447, 4 Sup. Ct. 466; Grattan v. Metropolitan Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372; Ferguson v. Massachusetts, etc., Ins. Co., 102 N. Y. 647; Suravits v. Prudential Ins. Co., 244 Pa. 582, 91 Atl. 495, L. R. A. 1915 A. 373; Oplinger v. New York L. Ins. Co., 253 Pa. 328, 98 Atl. 568. There is here also another reason for denying rescission. Representations of health must be understood as limited to the speaker's knowledge. Beyond that he can only give an opinion.

⁹¹ Bower on Actionable Misrepresentation, §§ 262, 264.

⁹² In support of the denial of rescission except under these circumstances, Bower cites Atwood v. Small, 6 Cl. & Fin. 232; Wilde v. Gibson, 1 H. L. Cas. 605; Brownlie v. Campbell, 5 App. Cas. 925; Soper v. Arnold, 37

C. D. 96, affd. 14 App. Cas. 429; May v. Platt, [1900] 1 Ch. 616; Debenham v. Sawbridge, [1901] 2 Ch. 98; Re Metal Constituents, Ltd., [1902] 1 Ch. 707, 709; Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326; Milch v. Coburn, [1910] 27 T. L. Rep. 170, and Angel v. Jay, [1911] 1 K. B. 666. The right of rescission even of wholly executed contracts, is well recognized where there is actual fraud. See, *e. g.*, Charter v. Trevelyan, 11 Cl. & Fin. 714. The exception in regard to essential error, Bower states, is not so well recognized, but see Brownlie v. Campbell, 5 A. C. 925, 937; Debenham v. Sawbridge, [1901] 2 Ch. 98. It should be observed that even apart from any misrepresentation, the mutual mistake of the parties should afford ground for relief where there is a mistake as to a vital matter.

⁹³ See, *e. g.*, Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855; Canadian Agency v. Assets Realization Co., 165 N. Y. App. Div. 96, 150 N. Y. S. 758, and see American decisions cited *supra*, note 87.

mon enough in our law to find that several parts of it which have grown up with little regard to each other have nevertheless logical and intimate connection, and that the doctrines laid down in one set of cases are hardly reconcilable with those established in others.

It is impossible that such a situation can be allowed to exist permanently. Some method of harmonizing the different doctrines must be worked out. The simplified forms of pleading which have almost everywhere superseded the earlier forms which were based on sharp distinctions between the various actions known to the common law, make it even more essential to establish harmony than it was when forms of action were clearly distinguished. Then it was possible as a practical matter to lay down a rule as to one action not wholly consistent with the rule established in regard to another. Then, in the language of an acute writer, "Each category was self-sustaining, its existence was its justification."⁴ But when the question presented by pleadings is reduced simply to an inquiry whether on a given state of facts a plaintiff is entitled to any relief, it is no longer possible to keep contradictory rules apart.

The law governing misrepresentation furnishes a striking instance of the truth of what has been said. Misrepresentation will call up to a lawyer's mind, primarily, the action on the case for deceit, and the requirements of a proper declaration in that action. But misrepresentation is legally important in other aspects, and some of them may profitably be compared with the rules established or in dispute in the action for deceit; and their connection is so close with the subject of contracts that many rights classed as contractual cannot otherwise be understood thoroughly.

§ 1502. Early history of deceit.

The word "deceit" in the old writ of deceit, and in the action on the case for damages for deceit, based on the earlier writ, seems to have carried to the minds of early lawyers no more definite meaning than the word "fraud" carries to the minds of modern lawyers. The typical cases relate to simulation of the

⁴ Francis H. Bohlen, 59 Am. L. Reg. 298, 315.

defrauded plaintiff by bringing an action or suffering a recovery, or entering into a bond or recognizance in his name.⁹⁵

An examination of the numerous cases cited in the earlier abridgments under the heading of "Deceit" will convince any one how little the subject, as understood by the early lawyers, had to do with the action for deceit as now understood.

Some cases, however, were included under this heading which ultimately formed the basis of the modern law. These were cases of deceit in the sale of goods by means of a false warranty; and there are also some expressions in the later year books in regard to deceit by false promises, from which the law of special assumpsit was afterwards developed.⁹⁶

But there was no recognition until the case of *Pasley v. Freeman*⁹⁷ of any general doctrine that statements false and known to be such by the speaker made to induce action by another were ground of liability. The contrary, indeed, is directly stated in the well-known case of *Chandelor v. Lopus*,⁹⁸ a century and a half earlier. And where, as in a leading case like *Pasley v. Freeman*, a learned judge dissents, it not infrequently happens, as in that case, that the dissenter expresses the early law, and objects to make any advance from it.

Since the decision of *Pasley v. Freeman* it has not been doubted that one who makes a statement of fact which he

⁹⁵ "Besides the special action on the case, there is also a peculiar remedy, entitled an action of deceit, (F. N. B. 95) to give damages in some particular cases of fraud, and principally where one man does anything in the name of another, by which he is deceived or injured; (Law of *nisi prius*, 30) as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs; or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when by collusion the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies

against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land. (Booth, Real Actions, 251; Rast. Entr. 221, 222.)" 3 Bl. Comm. 165.

⁹⁶ Ames, History of Assumpsit, 2 Harv. L. Rev. 1, 8 *et seq.*

⁹⁷ 3 T. R. 51 (1789).

⁹⁸ Cro. Jac. 4. This case is chiefly familiar in the law of warranty. But the court not only held that the defendant would not be liable for selling the stone in question affirming it to be a bezoar stone, unless he warranted it to be such, but further said: "and although he knew it to be no bezoar stone, it is not material." But see comment upon this sentence in 14 App. Cas. 357.

knows to be false for the purpose, or apparent purpose, of inducing another to act, is liable for the damage caused by the action which he induced.

§ 1503. Warranty of title.

The early authorities on the law of warranty which furnished the foundation for the decision of *Pasley v. Freeman* have also been the basis for the subsequent development of the law of warranty, and in this subsequent development the necessity of expressly warranting a statement to be true in order to make out an actionable case has been gradually done away with. This process was first completed in regard to warranty of title. In *Dale's Case*,⁹⁹ decided in 1585, the plaintiff sued on the ground that the defendant had sold as his own certain goods to the plaintiff which in fact belonged to another. Two judges held that the action did not lie because *scienter* was not alleged, but added, "if he had affirmed that they were his own goods then the action would lie." It may be inferred, therefore, that these judges were of opinion that either *scienter* without affirmation by the defendant, or affirmation without *scienter*, was enough. The third judge (Anderson), however, thought the action should lie. "For it shall be intended that he that sold had knowledge whether they were his own goods or not."

Anderson, J., was apparently prepared to adopt the modern doctrine of implied warranty of title, reasoning that the mere sale of the goods necessarily involved an affirmation. In another decision in the following reign ¹ it was held that a seller out of possession who made no affirmation of title was not liable to one who bought from him though it turned out the seller had no title. Another case in the same reign ² still leaves it uncertain whether the court regarded *scienter* as necessary. Apparently *scienter* was not alleged, but on motion to arrest judgment for the plaintiff the court seems to have assumed the fact saying, "the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the offense and cause of action," and the motion was denied. In 1689, however, Lord Holt decided that one who sold oxen in his pos-

⁹⁹ Cro. Elis. 44.

² *Furnis v. Leicester*, Cro. Jac.

¹ *Roswel v. Vaughan*, Cro. Jac. 196. 474.

session, affirming they were his, was liable to the buyer if in fact they were not. *Scienter* on the part of the defendant was held an unnecessary allegation, though in one report of the case,³ it was said that the objection that no such allegation was made might have been good upon demurrer, but after verdict the declaration was well enough. Any doubt as to Lord Holt's opinion which this decision might leave was set at rest in 1700 by the case of *Medina v. Stoughton*.⁴ On demurrer to a plea in which the defendant set up that he bought the goods in question in good faith and sold them in good faith, Holt said, "the plea is ill and the action well lies. Where a man is in possession of a thing which is a colour of title an action will lie upon a bare affirmation that the goods sold are his own."

Since these decisions it has not been doubted that an affirmation of title, though made in good faith by a seller, renders him liable; and the law has taken the further step that even without such an affirmation an obligation will be implied, at least if the seller was in possession when the sale took place.⁵

§ 1504. Warranty of quality.

In regard to warranty of quality the law has followed a similar path, although somewhat more slowly. From cases at the beginning of the nineteenth century⁶ it is made clear that by that time it had become established that it was not necessary, in order to render the seller liable as a warrantor, that the word "warrant," or any word of promise, should be used. This was not such a departure from early law as it might now seem, for even in the early law, when the use of the word "warrant" seems to have been essential, the gist of the action was regarded as the deceit caused by a misrepresentation deliberately made to induce a bargain. How little any idea of promise was thought to be involved in a warranty may be inferred from the early rule that there could be no warranty as to a future event.⁷ In other words, a warranty must be a misrepresentation of an ex-

³ *Cross v. Garnet*, 3 Mod. 261; s. c. *sub nom. Croese v. Gardner*, 1 Show. *68; Carthew, 90.

⁴ 1 Ld. Raym. 593; s. c. 1 Salk. 210.

⁵ *Supra*, § 977.

⁶ *Yates v. Pym*, 6 Taunt. 446; *Bridge v. Wain*, 1 Stark. 504; *Jendwine v. Slade*, 2 Esp. 572; *Power v. Barham*, 4 A. & E. 473.

⁷ 3 Bl. Comm. 165.

isting fact in precisely the same way that a fraudulent misrepresentation must now be in order to furnish a basis for action.

At the present day it is law, nearly, if not quite, everywhere where the common law prevails, that any representation of fact as to the quality of the goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty. A certain confusion has, indeed, been caused by a statement of Buller, J., in *Pasley v. Freeman*.⁸ That judge said, "It was rightly held by Holt, C. J., cited in the subsequent cases, and has been adopted ever since, that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended." In fact, in the decisions referred to, if the report may be trusted, Holt said nothing whatever about the necessity of intention; that requirement was interpolated by Buller himself. Many of the best courts in this country have in terms rejected any such requirement for making out an express warranty;⁹ and even in jurisdictions where the requirement of intention is still laid down, intent to warrant is not used as the equivalent of intent to contract: it means intent to affirm as a fact.¹⁰

§ 1505. Warranty may be, but need not be based on contract.

There can be no doubt now, of course, that a seller may promise, in consideration of the purchase of goods from him, that he will be answerable for their present, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods which he sells, thereby enters into such a contract. But when a seller is held liable on a warranty

⁸ 3 T. R. 51.

⁹ *Supra*, § 971.

¹⁰ "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not." *De Lussalle v. Guildford*, [1901] 2 K. B. 215, 221. The

statement was borrowed from Benjamin, Sales. It appears in the first and every subsequent edition (5th Eng. Ed. 659), and has also been approved by American courts *Carleton v. Jenks*, 80 Fed. 937, 26 C. C. A. 265; *Roberts v. Applegate*, 153 Ill. 210, 38 N. E. 676. It has, however, been disapproved by the House of Lords. *Heilbut v. Buckleton*, [1913] A. C. 30. A criticism of this decision showing its inconsistency with previous cases may be found in 27 Harv. L. Rev. 1.

for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation is quasi-contractual, inasmuch as the remedy of *assumpsit* is allowed for its enforcement. The confusion of thought as to the nature of the obligation seems to be in great measure due to the allowance in modern times of this remedy for breach of any warranty, whether in reality constituting a contract or only a representation. But *assumpsit* was not allowed as a remedy for breach of warranty until near the close of the eighteenth century.¹¹ And a declaration in tort without an allegation of *scienter* is still generally regarded as permissible.¹² The decisions so holding are not, as is sometimes supposed, a mere following of early authority after the reason for the earlier rule has ceased to exist; they involve a recognition of the fact that warranty is a hybrid between tort and contract. This was clearly recognized by Blackstone,¹³ who classifies warranties with contracts "implied by reason and construction of law." Under this heading, together with warranties, he inserts a statement of such obligations as this: "If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest." ¹⁴

¹¹ The first decision reported permitting it is *Stuart v. Wilkins*, 1 Doug. 18.

¹² *Shippen v. Bowen*, 122 U. S. 575, citing *Gresham v. Postan*, 2 C. & P. 540; *House v. Fort*, 4 Blackf. (Ind.) 293, 295; *Hillman v. Wilcox*, 30 Me. 170; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 520, 18 Am. Dec. 317; *Lassiter v. Ward*, 11 Ired. L. (N. C.) 443, 444; *Trice v. Cockran*, 8 Gratt. (Va.) 442, 450, 56 Am. Dec. 151. To the same effect are *Farrell v. Manhattan Market Co.*, 198 Mass. 271; *Erie City Iron Works v. Barber*, 106 Pa. St. 125;

Place v. Merrill, 14 R. I. 578; *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92; *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Tyler v. Moody*, 111 Ky. 191, 63 S. W. 433, 54 L. R. A. 417, 98 Am. St. Rep. 406. See, however, the contrary decisions, *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Caldbeck v. Simanton*, 82 Vt. 69, 71 Atl. 881, 20 L. R. A. (N. S.) 844; *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *Pierce v. Carey*, 37 Wis. 232.

¹³ 3 Comm. 163-165.

¹⁴ 3 Bl. Comm. 164, citing 10 Rep. 56.

Nor is the law of sales the only place where express or implied innocent misrepresentations may impose liability as a warrantor on the party making them. A restaurant-keeper may on this principle be liable for furnishing poor food,^{14a} and one who hires building or construction work may make himself liable for the adequacy of the plans which he furnishes.^{14b}

§ 1506. Illustrations.

To any one who still inclines to accept as fact the fiction of a contract where a warranty is based on a seller's misrepresentation of the quality of his goods, the argument may be put in this way. If it creates a contract for S to say of his horse when he sells it to B in order to induce the purchase, "the horse is sound," why is it not equally a contract if T should say precisely the same thing to B and thereby induce a sale of S's horse? If S's words to a buyer really mean "if you will buy my horse I undertake to be responsible for the truth of my assertion that the horse is sound," why does it not equally follow that if T should make similar statements to the buyer to induce the sale of S's horse that the same construction of an offer should be put upon them? A recent decision of the Supreme Court of South Carolina ¹⁵ furnishes an interesting comparison in this connection with the well-known case of *Derry v. Peek*.¹⁶ In the latter case the plaintiff was induced to take shares in the company by a misrepresentation of the directors in regard to a right which they stated had been given by special act of Parliament to use steam or other mechanical motive power. In the South Carolina case the plaintiff was induced to buy shares of stock by representations of the seller as to the corporate assets and liabilities. It can hardly be thought that the representations in these two cases are to be distinguished on any other ground than that one was made by a seller, and the other by persons interested in the taking of shares by the plaintiff but not interested as sellers. As a pure question of construction of language, surely if the words in one case amount to an offer to contract, they do so in the other case. In truth, it is submitted

^{14a} See *supra*, 996a.

^{14b} See *infra*, § 1966.

¹⁵ *Hier v. Jennings*, 87 S. Car. 87, 68 S. E. 1041.

¹⁶ 14 App. Cas. 337.

they are not words of offer. The only reasonable inference that can be drawn in either case is that representations of fact were made for the purpose of inducing the plaintiff to purchase shares. In the American case it was held that *scienter* need not be alleged or proved, the court saying: "Use of a statement of the corporate business by a director negotiating a sale of his stock therein could not be regarded as other than a direct affirmation of its correctness, and, if it was delivered for the purpose of assuring the buyer of the truth of the facts therein stated, and to induce him to purchase, and the buyer purchases in reliance thereon, there is an express warranty."¹⁷ The English case held that the directors were not liable because *scienter* was not proved; yet the English decisions on the law of warranty make it evident that the South Carolina Court was following clear English precedents.

An honest misrepresentation, then, made by a seller to a buyer in regard to the title, kind or quality of goods in order to induce the sale, will render him liable.^{17a}

§ 1507. Warranty by an agent of his authority.

Entirely analogous to the law of warranty in the sale of goods is the warranty which the law imposes upon an agent that he is authorized to act as such. The agent either expressly, or by necessary implication of fact, represents that he is an authorized agent, and it was decided in *Collen v. Wright*¹⁸ that the agent was liable as a warrantor. Cockburn, J., dissented from the decision of the court, and many legal thinkers have agreed with his dissent, on the ground that the plaintiff should not have been allowed to recover unless the agent knew of the falsity of his representations; but *Collen v. Wright* has been followed generally in the United States,¹⁹ and has been affirmed recently by the House of Lords in England.²⁰ On this occasion the case of *Derry v. Peek*²¹ was pressed upon the attention of the court and somewhat impatiently brushed aside by Lord Halsbury, who delivered the principal opinion, on the ground that *Derry*

¹⁷ 87 S. Car. 87, 95, 68 S. E. 1041, 1044.

^{17a} See *supra*, § 970.

¹⁸ 7 E. & B. 301, 8 E. & B. 647.

¹⁹ See *supra*, § 282.

²⁰ *Starkey v. Bank of England*, [1903] A. C. 114.

²¹ 14 App. Cas. 337.

v. Peek was an action for deceit and in the case at bar the action was contractual. But Lord Halsbury hardly asserted that the contract in such a case is other than a fiction of law imposed upon the agent because of his misrepresentation.²²

Here again is a case where honest misrepresentation will render a person liable. In one respect, moreover, the doctrine in regard to an agent's warranty has been advanced by the late decision of the House of Lords beyond the analogy of warranty in the law of sales, and beyond the previous authority of *Collen v. Wright*.²³ The defendant in *Starkey v. Bank of England*²⁴ did not purport to enter into a contract on behalf of his principal with the injured plaintiff. The defendant was a stockbroker, and, as such, presented to the Bank of England, in good faith, at the request of a customer, a power of attorney purporting to be signed by the owner of certain consols, and thereby induced the bank to transfer the consols to a third person. In fact, one of the signatures on the power of attorney was forged.

§ 1508. Estoppel in pais.

Another doctrine which must be considered in this connection is that of estoppel *in pais*. This doctrine, as now understood, precludes one who has made positive statements of fact to another, in reliance upon which the latter has acted, from denying their truth in any controversy between these two parties. That the misstatement shall have been either wilful or negligent is immaterial.²⁵ The effect of *Derry v. Peek*²⁶ on the doctrine

²² "That which does enforce the liability is this—that under the circumstances of this document being presented to the bank for the purpose of being acted upon, and being acted upon on the representation that the agent had the authority of the principal, which he had not, that does import an obligation—the contract being for good consideration—an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty." [1903] A. C. 114, 118. This decision is interesting to compare with *Heilbut v. Buckleton*, [1913] A. C. 30, where the court held that a repre-

sentation by a seller in regard to the character of personal property sold did not make him liable as a warrantor, since he did not in terms promise. In other words, the doctrine that the representation express or implied of an agent that he has authority to act amounts to a warranty is accepted by the House of Lords, but the much older and more firmly established doctrine that a representation by a seller inducing the sale of goods amounts to a warranty is now denied.

²³ 7 E. & B. 301, 8 E. & B. 647.

²⁴ [1903] A. C. 114.

²⁵ See *supra*, § 692.

²⁶ 14 App. Cas. 337.

of estoppel was pressed upon the English Court of Appeal soon after the decision of that case, but it was emphatically stated that the decision had no effect upon the doctrine of estoppel as previously understood.²⁷ Lindley, J., explained the matter thus: "Estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by him."²⁸ And in the same case Bowen, L. J., repeats this formula in substance: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel."²⁹

It is amusing to reflect on the ease with which Lord Bowen would have disposed of such a fiction if the harmonizing of decisions had required instead of forbidding him to do so. Estoppel is a rule of evidence in the same way that conclusive presumptions are rules of evidence. An estoppel, like a conclusive presumption, is a rule of substantive law masquerading as a rule of evidence. To speak of conclusive evidence of something admittedly false may be a useful formula, but it disguises the truth. An estoppel is in effect a conclusive admission of the truth of a non-existent fact. This supposed fact may be essential either for a cause of action, for a defense, or for a replication. As the fact is non-existent it is obvious that the admission and nothing else supplies the requirement which otherwise would be lacking. If the admitted non-existent fact alone creates a cause of action, defense, or replication, the admission or estoppel is the sole foundation, if other facts are needed in conjunction a partial foundation, of the cause of action, defense, or replication.

An estoppel then may be, and frequently is, either the sole or the main foundation of a cause of action. When a warehouseman states to an intending purchaser in answer to an inquiry that the seller has a certain quantity of goods stored in the warehouse, and relying on that statement the purchaser completes the bargain, the warehouseman is estopped to deny the truth of his statement.³⁰ The only essential facts of the purchaser's

²⁷ *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614; *Low v. Bouverie*, [1891] 3 Ch. 82.

²⁸ *Low v. Bouverie*, [1891] 3 Ch. 82, 101.

²⁹ *Low v. Bouverie*, [1891] 3 Ch. 82, 105.

³⁰ *Gillett v. Hill*, 2 Cr. & M. 530. See also *Knights v. Wiffen*, L. R. 5 Q. B. 660, and cases cited in *Williston, Sales*, § 418, note 46.

case when he sues the warehouseman are the misrepresentation, his own reliance upon it, and perhaps a demand and refusal; and the allegation of these facts constitutes a perfect cause of action, wherever reformed pleading has reached such a state that nothing further is required of the plaintiff than to state the material facts upon which his claim is founded. Nor is it material that the warehouseman was neither fraudulent nor negligent.³¹ His statement relates to a matter about which he must have accurate knowledge at his peril, or refrain from talking about it. So where a bailee issues a receipt for goods never received, and a purchaser relies upon the statement in the receipt that goods have been received.³² Or where a bailee fails to take up a receipt or bill of lading which mercantile usage requires him to take up when the goods behind the document are delivered, and in consequence a purchaser of the outstanding document is deceived by the representation which it contains that the bailee still holds the goods described, and is induced to buy the document or to advance money on the faith of it.³³ Or where a corporation issues a certificate of stock to one who is not a shareholder, and a subsequent purchaser, relying upon the misrepresentation of the certificate, buys it.³⁴ Or where a trustee, applied to for information as to the property of his *cestui que trust* by one proposing to lend money to the latter, gives misinformation, reliance upon which causes damage to the lender.³⁵ In all these cases, and their number might easily be increased, a cause of action exists because of damaging misrepresentation, certainly without regard to any fraudulent intent, and probably without regard to any other negligence than

³¹ It may seem difficult to suppose that such a situation can arise without negligence, but the English decisions seem to show the possibility, holding, as they do, that the warehouseman is estopped by such a representation when the only lack of accuracy in it is the omission to state that the seller has mingled in a mass a quantity of goods larger than that which the buyer proposes to purchase.

³² Williston, Sales, § 419.

³³ *Id.*

³⁴ *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614; *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618.

³⁵ *Burrowes v. Lock*, 10 Ves. 470; *Brownlie v. Campbell*, 5 App. Cas. 925, 953. In *Low v. Bouverie*, [1891] 3 Ch. 82, the Court of Appeal did not dispute the correctness of this doctrine, but construed the representation made by the trustee as amounting to no more than a statement of the trustee's belief, not a positive assertion of fact.

necessarily exists when a person whose position qualifies him to have accurate knowledge about a matter makes a misstatement in regard to it.

It is difficult to see how the law of estoppel and the doctrine of *Derry v. Peek* ³⁶ can be kept permanently in separate compartments when law and equity are fused and pleading reduced to a mere statement of the facts of the case. An inquiry which may be made in this connection is what would have been the result of an action against the defendants in *Derry v. Peek* for failing to utilize as directors, on behalf of the corporation whose shares the plaintiff had bought, the right to use steam as a motive power for its cars. It may be assumed that the value of the property would have been enhanced by the use of such motive power and that the directors, therefore, would have been liable if they had failed to make use of it, had they been legally authorized to do so. Could the defendants, who as directors issued a prospectus stating that they had such power, be heard to deny, subsequently, that their statement was correct? Would they not be estopped? If so, then allegations by the plaintiff of the defendants' statement, whether accurate or not, and whether made in good faith or not, and of his own reliance upon it, would be sufficient basis for a judgment in his favor.

§ 1509. Actions for damages for misrepresentation.

Even in actions in form claiming damages for deceit there is much authority to support the proposition that a defendant may be liable for honestly misrepresenting facts in regard to which he might reasonably be supposed to be peculiarly well informed. In *Cooley on Torts* it is laid down that a person is liable for deceit when he "supposed his representations to be true, but had no reason for any such belief, and nevertheless made them positively as of known facts, and induced the other to act upon them." ³⁷ This statement is supported by many authorities.

In 1827 Chief Justice Best, in referring to the basis of liability on a warranty by false affirmation, said: "He who affirms either *what he does not know to be true*, or knows to be false, to another's

³⁶ 14 App. Cas. 337.

³⁷ Vol. 2 (3d ed.), 956.

prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages."³⁸

Doubtless it is clear enough to-day that the law of England sanctions no such broad rule, but it is equally clear that American courts which should refuse to follow the decision of the House of Lords in *Derry v. Peek*³⁹ would have good old English authority behind them. It is impossible here to examine the decisions in detail. They cannot be wholly harmonized. The weight of authority would deny recovery unless the defendant's statement was made either with knowledge that it was false or at least without reasonable grounds for believing it to be true; but in judicial statements there is often a blurring of the distinction between reckless or careless honesty and conscious dishonesty.^{39a} Many decisions, however, clearly hold a defendant liable irrespective of good or bad faith, for making a positive false statement as to a matter of which he had, or asserted that he had, special means of knowledge.⁴⁰

³⁸ *Adamson v. Jarvis*, 4 Bing. 66. In this case the defendant, who had delivered goods to the plaintiff for the latter to sell as auctioneer, was held liable for his, the defendant's, statement that he was entitled to dispose of them.

In the second edition of *Saunders on Pleading and Evidence*, at page 60 it is said that "in an action for falsely representing a third person fit to be trusted, a *scienter* must be alleged and proved; though indeed the word 'fraudulently' might be a sufficient allegation in this respect, especially after verdict, *Willes*, 584. But in an action on the case for fraud, or on misrepresentation of any kind, an express warranty or *scienter* need not be alleged, nor proved if alleged."

³⁹ 14 App. Cas. 337.

^{39a} In the following cases some *scienter* was held necessary: *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Taylor v. Mullins*, 151 Ky. 597, 152 S. W. 774; *Boulton v. Stilwell*, 100 Md. 543, 60

Atl. 609, 1 L. R. A. (N. S.) 258; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; *Wann v. Northwestern Trust Co.*, 120 Minn. 493, 139 N. W. 1061; *Ray County Sav. Bank v. Hutton*, 224 Mo. 43, 123 S. W. 47; *Page v. Parker*, 40 N. H. 47. But see s. c., 43 N. H. 363, 80 Am. Dec. 172; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Bingham v. Fish*, 86 N. J. L. 316, 90 Atl. 1106; *Chester v. Comstock*, 40 N. Y. 575; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Citizens' State Bank v. Cressler* (Ok.), 170 Pac. 230; *Bailey v. Frazier*, 62 Oreg. 142, 124 Pac. 643; *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *Lamberton v. Dunham*, 165 Pa. St. 129, 30 Atl. 716.

⁴⁰ *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 673, 37 L. Ed. 1215; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623; *Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 203; *Jordan v. Pickett*, 78 Ala. 331; *Prest-*

§ 1510. Policy of imposing liability for innocent mistakes.

The use of the words "fraud" and "deceit" have probably exercised an unfortunate influence in the development of the law on the subject. These words naturally import consciously

wood *v.* Carlton, 162 Ala. 327, 333, 50 So. 254; Manning *v.* Carter, (Ala. 1917), 77 So. 744; Goodale *v.* Mid-daugh, 8 Colo. App. 223, 231, 46 Pac. 11; Board of Water Commissioners *v.* Robbins, 82 Conn. 623, 74 Atl. 938; Watson *v.* Jones, 41 Fla. 241, 254, 25 So. 678; Upchurch *v.* Mizell, 50 Fla. 456, 40 So. 29; New *v.* Jackson (Ind. App.), 95 N. E. 328; Mowes *v.* Robbins (Ind. App.), 120 N. E. 51; Smith *v.* Packard, 152 Iowa, 1, 130 N. W. 1076; Maffet *v.* Schaar, 89 Kan. 403, 131 Pac. 589; Ward *v.* Trimble, 103 Ky. 153, 159, 44 S. W. 450 (*cf.* Taylor *v.* Mullins, 151 Ky. 597, 152 S. W. 774); Trimble *v.* Reid, 19 Ky. L. Rep. 604, 41 S. W. 319; Braley *v.* Powers, 92 Me. 203, 209, 42 Atl. 362; Atlas Shoe Co. *v.* Bechard, 102 Me. 197, 203, 66 Atl. 390, 10 L. R. A. (N. S.) 1045; Phelps *v.* Georges' Creek & C. R. Co., 60 Md. 536 (*cf.* Cahill *v.* Applegarth, 98 Md. 493, 56 Atl. 794; Boulden *v.* Stilwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. [N. S.] 258); Fisher *v.* Mellen, 103 Mass. 503; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Weeks *v.* Currier, 172 Mass. 53, 55, 51 N. E. 416; Arnold *v.* Teel, 182 Mass. 1, 4, 64 N. E. 413; Adams *v.* Collins, 196 Mass. 422, 82 N. E. 498; Huntress *v.* Blodgett, 206 Mass. 318, 324, 92 N. E. 427 (see also Kerr *v.* Shurtleff, 218 Mass. 167, 105 N. E. 871); Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497; Aldrich *v.* Scribner, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379; Littlejohn *v.* Sample, 173 Mich. 419, 139 N. W. 38; Hubbard *v.* Oliver, 173 Mich. 337, 139 N. W. 77; Bullitt *v.* Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149; Riggs *v.* Thorpe, 67 Minn. 217, 69 N. W. 891;

Charles P. Kellogg Co. *v.* Holm, 82 Minn. 416, 85 N. W. 159; Freeman *v.* Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; Wann *v.* Northwestern Trust Co., 120 Minn. 493, 139 N. W. 1061; Sims *v.* Eiland, 57 Miss. 83, 85; McNeer *v.* Norfleet, 113 Miss. 611, 74 So. 577 (*cf.* Vincent *v.* Corbett, 94 Miss. 46, 47 So. 641, 21 L. R. A. (N. S.) 85; Snider *v.* McAtee, 165 Mo. App. 260, 147 S. W. 136; Phillips *v.* Jones, 12 Neb. 213, 10 N. W. 708; Johnson *v.* Gulick, 46 Neb. 817, 821, 65 N. W. 883, 50 Am. St. Rep. 629; Gerner *v.* Mosher, 58 Neb. 135, 154, 78 N. W. 384, 46 L. R. A. 244; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Houston *v.* Thornton, 122 N. C. 365, 373, 29 S. E. 827, 65 Am. St. Rep. 69; Whitehurst *v.* Life Ins. Co., 149 N. C. 273, 62 S. E. 1067; Howe *v.* Martin, 23 Okl. 561, 102 Pac. 128; Joines *v.* Combs, 38 Okl. 380, 132 Pac. 1115; Madden *v.* Graham (Okl.), 174 Pac. 259; Bonelli *v.* Burton, 61 Oreg. 429, 123 Pac. 37; Bower *v.* Fenn, 90 Pa. 359, 35 Am. Rep. 662; McCabe *v.* Desnoyers, 20 S. Dak. 581, 108 N. W. 341; Shea *v.* Mabry, 1 Lea (Tenn.), 319, 342; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33; Oneal *v.* Weisman, 39 Tex. Civ. App. 592, 88 S. W. 290; Barclay *v.* Deyerle, 53 Tex. Civ. App. 236, 116 S. W. 123; Gibbens *v.* Bourland (Tex. Civ. App.), 145 S. W. 274; Godfrey *v.* Olson, 68 Wash. 59, 122 Pac. 1014; James *v.* Piggott, 70 W. Va. 435, 74 S. E. 667; Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406; First Nat. Bank *v.* Hecht, 159 Wis. 113, 149 N. W. 703; Bechman *v.* Salzer (Wis.), 169 N. W. 279. See also Calif. Civ. Code, § 1710 (2); Mont.

dishonest conduct on the part of the defendant. Moreover, the difficulty in extending the limits of liability beyond cases where the defendant is consciously dishonest has been increased by the objection of modern judges and lawyers to the use of fiction in expressing the law. Conclusive presumptions are not now much favored, and such terms as "constructive fraud" and "legal fraud" share the disfavor into which conclusive presumptions of fraud have fallen. This disposition is certainly not to be quarreled with. It is better to state the law in terms which will give rise to as little misunderstanding as possible; but the result reached by means of fictitious statement must not be discarded with the fiction when, as has commonly been the case with fictions in the law, the result reached is desirable though the mode of statement is confusing.

The real issue which should be discussed is thus constantly obscured by the terminology of the subject. The real issue is no less than this: When a defendant has induced another to act by representations false in fact though not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?

In considering which doctrine is the better, consideration should be given chiefly to two things. First: logical consistency with itself in all parts of the law governing misrepresentation. Secondly: the inherent justice of the rule proposed. That the law of misrepresentation as laid down in *Derry v. Peek*⁴¹ is hopelessly inconsistent with the law governing misrepresenta-

Civ. Code, § 5073 (2); N. Dak. Civ. Code, § 5388 (2); S. Dak. Civ. Code, § 1293 (2); all of which provide that a deceit includes "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." "What's in a name" is well illustrated by *Carpenter v. Sugden*, 231 Mass. 1, 119 N. E. 959. No court has gone further than that of Massachusetts in holding that statements of fact made by one who asserted knowledge which he did not have are fraudulent whether made with conscious dishonesty or not. But in the case just cited the plaintiff who had

bought from the defendant the good will and contents of a garage under a written contract relied on an oral "warranty" that the articles purchased cost the defendant the amount set forth in the inventory. The court held the evidence properly rejected and said "There was no evidence of fraud." Surely whatever else a warranty of an existing fact may be it is at least an assertion of the truth of the fact, and surely also the seller of goods may be supposed to know what they cost him and when he warrants the cost, to assert that he has that knowledge.

⁴¹ 14 App. Cas. 337.

tion when relied on as the basis of warranty or estoppel, can hardly be denied. Adherence to what may be regarded as established English doctrine in deceit, estoppel, and warranty is absolutely illogical, and with simplified pleading becomes nearly, if not quite, impossible. It is a just ground of reproach to the law if a harmonious doctrine cannot be developed.

The inherent justice of the severer rule of liability which in some cases at least holds a speaker liable for damages for false representations, though his intentions were innocent and his statements honestly intended, is equally clear. However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had good reason to attribute to the defendant accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable.

§ 1511. Limitation of liability for honest misrepresentation.

The precise limits of liability in damages for honest misrepresentation are not fixed at the same place by all the courts which hold that such liability may exist. Two qualifying principles may claim some support in authority or reason. The first of these finds support in the early law, in the dissenting opinion in *Pasley v. Freeman*, and in sundry expressions in modern decisions, as in *Michigan*.⁴² This principle would confine liability to cases where the misrepresentation was made to induce another to enter into a contract with the person making the misrepresentation, and would be consistent with the modern law of seller's warranty, and indeed would find its chief support in cases relating to sales. On the other hand, the principle, though not inconsistent with most decisions relating to the implied warranty by an agent of his authority, since most of them relate to cases where the agent purported to enter into a contract, has been expressly repudiated by the House of Lords as a limitation on the agent's liability.⁴³ Further, there is no such limitation to liability for misrepresentation created by means

⁴² *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379.

⁴³ *Starkey v. Bank of England*, [1903] A. C. 114.

of an estoppel, and in the action of deceit the authority, both of courts which approve of *Derry v. Peek*⁴⁴ and of courts which do not, gives little support for a distinction between representations which induce a contract with the person making them and representations which induce a contract with another person, or indeed any other detrimental action. Nor is it easy to see on logical or ethical grounds why such a distinction should be made.

§ 1512. Negligence as a basis of liability.

The second qualifying principle suggested is that no liability should exist if there was reasonable ground for believing that the statements made were true. This amounts in effect to denying liability except for statements, made negligently, though it is not, in terms at least, an adoption of the action on the case for negligence for carelessly spoken words. A court might indeed adopt this qualifying principle without holding doctrines of contributory negligence applicable. The statutes of California and other States⁴⁵ excuse a defendant from liability if he had reasonable ground for believing his statement to be true. A similar doctrine seems to exist in North Carolina.⁴⁶ It is certainly by no means clear that the courts of these States would put the whole subject on the footing of a duty to use reasonable care in regard to spoken or written words.

It has been ably urged, however, that, subject to appropriate limitations, an action on the case for negligence is properly applicable to misrepresentations made carelessly but not dishonestly.⁴⁷ Doubtless under any theory of liability which excludes dishonesty as a necessary element of the cause of action it will generally be found that a defendant who is held liable has been guilty of culpable negligence. But there are objections to throwing the whole matter into the law of negligence, and treating spoken words in the same way that acts are treated. In the first place, the law of liability for false representations has

⁴⁴ 14 App. Cas. 337.

⁴⁵ *Supra*, n. 40.

⁴⁶ See North Carolina decisions cited in n. 40.

⁴⁷ Judge Jeremiah Smith, 14 Harv.

L. Rev. 184, cited and followed in *Cunningham v. C. R. Pease Co.*, 74 N. H. 435, 69 Atl. 120, 20 L. R. A. (N. S.) 236, and in *Conway Nat. Bank v. Pease*, 76 N. H. 319, 82 Atl. 1068.

grown up on other lines than the law of negligence. There is a violation of historical continuity in forcing the two together. This should not be an insuperable obstacle if logic and practical convenience demanded the joinder, but this does not seem true. Neither the law of warranty nor that of estoppel is based on negligence, so that no general consistency of the law governing misrepresentation would be attained. Furthermore, if negligence is to be the basis of liability for words regarded from the standpoint of misrepresentation, the same test should logically be applied to defamatory words; but the whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words, for the law governing defamation "is not a law requiring care and caution in greater or less degree, but a law of absolute responsibility qualified by absolute exceptions."⁴⁸ It is also an objection that if an action for negligent misrepresentation as such were permitted, it would be necessary to limit somewhat arbitrarily the scope of the action; for it is probably true, as has often been said, that to hold every man liable for the consequences of words carelessly spoken would be to impose a degree of liability beyond what is reasonable. Again, the doctrine of contributory negligence would be troublesome to apply.⁴⁹ Is it contributory negligence for a man to rely on what he is told by a person in a position to know, and to fail to make an investigation for himself? Though many decisions require that a plaintiff should not have been too foolish in believing what no reasonable man in his position should believe, it is going too far, both in reason and on the authorities, to say that a plaintiff, unless his conduct was not wholly irrational, should lose his rights because he failed to make independent investigation and believed what he was told. It should not lie in the mouth of the man who induced his reliance to assert that the reliance was negligent.⁵⁰

⁴⁸ Pollock, Torts, 8th ed. 553, n. (x). See also *Peck v. Tribune Co.*, 214 U. S. 185, 53 L. Ed. 960, 29 Sup. Ct. 554.

⁴⁹ It was applied, however, in *Conway Nat. Bank v. Pease*, 76 N. H. 319, 82 Atl. 1068. The person deceived must have acted like "a reasonably prudent man."

⁵⁰ *Goodale v. Middaugh*, 8 Colo. App. 223, 231, 46 Pac. 11; *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34 L. R. A. (N. S.) 1147; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384; *Bower v. Fenn*, 90 Pa. 359, 35 Am. Rep. 662; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406.

If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for the consequences of reliance upon his misstatement. Such a principle most nearly harmonizes the law of misrepresentation in its various aspects.

To avoid misapprehension it should be added that where because of a contract of employment a person is under a duty to speak, as by making a report or giving an opinion as an expert, the law of negligence governs his liability. "As a consequence of his contract of employment the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract he would not be liable for statements unless fraudulent, or for advice unless dishonest."⁵¹

There seems no reason whatever for not holding a defendant for the natural consequences of his actions when the question involved relates to tort as well as when it relates to contract. In the formation of contracts the parties are rightly held to the natural consequences of what they say. The idea that conscious dishonesty is necessary in an action of tort has perhaps been due to the use of such words as "fraud" and "deceit," which ordinarily connote dishonesty.⁵²

⁵¹ *Corey v. Eastman*, 166 Mass. 279, 287, 44 N. E. 217, 55 Am. St. Rep. 401, per Holmes, J.

⁵² The idea that a consciously dishonest state of mind is essential for an action of tort for deceit leads to other consequences than decisions that the statement made by the defendant must be known by him to be false. For instance, if the defendant makes a statement which is false if his words are given the natural meaning which his hearer would give them, but which are true if taken in some unnatural sense which he himself put on them, no liability is imposed on the defendant, even though he knew that the facts did not accord with the natural meaning of his words, provided that natural

meaning did not occur to him. Both in England and in Massachusetts it has been held that under these circumstances a defendant is not liable. *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford*, [1891] 2 Ch. 449 (Ct. App.); *Nash v. Minnesota Title & Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 499.

In the Massachusetts decision the dissenting opinion of Holmes, J., in which Field, C. J., concurred, is a very effective argument against the view of the majority of the court. It seems odd that in Massachusetts, where it has been held since, as well as before, the decision in question, that a man is liable, who positively but erroneously asserts as facts matters about which

§ 1513. Conscious error without fraud.

In England the courts have gone very far in consequence of the doctrine that a guilty state of mind is a necessary element in order to make the defendant liable. Both in *Derry v. Peek*⁵³ and in *Angus v. Clifford*⁵⁴ the court held that no recovery could be had though the defendants made statements which were untrue and which it is absolutely impossible to suppose they did not know were untrue. On the most favorable view the courts simply did not think that the untruth was believed to be of any importance by the defendants, who therefore had no intent to defraud if that word be used in the sense naturally given to it. In *Derry v. Peek* the defendants stated that their company had a right to use steam motive power for its cars. In fact the defendant directors confidently expected to get that right, but that all of them supposed, or could have supposed, that they actually had it is incredible. Lord Bramwell alone squarely faced and justified all that was involved in the decision of the court. He said: "It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. . . . A man may know it [the truth], and yet it may not be present to his mind at the moment of speaking; or if the fact is present to his mind, it may not occur to him to be of any use to mention it."⁵⁵ So in *Angus v. Clifford* the defendant stated that a certain published report of an expert on the company's property had been made for the directors. In fact the report had not been made for the directors, but for the promoters who sold the property to the company. It is impossible to suppose that the directors did not know this. Some members at least of the court tried to rest the case on the ground that the defendants were not using the published words of the prospectus in the natural sense in which the plaintiff understood them; but that "made for the directors" can by anybody ever have been supposed to mean made for some one else

he should be expected to know, although he thinks he knows, it should also be held that a man who asserts what is false, and what he knows is false, if his words be taken in their natural meaning, may, if he used them

in an unnatural sense, prove this and so escape liability.

⁵³ 14 App. Cas. 337.

⁵⁴ [1891] 2 Ch. 449 (C. A.).

⁵⁵ 14 App. Cas. 337, 348.

is absurd, and all members of the court lay stress on the point that the defendants did not regard the misrepresentation of fact as "important." If conscious dishonesty on the part of the defendant is a necessary element of tort for misrepresentation these decisions are right, but they represent a distinctly lower standard of morality and justice than the contrary decisions.⁵⁶ Moreover, the standard which they adopt is very difficult to apply. A defendant who is charged with false representations, and who can escape by making out that his intentions were honest though his words naturally understood were false, will rarely fail to testify to his own honesty of intention. The issue thus raised of the defendant's state of mind is difficult to try, and attempts at its decision are quite as likely to promote perjury as justice.

§ 1514. Argument based on measure of damages.

It may properly be urged that the measure of damages in an action for deceit differs from that applicable to actions for breach of warranty or to actions based on estoppel. In an action of tort for deceit it may be said that the law should endeavor to place the plaintiff in as good a position as he would have been in had no tort been committed; that is, if the plaintiff had not entered into the bargain at all. On the other hand, for misrepresentation which amounts to a warranty or estoppel the defendant is compelled to place the plaintiff in as good a position as he would have been in had the misrepresentation been true. Undoubtedly this difference in theory exists, though as matter of fact the weight of authority in this country gives the plaintiff the same measure of damages in tort for deceit as it gives for breach of warranty.⁵⁷ But the vital question concerns liability and not the measure of damages for it. If it be granted that the defendant should be liable for honest misrepresentation to the extent suggested, it is of little comparative importance whether the liability should be to make the representa-

⁵⁶ In *Grosh v. Ivanhoe Land Co.*, 95 Va. 161, 27 S. E. 841, the vendor of town lots falsely represented that railroads and other enterprises were established in the town. He was

held none the less liable because he believed that they soon would be. See also *Whiting v. Price*, 169 Mass. 576, 48 N. E. 772.

⁵⁷ See *supra*, § 1392.

tion good, or to make good the loss incurred by reliance upon it. There is authority for either way of dealing with the liability.

§ 1515. Action in reliance on false impression.

No legal wrong is caused by false and fraudulent representations unless they are acted upon. And a person induced by false representations to do an act which it was his duty to do, has had no legal rights infringed.⁵⁸ An injurious result must be produced in order to give cause for complaint.⁵⁹ But it is not necessary that such representations should have formed the only inducement for entering into a transaction; it is enough if they were a material inducement.⁶⁰ Where one to whom

⁵⁸ *Musconetoong Iron Works v. Delaware &c. R. Co.*, 78 N. J. L. 717, 76 Atl. 971.

⁵⁹ *Attwood v. Small*, 6 C. & F. 232, 444; *Smith v. Kay*, 7 H. of L. Cas. 750, 775; *Macleay v. Tait*, [1906] A. C. 24; *Wagner v. National Ins. Co.*, 90 Fed. 395, 81 U. S. App. 691, 33 C. C. A. 121; *Missouri Phonograph Co. v. Tomlinson*, 249 Fed. 658, 161 C. C. A. 568; *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237; *Darby v. Kroell*, 92 Ala. 607, 8 So. 384; *Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 171 Pac. 431; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Bowman v. Carithers*, 40 Ind. 90; *First Nat. Bank v. Garner (Ind.)*, 118 N. E. 813, 119 N. E. 711; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250; *Ely v. Stewart*, 2 Md. 408; *Dawe v. Morris*, 149 Mass. 188, 192, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Bilafsky v. Conveyancers' Title Ins. Co.*, 192 Mass. 504, 510, 78 N. E. 534; *Humphrey v. Merriman*, 32 Minn. 197, 20 N. W. 138; *Anderson v. Burnett*, 5 How. (Miss.) 165, 35 Am. Dec. 425; *American Assn. v. Bear*, 48 Neb. 455, 67 N. W. 500; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Hotchkin v. Third Nat. Bank*, 127

N. Y. 329, 27 N. E. 1050; *Foy v. Haughton*, 83 N. C. 467; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593; *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651; *Fowler v. McCann*, 86 Wis. 427, 56 N. W. 1085.

⁶⁰ *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Union Mfg. Co. v. East Alabama Bank*, 129 Ala. 292, 29 So. 781; *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45; *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409; *Ochs v. Woods*, 221 N. Y. 335, 117 N. E. 305; *Safford v. Grout*, 120 Mass. 20; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188. In *Macleay v. Tait*, [1906] A. C. 24, 26, Lord Halsbury said: "If the prospectus is calculated to induce people to take shares, and they do take shares, the prospectus, tainted with falsehood as it is, has acted as a whole, and people cannot be expected to analyze their own mental sensations so minutely as to be able to explain what particular statement had induced them to become subscribers." In *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799, the court said: "It is not necessary that false representations should have been the sole or even the predominant motive."

false statements are made undertakes to verify them and form a judgment of his own upon the facts, this is evidence of a reliance on his own judgment rather than on the representations, and no relief can be had,⁶¹ unless it is found as a fact that the representations were also relied upon.⁶² The falsity of a statement may be so obvious as to preclude the inference that action was based in reliance upon it;⁶³ and if the falsity of representations is discovered before the transaction is finally entered into, they are immaterial.⁶⁴ Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on.⁶⁵

§ 1516. Unjustifiable reliance.

It is no doubt true that relief is denied in many cases of fraudulent representations where the representations were such that no reasonable person ought to have relied upon them.⁶⁶ It is on this ground that misrepresentations of opinion and of law are not actionable. But in order to give a fraudulent person immunity for his statements, it is not enough that a more careful person might not have been deceived. It has indeed been

⁶¹ *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Clark v. Reader*, 158 U. S. 505, 525, 15 S. Ct. 849, 39 L. Ed. 1070; *Hough v. Richardson*, 3 Story, 659; *Brown v. Smith*, 109 Fed. 26; *Brewer v. Arantz*, 124 Ala. 127, 26 So. 922; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Tuck v. Downing*, 76 Ill. 71; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Hagee v. Grossman*, 31 Ind. 223; *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553; *Lilienthal v. Suffolk Brewing Co.*, 154 Mass. 185, 28 N. E. 151, 12 L. R. A. 821, 26 Am. St. Rep. 234; *Buxton v. Jones*, 120 Mich. 522, 79 N. W. 980; *Halls v. Thompson*, 1 Smedes & M. 443, 481, 482; *Black v. Irvin*, 76 Oreg. 561, 149 Pac. 540; *Hegdale v. Wade*, 78 Oreg. 349, 153 Pac. 107; *Reimers v. Brennan*, 84 Oreg. 53, 164 Pac. 552; *Phipps v. Buckman*, 30 Pa. St. 401;

Columbia Sav. Bank &c. Co. v. True, 108 S. Car. 56, 93 S. E. 389; *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97.

⁶² "The fact that the plaintiff called in two men to advise her in the matter may have been evidence that she did not rely entirely on what Smith said, but it is not conclusive that she was not misled by his statements. It was clearly competent for the jury to find that she was." *Sleeper v. Smith*, 77 N. H. 337, 91 Atl. 866, 868. See also *Schmidt v. Thompson*, (Minn. 1918), 167 N. W. 543.

⁶³ *Trammell v. Ashworth*, 99 Va. 646, 652, 39 S. E. 593.

⁶⁴ *Pratt v. Philbrook*, 41 Me. 132.

⁶⁵ *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241. See also references to the analogous question in regard to warranties, *Williston, Sales*, § 206.

⁶⁶ See *supra*, §§ 1491, 1495.

held by the Supreme Court of the United States⁶⁷ and by other courts, that if means were at hand by which the deceived person might have detected the untruth, and no artifice used to prevent investigation, the fraud will not be actionable.⁶⁸ But this doctrine can hardly be accepted broadly to-day; misrepresentations often cause the person to whom they are addressed not to use the means of knowledge within his power. The modern tendency is certainly toward the doctrine that negligence in trusting to a misrepresentation will not excuse positive willful fraud or deprive the defrauded person of his remedy.⁶⁹ Es-

⁶⁷ *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Andrus v. St. Louis, etc., Refining Co.*, 130 U. S. 643, 647, 9 S. Ct. 645, 32 L. Ed. 1054.

⁶⁸ *Anschutz v. Miller (C. C.)*, 20 Fed. 376; *Journal Printing Co. v. Maxwell*, 1 Pennew. 511, 43 Atl. 615; *Gatling v. Newell*, 12 Ind. 118; *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Como Orchard Land Co. v. Markham*, 54 Mont. 438, 171 Pac. 274; *Long v. Warren*, 68 N. Y. 426 (but see *Schumaker v. Mather*, 133 N. Y. 590, 595, 30 N. E. 755); *Reimers v. Brennan*, 84 Oreg. 53, 164 Pac. 552; *Whitman v. Seaboard Air Line Ry.*, 107 S. Car. 198, 200, 92 S. E. 861; *Winter v. Johnson*, 27 S. Dak. 512, 131 N. W. 1020; *Griffith v. Strand*, 19 Wash. 686, 54 Pa. 613; *Walquist v. Johnson (Wash.)*, 173 Pac. 735. See also *Gratz v. Schuler*, 25 Cal. App. 117, 142 Pac. 899.

⁶⁹ *Redgrave v. Hurd*, 20 Ch. D. 1; *Henderson v. Henshall*, 54 Fed. 320, 7 U. S. App. 565, 4 C. C. A. 357; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444; *Martin v. Burford*, 181 Fed. 922, 104 C. C. A. 360; *Barnett Oil & Gas Co. v. New Martinsville Oil Co.*, 254 Fed. 481; *Burroughs v. Guano Co.*, 81 Ala. 255, 1 So. 212; *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143; *Graham v. Thompson*, 55 Ark. 296, 299, 18 S. W. 58, 29 Am. St. Rep. 40; *Neely v. Rembert*, 71 Ark. 91, 71 S. W. 259; *Hunt v. Davis*, 98 Ark. 44, 135 S.

W. 458; *Maxon-Nowlin Co. v. Norrington*, 166 Cal. 509, 137 Pac. 240; *Linton v. Strong*, 107 Ill. 295; *Carr v. Harnstrom*, 207 Ill. App. 31; *Hale v. Philbrick*, 42 Iowa, 81; *McDowell v. Caldwell*, 116 Iowa, 475, 89 N. W. 1111; *Severson v. Kock*, 159 Ia. 343, 140 N. W. 220; *Wakefield v. Coleman*, 159 Ia. 241, 140 N. W. 386; *Eastern Trust & Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17; *Harlow v. Perry*, 113 Me. 239, 93 Atl. 544; *Bixler v. Wright*, 116 Me. 133, 100 Atl. 467; *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454; *Reggio v. Warren*, 207 Mass. 525, 93 N. E. 805, 32 L. R. A. (N. S.) 340; *Shapira v. Wildey Sav. Bank*, 213 Mass. 498, 100 N. E. 619; *Jackson v. Collins*, 39 Mich. 557; *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Van Metre v. Nunn*, 116 Minn. 444, 133 N. W. 1012; *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136; *Laird v. Keithley*, (Mo. 1918), 201 S. W. 1138; *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Albany Institution v. Burdick*, 87 N. Y. 40; *Muller v. Rosenblath*, 142 N. Y. S. 602, 157 N. Y. App. Div. 513; *White Sewing Mach. Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593; *Elliott Supply Co. v. Lish*, 36 N. Dak. 640, 163 N. W. 271; *Mangold & Glandt Bank v. Utterback (Okl.)*, 174

pecially where there is a relation of natural trust and confidence (though not strictly a fiduciary relation) the failure of the defrauded party to exercise vigilance will not deprive him of redress.⁷⁰ It is on the ground of unjustifiable reliance that relief is sometimes denied to those who execute written contracts without reading them, on the faith of representations as to the contents of the documents. If no relation of trust existed be-

Pac. 542; *Davis v. Mitchell*, 72 Or. 165, 142 Pac. 788; *Dupree v. Savage* (Tex. Civ. App.), 154 S. W. 701; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799; *Warder v. Whitish*, 77 Wis. 430, 46 N. W. 540. In *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262, an action for false representations, it appeared that the plaintiff was induced to buy a bond on the faith of false representations. The defendant who made these representations gave as his source of information several persons, whom he named, living in the same town with the plaintiff and known to him. These persons the defendant advised the plaintiff to see and consult. The defendant asked an instruction that the plaintiff could not recover for such statements since he was referred to the sources of information. This request was refused, and the question was left to the jury whether the plaintiff ought to have inquired of the persons named. On exceptions this procedure was held correct, *Holmes, J.*, saying: "It is true that in cases of representations as to quality, correspondence to sample, etc., of goods exhibited in the buyer's presence, the court has ruled that if the buyer had full means of ascertaining the truth for himself he could not set up that he was imposed upon by fraud (*Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265; *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Long v.*

Warren, 68 N. Y. 426); and that a verdict has been directed partly on that ground. *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215. See *Bayly v. Merrel*, Cro. Jac. 386. But the requirement as it has been worked out does not call for more than reasonable diligence (*Holst v. Stewart*, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442; *Brown v. Leach*, 107 Mass. 364, 368; *Nowlan v. Cain*, 3 Allen, 261, 264); and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury. *Holst v. Stewart*, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442. See *Burns v. Lane*, 138 Mass. 350, 355, 356; *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088. The matter may have been confused a little by not distinguishing between seller's talk as to value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning which even sellers may be held liable for fraud, and as to which the buyer may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases."

⁷⁰ *Edward Barron Est. Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125; *Stonemets v. Head*, 248 Mo. 243, 154 S. W. 108; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

tween the parties, and if the defrauded person was not so ignorant or illiterate as to excuse reliance on the superior knowledge of the other party, some courts have so held.⁷¹ But the better view is rather to deny to one who has been guilty of positive fraud in inducing the other party to refrain from reading the document the privilege of excusing his own misconduct by the stupidity or credulity of the defrauded party.⁷²

§ 1517. Fraud on the seller by impersonation.

A method of fraud upon the seller not infrequently committed is for a fraudulent buyer to obtain goods by inducing the seller to believe that the sale is made to another person having good credit. If the buyer induces the seller to assent to the transfer of title in the goods to him under such a mistaken belief, title will pass although it will be voidable for fraud. Thus where the buyer in person obtains the assent of the seller to a sale to him

⁷¹ *Pratt v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Sanborn v. Sanborn*, 104 Mich. 180, 62 N. W. 371; *Quinby v. Shearer*, 56 Minn. 534, 58 N. W. 155; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016.

⁷² *Carlisle & Co. v. Bragg*, [1911] 1 K. B. 489; *American Fine Art Co. v. Reeves Pulley Co.*, 127 Fed. 808, 62 C. C. A. 488; *Capital Security Co. v. Holland*, 6 Ala. App. 197, 60 So. 495; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *Angier v. Brewster*, 69 Ga. 362; *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999; *Chapman v. Atlanta Guano Co.*, 91 Ga. 821, 18 S. E. 41; *New v. Wambach*, 42 Ind. 456; *Pictorial Review Co. v. Fitzgibbon*, 163 Ia. 644, 145 N. W. 315; *Disney v. St. Louis Jewelry Co.*, 76 Kan. 145, 90 Pac. 782; *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427; *Great Northern Mfg. Co. v. Brown*, 113 Me. 51, 92 Atl. 993; *Bixler v. Wright*, 116 Me. 133, 100 Atl. 467; *Rosenberg v. Doe*, 148 Mass. 560,

20 N. E. 176; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Shrimpton & Sons v. Philbrick*, 53 Minn. 366, 55 N. W. 551; *Adolph v. Minneapolis & P. Ry. Co.*, 58 Minn. 178, 59 N. W. 959; *Demaris v. Rodgers*, 110 Minn. 49, 124 N. W. 457; *Eggleston v. Advance Thresher Co.*, 96 Minn. 241, 104 N. W. 891; *Stamps v. Bracy*, 1 How. (Miss.) 312; *Tait v. Locke*, 130 Mo. App. 273, 109 S. W. 105; *Cole Bros. v. Williams*, 12 Neb. 440, 11 N. W. 875; *Dunston Lithograph Co. v. Borgo*, 84 N. J. L. 623, 87 Atl. 334; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.), 463 (annotated); *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Houston & T. C. R. Co. v. Milam* (Tex. Civ. App.), 58 S. W. 735; *Compagnie des Metaux Unital v. Victoria Mfg. Co.* (Tex. Civ. App.), 107 S. W. 651; *Warder Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016.

of the goods by pretending to be some one else, title passes,⁷³ although as between the parties the transaction is voidable.⁷⁴ In such a case, though it is true the seller intends to transfer title to the person of good credit whom he supposes to be the person standing before him, his primary intent is to transfer title to the person before him.⁷⁵ It frequently happens that a seller intends several things when professing to transfer title, and that all of these intentions cannot be effected. This is almost invariably true where the bargain is induced by fraud. Thus if the buyer is the person that he purports to be, but deceives the seller as to his pecuniary responsibility, the seller here also has a double intent; namely, to transfer title to the goods to the person before him, and also to transfer title to the goods to a person of pecuniary responsibility; but the primary intent is to transfer title to the person before him, and accordingly title will pass. On the other hand, if goods are ordered by mail by a fraudulent person, the name of a responsible buyer being used as a means of deception to induce the seller to send for-

⁷³ *Hickey v. McDonald*, 151 Ala. 497, 44 So. 201, 13 L. R. A. (N. S.) 413; *Martin v. Green*, 117 Me. 138, 102 Atl. 977; *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283; *Brighton Packing Co. v. Butchers' &c. Assoc.*, 211 Mass. 398, 402, 97 N. E. 780; *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441. But see *Loeffel v. Pohlman*, 47 Mo. App. 574; *Morrison v. Robertson*, [1908] S. C. 332 (Scotch Ct. of Sess.). This principle has been applied in the law of negotiable paper where it is held that if a note is made payable in terms to A, but is delivered to B on the supposition that he is A, title to the note is in B and may be transferred by B's indorsement. *Emporia Bank v. Shotwell*, 35 Kans. 360, 11 Pac. 141, 57 Am. Rep. 171; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Land Trust Co. v. Northwestern Bank*, 796 Pa. St. 230, 46 Atl. 420, 50 L. R. A. 15, 79 Am. St. Rep. 717. Compare *Tolman v. American Bank*, 22 R. I.

462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850, where a contrary conclusion was reached; but this was based on the Negotiable Instruments Law, the wording of which affords some color for the decision, which must, however, be deemed erroneous.

⁷⁴ So where in a contract of agency the agent assumed a false name the contract was held unenforceable by him or his assignee. *Morgan Munitions Supply Co. v. Studebaker Corp.* 226 N. Y. 94, 123 N. E. 146.

⁷⁵ For the same reason where a loan of money was obtained on a mortgage bond signed by a real person (an infant) in his own name, by one who fraudulently pretended that he had signed it, and that the name was his, the court held that the lender's real bargain was with the borrower before him and not with the signer of the bond, and that the contract might be reformed to express this. *Gothelf v. Shapiro*, 136 N. Y. App. D. 1, 120 N. Y. S. 210.

ward the goods, the seller's primary intent is to sell the goods to the person whose name appears to be signed to the letter. The seller also intends to sell the goods to the person who wrote the letter. He believes that these two intentions are harmonious because he believes the persons are one and the same. As they are not the same, both intentions cannot be made effectual; but the primary intent is to sell to the person whose name appears signed to the letter; that is the essential matter in the seller's mind. The belief that the writer of the letter is that person is rather an inducement to the intent to sell to the person indicated by the signature than itself the governing purpose.⁷⁶ So where a person falsely represents that he is the agent

⁷⁶ The leading case illustrating this point is *Cundy v. Lindsay*, 3 A. C. 459. In this case it appeared that one Alfred Blenkarn hired a room which had side windows on Wood street. He wrote an order to Messrs. Lindsay as from "37 Wood Street." He signed this letter without any initial representing a Christian name, and wrote it so that it appeared to be "Blenkiron & Co." There was a firm, in good credit, of W. Blenkiron & Son carrying on business at 123 Wood street. The goods were sent addressed to "Messrs. Blenkiron & Co., 37 Wood Street," where they were obtained by Blenkarn. He sold the goods to various innocent purchasers, among others to Messrs. Cundy who resold them in the regular course of business. Messrs. Lindsay brought this action against Messrs. Cundy for conversion, and were held entitled to maintain that action. Similarly in *Newberry v. Norfolk & Southern Ry. Co.*, 133 N. C. 45, 45 S. E. 356, it appeared that there were two persons named respectively Arthur B. Alexander and Alfred Alexander. The former, who was notoriously insolvent, ordered goods from the plaintiff, signing the order "A. Alexander." The seller shipped the goods, supposing they were ordered by Alfred Alexander,

who was a man of means. It was held that no title passed to Arthur Alexander and the plaintiff was entitled to reclaim his goods. See also *School Sisters v. Kusnitt*, 125 Md. 323, 93 Atl. 928; *Brighton Packing Co. v. Butchers' &c. Assoc.*, 211 Mass. 398, 97 N. E. 780; *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441; *Mercantile Nat. Bank v. Silverman*, 148 N. Y. App. D. 1, 132 N. Y. S. 1017. Compare *Perkins v. Anderson*, 65 Iowa, 398, 21 N. W. 696; *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. In the case last cited goods were ordered by a fraudulent person under the name of A. Swannick. This was the name of a reputable dealer in the same town. The goods were sent directed to A. Swannick. The carrier took them first to the reputable dealer who refused them, and then delivered them to the fraudulent person who had written the order. The carrier was not held liable. In this case, however, the court professed to decide nothing in regard to title, and the numerous cases in regard to the liability of a carrier for misdelivery must be carefully scrutinized before any weight is conceded to them upon the point herein discussed. Although it is well settled that a carrier is generally liable for delivering goods

of another, and by this false representation obtains possession of goods, the seller agreeing to sell to the alleged principal, no title passes. The alleged principal gets no title because he never agreed to buy, and the agent gets no title because the seller never agreed to transfer title to him.⁷⁷ If, however, a fraudulent buyer, though attaching to a letter ordering goods, a name which is not his own, chooses a purely fictitious one, title to goods sent will pass and a *bona fide* sub-purchaser will acquire an indefeasible title.⁷⁸ But if S sells goods to B, erroneously sup-

to any other person than the owner or the person to whom they are billed, and though it might, therefore, seem a safe assumption that where a seller has shipped goods in accordance with an order, the carrier's liability would depend on whether the seller in fact shipped the goods to the person to whom delivery was made by the carrier, the case of *Singer v. Merchants' Transportation Co.*, 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 635, shows that every court at least would not assent to the assumption. In that case the plaintiff, a shoe dealer in Boston, named Louis Singer, delivered cases of goods to the defendant for transportation to Springfield, Illinois, marked L. Singer, Springfield, Illinois. There was in Springfield, Illinois, a dealer in goods of the kind shipped, named Lena Singer. She did business under the name of L. Singer, and was so known to the defendant's representatives, and goods had been received for her over the defendant's line nearly every week addressed to L. Singer. The shipper in fact intended to address the goods to himself; he did not know there was any person by the name of Lena Singer or L. Singer in Springfield, Illinois. It was held that the contract of the defendant was to deliver the goods to L. Singer, Springfield, Illinois, and that the defendant had performed this contract and was not liable to the plaintiff,

Louis Singer, for the loss of the goods; nor was it held material that the plaintiff for five years had sent goods six or seven times a year addressed in the same way. It will be observed that in this case the title to the goods was unquestionably in Louis Singer, and that in consigning them to L. Singer he intended to consign them to himself. It is, therefore, evident that a decision that a carrier is not liable as for a misdelivery does not necessarily involve the conclusion that the person to whom the goods were delivered was the owner or the person intended to be the consignee. To similar effect is *Porter v. Oceanic S. S. Co.*, 223 Mass. 224, 111 N. E. 864. On the same principle where a check payable to "Max Roth" was sent by the drawer to Cleveland instead of to New York, and in Cleveland fell into the hands of a Max Roth for whom it was not intended, who indorsed and collected it, it was held that the drawee bank could charge the payment against the drawer. *Weisberger Co. v. Barberton Bank Co.*, 84 Ohio St. 21, 95 N. E. 379, 34 L. R. A. (N. S.) 1100 (criticised in 60 Am. L. Reg. 443).

⁷⁷ *Hardman v. Booth*, 1 H. & C. 803; *Kingsford v. Merry*, 1 H. & N. 503; *Hollins v. Fowler*, L. R. 7 H. L. 757, 763, 795.

⁷⁸ *King's Norton Metal Co. v. Edridge*, 14 T. L. R. 98; *Smith Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400; *Alexander v. Swackhamer*,

posing him to be purchasing as agent for C, but without any representation or pretence on the part of B that he is buying as agent for another, the contract is valid and the title to the goods passes to B.⁷⁹

§ 1518. Misrepresentations by third persons.

Fraudulent misrepresentations inducing the person to whom the misrepresentations are addressed to buy or sell property or enter into a contract with some one other than the maker of the representations will not give the defrauded person ground for rescinding the transaction,⁸⁰ except in the following cases:

(1) Where the representations were made by one who was an agent or purported to be an agent of the person receiving the benefit of the fraud. It is immaterial for this purpose whether the representations were made within the apparent or actual scope of the agent's authority. The principal though innocent at the outset renders himself a party to the fraud if after knowledge of how his advantage was obtained he fails to surrender it.⁸¹

105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283; *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Hentz v. Miller*, 94 N. Y. 64; *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441, 442; *Consumers' Ice Co. v. Webster*, 32 N. Y. App. D. 592, 53 N. Y. S. 56; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *Decan v. Shipper*, 35 Pa. St. 239, 78 Am. Dec. 334. And see *Dean v. Yates*, 22 Ohio St. 388; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Barker v. Dinsmore*, 72 Pa. St. 427, 13 Am. Rep. 697. *Contra*, *Hawkins v. Davis*, 8 Baxt. 506.

⁷⁹ *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369. Compare *Ex parte Barnett*, 3 Ch. D. 123. And see *Ellsworth v. Randall*, 78 Iowa, 141, 42 N. W. 629, 16 Am. St. Rep. 425; *Huffman v. Long*, 40 Minn. 473, 42 N. W. 355; *Kayton v. Barnett*, 116 N. Y. 625, 23

N. E. 24. And if B buys from S, erroneously supposing S to be acting as agent for a corporation against which B has a claim, he is liable to S for the price. *Pissutielle v. Graham*, 56 N. Y. Misc. 584, 106 N. Y. S. 1099.

⁸⁰ *Masters v. Ibberson*, 8 C. B. 100; *White v. Garden*, 10 C. B. 919; *Pulford v. Richards*, 17 Beav. 87, 95; *Lindsey v. Veasy*, 62 Ala. 421; *Publishers v. Wilks*, 105 Ark. 243, 151 S. W. 280; *Strong v. Smith*, 62 Conn. 39, 25 Atl. 395; *Equitable Life Assur. Soc. v. Cosby* (Ky.), 126 S. W. 142; *Appleton v. Horton*, 25 Me. 23; *Nash v. Minnesota &c. Trust Co.*, 163 Mass. 574, 581, 40 N. E. 1039, 28 L. R. A. 753; *Vass v. Riddick*, 89 N. C. 6; *Dangler v. Baker*, 35 Ohio St. 673; *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89.

⁸¹ *McIntyre v. Pryor*, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; *Veasie v. Williams*, 8 How. 134, 12 L. Ed. 1018; *Continental Ins. Co. v. Insurance Co. of Pa.*, 51 Fed. 884, 2 C. C. A. 535;

(2) Where, though the misrepresentations were not made by one acting as agent of the party benefited, the latter was or should have been cognizant of them, or was the cause of their being made, or⁸² gave no value for what he received, or gave no value until after he had learned of the misrepresentations.⁸³

(3) Where the misrepresentations induce a mistake of both parties to the contract of so vital a character as to justify relief on that ground.⁸⁴

§ 1519. Misrepresentations indirectly made.

Fraudulent misrepresentations indirectly reaching and influencing persons other than the one to whom they were directly addressed, may have the same effect as if made directly to the person influenced, if their effect was intended or should have been anticipated by the party benefiting by them. Thus a buyer of goods is responsible for misrepresentations of solvency, not only when made by him in person, but when made by his agents; and false statements made to commercial agencies and afterward furnished to sellers of goods who act in reliance on the statements, make the buyer guilty of fraud if his statements were made with knowledge of their falsity. Since the purpose of commercial agencies is to give information as to

Riser v. Walton, 78 Cal. 490, 21 Pac. 362; *Wolfe v. Pugh*, 101 Ind. 293; *Day v. Merrick*, 158 Ia. 287, 138 N. W. 400; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; *Presby v. Parker*, 56 N. H. 409; *Bennett v. Judson*, 21 N. Y. 238; *Krumm v. Beach*, 96 N. Y. 398; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; *Coleman v. Stark*, 1 Oreg. 115; *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531; *Meyerhoff v. Daniels*, 173 Pa. 555, 34 Atl. 298, 51 Am. St. Rep. 782; *Schultheis v. Sellers*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210; *O'Leary v. Tillinghast*, 22 R. I. 161, 46 Atl. 754; *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. 21; *Fittsimmons*

v. Joslin, 21 Vt. 129, 52 Am. Dec. 46; *Ladd v. Lord*, 36 Vt. 194; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352, 56 Am. Dec. 116; *Nelson v. Title & Trust Co.*, 52 Wash. 258, 100 Pac. 730; *Morse v. Ryan*, 26 Wis. 356.

⁸² See the following section.

⁸³ *Huguenin v. Baseley*, 14 Ves. 273, 289; *Scholefield v. Templar*, 4 De G. & J. 429; *Trevitt v. Converse*, 31 Ohio St. 60, 71; *Atkinson v. Reed* (Tex. Civ. App.), 49 S. W. 260, 263; *Law v. Grant*, 37 Wis. 548. It may be asked what essential difference is there in taking advantage of a misrepresentation by a third person, and silently taking advantage of a known erroneous belief of the other party, however acquired. See *supra*, § 1497.

⁸⁴ See *infra*, § 1544.

credits, the buyer must know that his statements may be relied upon not only by any customer of the commercial agency to which a statement is made,⁸⁵ but by others for whom subscribers may procure information.⁸⁶ If, however, a commercial agency obtains the facts upon which it bases its rating from outside sources, and not from the buyer or some one authorized by him, the seller cannot treat a sale induced thereby as fraudulent.⁸⁷ But if in such a case the buyer referred the seller to his commercial rating, he thereby approves it as correct, and is in the same position as if he had originated it.⁸⁸ It has been held insufficient that the buyer knew of the incorrect rating and that it had been furnished to the seller.⁸⁹ For how long a time a statement made to a mercantile agency may furnish reasonable ground of reliance to a seller depends in great measure on the circumstances of the case. If the statement was accurate when made, but after lapse of time had ceased to be so, the situation seems similar to that which exists where the mercantile

⁸⁵ *Fechheimer v. Baum* (C. C.), 37 Fed. 167, 2 L. R. A. 153; *In re Epstein* (D. C.), 109 Fed. 874; *W. W. Johnson Co. v. Triplett*, 66 Ark. 233, 50 S. W. 455; *Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97; *Tennent Shoe Co. v. Stovall & Brand*, 25 Ky. L. Rep. 1615, 78 S. W. 417; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Courtney v. Knabe, etc., Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Emerson v. Detroit, etc., Spring Co.*, 100 Mich. 127, 59 N. W. 659; *Stevens v. Ludlum*, 46 Minn. 180, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; *Kellogg Co. v. Holm*, 82 Minn. 416, 85 N. W. 159; *Farwell Co. v. Boyce*, 17 Mont. 83, 42 Pac. 98; *Eaton v. Avery*, 83 N. Y. 31; *Tindle v. Birkett*, 57 N. Y. App. Div. 450, 67 N. Y. S. 1017, *affd.*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Arnold v. Richardson*, 74 App. Div. 581, 77 N. Y. S. 763; *Ernst v.*

Cohn (Tenn. Ch. App.), 62 S. W. 186; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738.

⁸⁶ *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011.

⁸⁷ *In re Roalswick*, 110 Fed. 639; *Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. 129; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hiller v. Ellis*, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. 162; *Cream City Hat Co. v. Tollinger*, 62 Neb. 98, 86 N. W. 921; *Maccullar v. McKinley*, 99 N. Y. 353, 2 N. E. 9.

⁸⁸ *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

⁸⁹ *Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316. See also *Dorman v. Weakley* (Tenn. Ch. App.), 39 S. W. 890. *Cf.* cases cited in the preceding section, n. 83, which hold that one who knowingly takes advantage of a third person's misrepresentations becomes responsible for them.

agency derives its information from independent sources. In each case the buyer knows that the seller is or may be acting under an erroneous impression, and in each case the buyer is not at fault for that impression except that he has failed to remove it. In one case he is not at fault because he did not make the statement, and in the other case he is not at fault because, although he originally made it, his statement was then neither false nor fraudulent.⁹⁰ Though it might not generally be held fraud for the buyer to remain silent knowing that the seller was relying or might rely on an erroneous rating, such conduct may be evidence of an intent on the seller's part not to pay for goods,⁹¹ and slight circumstances may be sufficient to amount to a representation by the buyer that the rating of the agency is correct.⁹² If the statement was falsely made, a buyer is en-

⁹⁰ This view is taken and the transaction held not fraudulent in *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Reid v. Kempe*, 74 Minn. 474, 77 N. W. 413; *Strickland v. Willis* (Tex. Civ. App.), 43 S. W. 602. Of course if the buyer refers to the statement or in any way induces the seller to act upon it, he thereby in effect makes a new representation that the old rating is accurate and is guilty of fraud. *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

⁹¹ *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283; *Lindauer v. Hay*, 61 Iowa, 663, 17 N. W. 98.

⁹² *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316 (here the buyer referred the seller to the rating of the agency); *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112. In this case the defendant, Frank Chickering, who had no means, was a member of the firm of Frank Chickering & Co., the office of which was in Ohio. The defendant, however, lived in Michigan and did business there under the name of Chickering & Co. The firm of Frank Chickering & Co., which did business in Ohio, by virtue of its solvent part-

ners, was correctly rated as worth \$50,000 to \$75,000. Two mercantile agencies listed the firm of Frank Chickering & Co. in their lists for Grand Rapids, Michigan, where the defendant lived. It did not appear conclusively that the defendant was responsible for this, but the evidence pointed that way. The court said (p. 189): "If it be admitted that he was doing business at Grand Rapids for his sole use, under the name of Frank Chickering & Co., he knew that one of the leading mercantile reports of the country was representing that firm as consisting of Mr. Chickering, Mr. Monnette, and Mr. Hull, and that they were worth a large sum of money. He also knew that this report, so far as it related to the business of Frank Chickering & Co., done for his sole benefit, was untrue, and was calculated to mislead, and might result in the consummation of frauds upon the persons who had a right to rely upon these reports, if they acted upon them. He also knew that there was no report in that list of the firm of Frank Chickering & Co., so far as it related to his sole business, and that, when he did business in the name of Frank

titled to rely upon the statement, at least for a reasonable time.⁹³ And there seems force in the statement in a New York decision,⁹⁴ that if the statement originally was made falsely and fraudulently, the fraudulent person "cannot be heard to say that its mischievous force was operative longer than was expected."

§ 1520. Representations of solvency.

A common form of fraud upon the seller is a misrepresentation of the buyer's solvency or ability to pay for the goods, by which the seller is induced to give credit to the buyer. Such representations if going beyond an expression of opinion are obviously fraudulent.⁹⁵ There can be no doubt that any mis-

Chickering & Co. the subscribers to Dun & Co.'s reports would naturally and would have a right to suppose he was doing business not only for himself but for Mr. Monnette and Mr. Hull, and that credit extended to the firm would be in the belief that it was extended to a responsible firm. To do business under such circumstances in the name of a responsible firm, for his own use, when he was hopelessly insolvent, was a fraud upon those with whom he did business, and to allow such a transaction to stand would not be very creditable to the courts. . . . This was not a case of simply remaining silent when one was under no obligation to speak. The defendant knew, as already stated, that the firm of Frank Chickering & Co., listed at Grand Rapids, was represented by a great mercantile agency as responsible and entitled to credit, and that this representation would naturally be relied upon when an order was sent in the name of that firm. Under such circumstances, it was his duty to speak when he came to deal with a person who was a stranger to him and who, by the usual and known methods among business men, would be likely to consult the representation as contained

in the mercantile reports." It may be added that the use of the name Frank Chickering & Co. was a misrepresentation. It is submitted that it will always be a misrepresentation for a buyer to use language in a sense, which though literally accurate, he knows will be misinterpreted by the seller.

⁹³ Statements made a year before the sale were held not necessarily too remote in *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. 180. So in *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 415, 75 N. W. 316, where reports were made "nearly a year" before the purchase. The question was held to be one of fact to the jury whether a statement made two months before should have been acted upon by the seller without inquiry. *Richardson Dry Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. 1079. See also *Treadwell v. State*, 99 Ga. 779, 27 S. E. 785. In *Sharpless v. Gummey*, 166 Pa. St. 199, 30 Atl. 1127, two and a half years was held too great a lapse of time for the seller to be justified in relying on a statement.

⁹⁴ *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427, 60 N. E. 771. See also *Brown v. Lobdell*, 51 Ill. App. 574.

⁹⁵ *In re Marengo Mercantile Co.*,

statement of fact of this kind made with knowledge of its falsity and operating as an inducement to the sale is ground either for avoiding the sale or for an action of deceit. Statements are sometimes made, however, which are merely matters of opinion, not statements of fact, and, therefore, not within the rule just stated.⁹⁶ This is especially likely to be true of misrepresentations made, not by the buyer himself, but by third persons,

§ 1521. Intention not to pay for the goods.

The law is well settled that where the buyer at the time of the purchase is insolvent and intends not to pay for the goods, it is a fraud which will render the purchaser's title voidable.⁹⁷

199 Fed. 474; *Fay v. Hill*, 249 Fed. 415, 161 C. C. A. 389; *McKensie v. Weineman*, 116 Ala. 194, 22 So. 508; *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Bell v. Kaufman*, 9 Colo. App. 259, 47 Pac. 1035; *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40; *Dinkler v. Potts*, 90 Ga. 103, 15 S. E. 690; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Clark v. Munroe Co.*, 127 Mich. 300, 86 N. W. 816; *McKinney v. Bank*, 36 Neb. 629, 54 N. W. 963; *Boyd v. Shiffer*, 156 Pa. St. 100, 27 Atl. 60; *Cincinnati Cooperage Co. v. Gaul*, 170 Pa. St. 545, 32 Atl. 1093; *Fitchard v. Doheny*, 93 App. Div. 9, 86 N. Y. S. 964; *Richardson v. Vick*, 125 Tenn. 532, 145 S. W. 174; *Wertheimer-Schwartz Shoe Co. v. Faris* (Tenn. Ch. App.), 46 S. W. 336. Nor is it the less fraudulent because the buyer intended to pay. *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 679.

⁹⁶ See *supra*, § 1491.

⁹⁷ *Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W. 216; *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26; *Ex parte Whittaker*, 10 Ch. 446, 449; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Parker v. Byrnes*, 1 Low. 539; *In re Spann*, 183 Fed. 819; *In re Marks*, 218 Fed.

453, 134 C. C. A. 253; *In re Hunter-Rand Co.*, 241 Fed. 175; *In re Collins*, 242 Fed. 975; *Jones v. H. M. Hobbie Grocery Co.*, 246 Fed. 431, 158 C. C. A. 495; *Loeb v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Robinson v. Levi*, 81 Ala. 134, 1 So. 554; *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283; *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Morrison v. Shuster*, 1 Mackey (D. C.), 190; *Johnson v. O'Donnell*, 75 Ga. 453; *Seisel v. Wells*, 99 Ga. 159, 25 S. E. 266; *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *Wabash, St. L. & P. R. Co. v. Shryock*, 9 Ill. App. 323; *Brower v. Goodyer*, 88 Ind. 572; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *J. J. Smith Lumber Co. v. Scott County Garbage &c. Co.*, 149 Ia. 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184; *Reager v. Kendall*, 19 Ky. L. Rep. 27, 39 S. W. 257; *Kirkpatrick's Exec. v. E. Rehkoph Saddlery Co.*, 144 Ky. 129, 137 S. W. 862; *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N.

In Pennsylvania, however, it is essential that some positive representation be made or some trick, artifice, or conduct which involves a false representation be added. Secret intention not to pay is there insufficient.⁹⁸ It may be urged that a mere intention does not amount to a representation of an existing fact by the buyer and that if a court gives relief to the buyer the only ground can be that circumstances exist though the seller has no knowledge of them which render the transaction unfair. The answer to this, however, is that the purchase of goods implies a promise to pay for them even if there is no express promise; and a promise to pay, whether express or implied, involves a representation that the buyer intends to keep his promise. Accordingly, not only is the bargain voidable, but it has been held the seller may maintain an action of deceit.⁹⁹ This,

S.) 245; *Powell v. Bradlee*, 9 G. & J. 220; *Dow v. Sanborn*, 3 Allen, 181; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Ayers v. Farwell*, 196 Mass. 349, 82 N. E. 35; *Phinney v. Friedman*, 224 Mass. 531, 113 N. E. 285; *Shipman v. Seymour*, 40 Mich. 274; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *Bidault v. Wales*, 19 Mo. 36, 59 Am. Dec. 327; *Fox v. Webster*, 46 Mo. 181; *Stewart v. Emerson*, 52 N. H. 301; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Hennequin v. Naylor*, 24 N. Y. 139; *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. 298; *Ash v. Putnam*, 1 Hill, 302; *Cary v. Hotailing*, 1 Hill, 311, 37 Am. Dec. 233; *Durrell v. Haley*, 1 Paige, 492, 19 Am. Dec. 444; *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446; *Richardson v. Vick*, 125 Tenn. 532, 145 S. W. 174; *Davis v. McWhirter*, 40 U. C. Q. B. 598.

⁹⁸ *Smith v. Smith*, 21 Pa. St. 367, 60 Am. Dec. 51; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Bughman v. Bank*, 159 Pa. St. 94, 28 Atl. 209 (in this case *Mitchell, C. J.*, though regarding the Pennsylvania rule as established, and, therefore, following it, said that it "was not in harmony

with . . . sound policy or the principles of business honesty").

⁹⁹ *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. But see *Dawe v. Morris*, 149 Mass. 188, 192, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404, where *Devens, J.*, said: "The plaintiff further contends that, as where goods have been obtained under the form of a purchase, with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser, or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which at the time of making the promisor intended not to perform, by reason of which nonperformance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise. Assuming that the plaintiff's declaration enables him to raise this question, which may be doubted . . . there is an obvious

however, is not universally admitted.¹ If the reasoning is sound it would follow that it is immaterial whether the buyer is insolvent or not; the intention not to pay would be the only material circumstance. This result seems correct and would doubtless generally be reached, but not perhaps everywhere.² It would also logically follow that in any case where a promise was made with a preconceived intention not to perform it, the promisor would be guilty of a fraudulent misrepresentation of fact. Many courts certainly would not be prepared to go to this length.³ If it cannot be said that making a promise with intent not to perform it involves a misrepresentation of fact, the seller's right to rescind must be based on the ground that the circumstances of the case of which the seller was ignorant, and which the buyer, knowing their materiality, failed to disclose, render the transaction fraudulent and make it equitable to avoid it. If this be accepted as the true ground, it would seem to follow that hopeless insolvency on the part of the buyer, not disclosed to the seller, ought of itself to afford ground for rescinding a sale; and though it is generally held that mere non-disclosure of insolvency will not suffice to avoid a sale,⁴ where

difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the nonperformance of that which it is the duty of the defendant to perform, and where there is no other wrong than such nonperformance. To term this a 'tort' would be to confound a cause of action in contract with one in tort, and would violate the policy of the Statute of Frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts."

¹ See Pollock, Torts (2d ed.), p. 252, and note (m). Also extract from *Dawe v. Morris* in the preceding note, and *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Donovan v. Clifford*, 225 Mass. 435, 114 N. E. 681. In *Commonwealth v. Althause*, 207 Mass. 32, 93 N. E. 202, 31 L. R. A. (N. S.)

999, it was held that no prosecution for obtaining property by false pretences could be maintained.

² *La Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 1 So. 160 (but see *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 So. 1009). Insolvency was not mentioned as requisite in *Donovan v. Clifford*, 225 Mass. 435, 114 N. E. 681; *German Nat. Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556. In *Ditton v. Purcell*, 21 N. Dak. 648, 132 N. W. 347, 36 L. R. A. (N. S.) 149, it was held that the giving of a check in payment of the price of personal property with intent, after obtaining possession, to set off note of the seller barred by bankruptcy or obtain a discount from the purchase price in settlement, was a fraud on the seller, for which he might rescind, and recover the property.

³ See *supra*, § 1495.

⁴ *Ex parte Whittaker*, L. R. 10 Ch.

the buyer knows that his financial condition is such that it will be impossible for him to pay, the inference is strong that he did not intend to pay.⁵

§ 1522. Fraud on a buyer.

Fraud upon a buyer will generally consist of some misrepresentation in regard to the character of the property or in regard to the title, quantity, or value. Misrepresentations as to quantity and value have already been sufficiently discussed.⁶ Representations in regard to the character of the goods have also been considered both in connection with the law of warranty⁷ and in connection with fraudulent representations by the seller.⁸ A representation in regard to goods will frequently

App. 446; *Carnahan v. Bailey*, 28 Fed. 519; *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. 431; *Bell v. Ellis*, 33 Cal. 620; *Burchinell v. Hirah*, 5 Colo. App. 500, 39 Pac. 352; *Mears v. Waples*, 3 Houst. 581; *Fulton v. Gibian*, 98 Ga. 224, 25 S. E. 431; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Reticker v. Katsenstein*, 26 Ill. App. 33; *Hacker v. Munroe*, 56 Ill. App. 532; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Houghtaling v. Hills*, 59 Iowa, 287, 13 N. W. 305; *Reid v. Cowduroy*, 79 Iowa, 169, 44 N. W. 351; *Franklin Sugar Ref. Co. v. Collier*, 89 Iowa, 69, 56 N. W. 279; *Blaul v. Wandel*, 137 Ia. 301, 114 N. W. 899; *J. J. Smith Lumber Co. v. Scott County Garbage & Co.*, 149 Ia. 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184; *Kelsey v. Harrison*, 29 Kans. 143; *Cross v. Peters*, 1 Greenl. 376, 10 Am. Dec. 78; *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 595, 613, 39 Atl. 314; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Phinney v. Friedman*, 224 Mass. 531, 113 N. E. 285; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373; *Reeder Bros. Shoe Co. v. Prylinski*, 102 Mich. 468, 60 N. W. 969; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519;

Sprague, Warner & Co. v. Kempe, 74 Minn. 465, 77 N. W. 412; *Manheimer v. Harrington*, 20 Mo. App. 297; *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *Nichols v. Pinner*, 18 N. Y. 295; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Wright v. Brown*, 67 N. Y. 1; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Wheeler & Wilson Mfg. Co. v. Keeler*, 65 Hun, 508; *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905; *Hallacher v. Henlein* (Tenn. Ch. App.), 39 S. W. 869; *Redington v. Roberts*, 25 Vt. 686; *Garbutt v. Bank*, 22 Wis. 384; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92, 80 N. W. 103; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599.

⁵ In *Gillespie v. Piles*, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1, it was said that his intention would be "conclusively presumed." See also *In re Hunter Rand Co.*, 241 Fed. 175, 183; *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 So. 1009; *Johnson v. Monell*, * 41 N. Y. (2 Keyes) 655.

⁶ *Supra*, § 1492.

⁷ *Supra*, §§ 968 et seq.

⁸ *Supra*, § 1492.

be not only a warranty but, if fraudulently made, also ground for an action of deceit. False representations as to title, though to some extent involving a statement of law and sometimes also of opinion, involve also such assertions of fact as to constitute actionable fraud.⁹ And misrepresentations as to mortgages or other liens upon the property are likewise actionable if made with knowledge of their falsity.¹⁰ It seems also that offering goods for sale without disclosing a defect in the title or an incumbrance is itself a representation of good title and freedom from incumbrance. It is, at least, partly on this ground that warranties of title and freedom from incumbrances are implied.¹¹ And if the seller knew of the defect in his title his offer to sell would amount to a fraudulent misrepresentation.¹²

§ 1523. Remedies of defrauded party.

Although relief may be obtained by a defrauded party to a contract in a variety of ways, such relief is always based on one of three general remedies which are open to the defrauded party: (1) A right to damages for being led into the transaction. Under this form of relief the injured party does not seek to undo the fraudulent transaction but claims sufficient compensation to make his position as good as it would have been had he not entered into the transaction at all. (2) Rescission of the fraudulent transaction and restoration of the situation which the parties occupied before the fraudulent transaction was entered into. (3) Enforcement against the fraudulent person of the kind of bargain which he represented that he was making. This relief is possible in at least two classes of cases. Frequently a fraudulent representation to induce the sale of goods will amount to a warranty. In such a case the buyer may recover damages sufficient to put him not simply in as good a position as he occupied before the fraudulent transaction, but in as good a position as he would have occupied had the fraudulent state-

⁹ *Simpson v. Wiggin*, 3 Woodb. & M. 413; *Hale v. Philbrick*, 42 Iowa, 81; *McGibbons v. Wilder*, 78 Iowa, 531, 535; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Halsell v. Musgrave*, 5 Tex. Civ. App. 476, 24 S. W. 358

¹⁰ *Stevenson v. Marble*, 84 Fed. 23; *Merritt v. Robinson*, 35 Ark. 483; *Dinwiddie v. Kelley*, 46 Ind. 392; *Loucks v. Taylor*, 23 Ind. App. 245.

¹¹ See *supra*, §§ 975-980, 1503.

¹² *Merritt v. Robinson*, 35 Ark. 483; *Abbott v. Marshall*, 48 Me. 44.

ments been true. This last form of redress, however, is not based on fraud, and has been sufficiently considered in connection with warranty. But as has been seen in an earlier section ¹³ in many States the measure of damages in an action of deceit has been assimilated to the measure of damages appropriate for breach of warranty. The other instance where the defrauded party in effect can compel the fraudulent party to make good his representations is illustrated by the rule that reformation may be had of a written contract or conveyance for fraud. If through the fraud of one party and mistake of the other the writing does not conform to the agreement between the parties, equity will rectify it.¹⁴

§ 1524. Action of damages for deceit.

The right of one who has suffered damage by fraudulent representations to bring an action for deceit needs no citations of authorities. In order to maintain such an action where benefit has been received by the plaintiff, it is not necessary that such benefit be returned. The defrauded party may retain this benefit and sue for the damages he has suffered.¹⁵ Nor need demand be made before suit¹⁶ It is of course essential to the right of action that some damage shall have been suffered, and it has been urged that where a contract induced by fraud is still wholly executory on both sides at the time the fraud is discovered, no damage is suffered by the defrauded party since the fraud furnishes a complete defense to the enforcement of the contract. According to this view, therefore, performance of

¹³ *Supra*, § 1392.

¹⁴ See *infra*, § 1525.

¹⁵ *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 299, 57 S. W. 936, 82 Am. St. Rep. 295; *Herfort v. Cramer*, 7 Colo. 483; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Ligon v. Minton (Ky.)*, 125 S. W. 304; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Elliott v. Brady*, 192 N. Y. 221, 85 N. E. 69; *Smith v. Salomon*, 172 N. Y. S. 515; *McCabe v. Kelleher (Oreg.)*, 175 Pac. 608. See also cases

cited in the following note. A defrauded seller may prove in the buyer's bankruptcy for the price, and there after sue him for deceit. *Talcott v. Friend*, 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649.

¹⁶ *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 57 Fed. 685, 692, 18 U. S. App. 256, 616, 24 L. R. A. 417, 6 C. C. A. 508; *Farwell v. Hancock*, 120 Ill. 573, 577, 11 N. E. 875; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401.

the contract by the defrauded party under these circumstances is an unnecessary act, and no damages can be recovered.¹⁷ If this doctrine is logically carried out, however, it would be necessary also to hold that if the contract though not wholly executory is capable of rescission, and if thereby the parties can be restored to their former situation, no recovery can be had in deceit, because no damage has been suffered. It seems more accurate, however, to hold the damage is caused by the original transaction. Even if this is merely an executory contract, the contract is not void, and the result of the fraud is the existence of a contract to which the defrauded person is a party. Moreover, as has been previously shown,¹⁸ in most jurisdictions recovery is allowed on false representations on the basis of warranty; that is, the plaintiff recovers, not the damages caused by being induced to enter into the transaction, but the damages he suffers by the failure to make good the representations. Accordingly it is generally held that one who has been defrauded may, though the contract is executory, affirm the contract and perform it without forfeiting his right to recover damages for deceit. Certainly where the contract is even partially executed this result is clearly sound.¹⁹ The right to damage may be asserted by the defrauded person not only as plaintiff but as defendant. By recoupment, or counterclaim, he is allowed to deduct his damages when sued for failure to perform his obligations under the bargain.²⁰

¹⁷ *Thomas v. Birch* (Cal.), 173 Pac. 1102; *St. John v. Hendrickson*, 81 Ind. 350; *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52; *McCabe v. Kelleher* (Oreg.), 175 Pac. 608.

¹⁸ *Supra*, § 1392.

¹⁹ *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525, 35 N. W. 603, 5 Am. St. Rep. 697; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Whitney v. Allaire*, 4 Denio, 554, 1 N. Y. 305; *Allaire v. Whitney*, 1. Hill, 484; *Grabenheimer v. Blum*,

63 Tex. 369; *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625. In *Cain v. Dickenson*, 60 N. H. 371, the defrauded person when performing expressly reserved his right to sue for the fraud.

²⁰ *Wilson v. New United States Cattle Ranch Co.*, 73 Fed. 994, 36 U. S. App. 634, 20 C. C. A. 244; *Lilley v. Randall*, 3 Colo. 298; *Sharp v. Ponce*, 76 Me. 350; *Gent v. Ensor*, 41 Md. 24; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Sanborn v. Osgood*, 16 N. H. 112; *Lukens v. Aiken*, 174 Pa. St. 152, 34 Atl. 575. See also in regard to similar procedure for breach of warranty, *supra*, §§ 1391, 1464.

It is commonly said that the right to recover damages may be waived. Doubtless election to rescind the transaction operates as a bar to the right to recover damages.²¹ And a right of action for deceit may be settled in the same way as any other right of action—by a release under seal, or by a compromise or accord and satisfaction accompanied by sufficient consideration. In most if not all the cases relied on as showing the possibility of waiving a right to sue for fraud, the elements of accord and satisfaction will be found. That an assent or agreement or rescission without consideration or formal release will discharge a right of action for deceit already accrued cannot be admitted.²²

§ 1525. Rescission and restitution—reformation.

The alternative remedy of rescission and restitution is in its origin equitable, though now relief can generally be obtained at law. If the defrauded party has parted with nothing, but has merely entered into an executory obligation by simple contract it needs no citation of cases to establish the point that he may plead the fraud as a defense. If the obligation was under seal, this was not allowed in England prior to the Common Law Procedure Act of 1854;²³ and the early law in the United States was the same.^{23a} It was necessary to apply to equity for an injunction. As an unconditional perpetual injunction would be granted,^{23b} it followed that as soon as equitable pleas were allowed at law the defense became available without application to equity. If the defrauded person has parted with property which he wishes to regain, he is compelled to become an actor. Where the property is of a sort requiring formal transfer of

²¹ In *Cohon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, it was held that an action to rescind a contract might be amended into an action to recover damages for the fraud alleged to have been committed, but this seems unsound, as the assertion of the right to rescind without even beginning a suit seems a conclusive election. See *infra*, § 1469.

²² See *supra*, §§ 678 *et seq.*

²³ *Mason v. Ditchbourne*, 1 M. & Rob. 460; *Wright v. Campbell*, 2

F. & F. 393; Ames, *Legal Essays*, 106.

^{23a} *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Vandervelden v. Chicago & N. W. Ry. Co.*, 61 Fed. Rep. 54; *Halley v. Younge*, 27 Ala. 203; *Gage v. Lewis*, 68 Ill. 604, 613; *Huston v. Williams*, 3 Blackf. 170, 25 Am. Dec. 84; *Burrows v. Alter*, 7 Mo. 424; *Stryker v. Vanderbilt*, 1 Dutch. 482; *Dale v. Roosevelt*, 9 Cow. 307; *Wyche v. Macklin*, 2 Rand. 426.

^{23b} *Lovell v. Hicks*, 2 Y. & C. Ex. 46; Ames, *Legal Essays*, 106.

title, as land or shares of stock, it will generally be necessary for him to get the aid of a court having equity powers in order to bring about a restoration of the former status. The test of equity jurisdiction is the inadequacy of available remedies at law.^{23c} But, as previously shown,²⁴ in the case of chattel property a defrauded seller may regain title by trover or replevin or without the aid of a court; and a defrauded buyer may sue at law for the price which he paid.²⁵ It is not necessary that actual damage shall have resulted from fraud in order to justify rescission.²⁶ The transaction if rescinded must be rescinded as a whole.²⁷ Therefore, it is generally held that a seller who has sold goods on credit cannot, because the sale was induced by fraud, sue for the price before the period of credit has expired.²⁸ In some jurisdictions, however, either on the ground that the agreement for credit is a separate collateral agreement, or for some other reason, immediate recovery is allowed.²⁹ Though it seems impossible to support the maintenance of an action on the contract for the price before the period of credit has expired, there seems good ground for allowing the plaintiff at once to rescind the contract and, instead of suing in trover, to waive the tort and sue in *assumpsit*, not for the price of the goods but for their value.³⁰ The same reasoning as that applied to the case of sales has led to the conclusion that where one is fraudulently induced to contract to work for a specific sum, and has done the work he can recover in *indebitatus assumpsit* only according to the terms of the contract.³¹

^{23c} See Elliott, Contracts, §§ 2424 *et seq.*

²⁴ *Supra*, § 1370.

²⁵ See *supra*, § 1373.

²⁶ Barnes v. Century Sav. Bank, 149 Ia. 367, 128 N. W. 541.

²⁷ Pike's Peak Paint Co. v. Masury, 19 Colo. App. 236. And see cases in the following note.

²⁸ Ferguson v. Carrington, 9 B. & C. 59; Kellogg v. Turpie, 93 Ill. 265, 34 Am. Rep. 163; Prest v. Farmington, 117 Me. 348, 352, 104 Atl. 521, 523; Del-lone v. Hull, 47 Md. 112; Allen v. Ford, 19 Pick. 217; Jones v. Brown, 167 Pa. St. 395, 31 Atl. 647. And see Whitlock v. Heard, 3 Rich. L. 88.

²⁹ Blalock v. Phillips, 38 Ga. 216; Wigand v. Sichel, 3 Keyes, 120; Crossman v. Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; Heilbronn v. Herzog, 165 N. Y. 98, 58 N. E. 759; Jaffray v. Wolf, 4 Okla. 303, 47 Pac. 496.

³⁰ Barrett v. Koella, 5 Biss. 40; Diets's Assignee v. Sutcliffe, 80 Ky. 650; Crown Cycle Co. v. Brown, 39 Or. 285, 64 Pac. 451. See further, 44 Cent. L. J. 390; and *supra*, §§ 1455, 1458.

³¹ Selway v. Fogg, 5 M. & W. 83; Klaus v. J. H. Flick Const. Co., 198 Ill. App. 445; Prest v. Farmington, 117 Me. 348, 104 Atl. 521.

Another remedy is applicable also for a particular kind of fraud. Where a writing owing to the fraud of one of the parties, and mistake of the other fails to express the agreement at which they arrived, reformation will be allowed.³²

§ 1526. Time allowed for election of remedies.

It is generally said that a defrauded party must elect whether he will affirm the fraudulent transaction or rescind it. But a transaction though induced by fraud is not on that account void, it is only voidable. Consequently if nothing is done the transaction is not avoided, and the rights of the parties will be fixed by the agreement which they made without any manifestation of election. The right to sue for deceit which is based on the assumption that the fraudulent transaction is to stand does not, therefore, require prompt action by the injured party.³³ The Statute of Limitations alone prevents excessive delay, though it is obvious that delay in asserting a right of action for fraud will tend to show both that no fraud was perpetrated and, in connection with other circumstances, that if there was fraud, any right of action that may have existed has been discharged. Setting a fraudulent bargain aside, however, is an alternative right given on equitable principles to the injured party and, therefore, if this remedy is desired it must be sought with reasonable promptness after the fraud has been discovered.³⁴ But

³² *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. Ed. 721; *Medical Society v. Gilbreth*, 208 Fed. 899; *Trenton Terra Cotta Co. v. Clay Shingle Co.*, 80 Fed. 46; *Hand v. Cox*, 164 Ala. 348, 51 So. 519; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Dazey v. Binkley*, 285 Ill. 513, 121 N. E. 165; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Hitchins v. Pettingill*, 58 N. H. 386; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577; *Walker v. Bourgeois*, 88 N. J. Eq. 124, 102 Atl. 250; *Cleveland v. Bateman*, 21 N. Mex. 675, 158 Pac. 648, Ann. Cas. 1918 E.

1011; *Welles v. Yates*, 44 N. Y. 525; *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866, 51 N. W. 257; *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

³³ *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46.

³⁴ *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Mudsill Mining Co. v. Watrous*, 61 Fed. 163, 22 U. S. App. 12, 9 C. C. A. 415; *Blank v. Aronson*, 187 Fed. 241, 109 C. C. A. 327; *Bowden v. Spellman*, 59 Ark. 251, 259, 27 S. W. 602; *Board*

"The question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind; the immediate consideration being whether the period has been long enough to result in prejudice to the other party."²⁵ "In the case of an executory contract a refusal to perform any obligation thereunder and the defence of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and, unless

of *Water Com'rs v. Robbins*, 82 Conn. 623, 74 Atl. 938; *Cedar Rapids Ins. Co. v. Butler*, 83 Iowa, 124, 129, 48 N. W. 1026; *Nichols & Shepard Co. v. Wheeler*, 150 Ky. 169, 150 S. W. 33; *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208; *Baker v. Lever*, 67 N. Y. 304, 309, 23 Am. Rep. 117; *Trott v. Schmitt*, 119 N. Y. App. D. 474, 104 N. Y. S. 98; *Ditton v. Purcell*, 21 N. Dak. 648, 132 N. W. 347, 36 L. R. A. (N. S.) 149; *Robinson v. Roberts*, 20 Okl. 787, 95 Pac. 246; *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 649; *Houston Motor Car Co. v. Brashear* (Tex. Civ. App.), 158 S. W. 233.

²⁵ *Brown v. Young*, 62 Ind. App. 364, 110 N. E. 562, 565; *Basye v. Paola Refining Co.*, 79 Kan. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. Rep. 346; *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914 B. 859. In the case last cited, Swayse, J., said: "It is also settled that one who desires to rescind a contract must act within a reasonable time. *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; *Clampitt v. Doyle*, 73 N. J. Eq. 678, 70 Atl. 129. What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that, unless the situation of the other party has changed to his detriment, the contract

continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. *Clough v. London & N. Ry.* [1871] L. R. 7 Ex. 26; *Morrison v. Universal Marine Ins. Co.* [1873] L. R. 8 Ex. 197, 205; *United Shoe Machinery Co. of Canada v. Brunet* [1909] A. C. 330. He may even wait until action is brought against him, (*Clough v. London & N. Ry.*, *ubi supra*), and a plea setting up the fraud amounts to a rescission of the contract. *Lawton v. Elmore*, 27 L. J. Ex. 141; *Dawes v. Harness*, L. R. 10 C. P. 166; *Aaron's Reefs v. Twiss* [1896] A. C. 273. The case last cited was an action by a company against a shareholder for calls upon his stock. In such cases the right of creditors and other stockholders to have the stock paid for requires a prompt disaffirmance of the subscription to stock; but, inasmuch as in the case before the court the rights of creditors and other stockholders were not involved, it was held enough to set up the fraud by way of defence when action was brought."

In *Armstrong v. Jackson*, [1917] 2 K. B. 822, 830, *McCardie, J.*, said: "If, however, he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, then the Court will (apart from any other point) act by analogy to the Statute of Limitations and refuse to grant relief; see *Oelkers v. Ellis*, [1914] 2 K. B. 139, 151."

his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action. The failure of the vendee to disaffirm the contract might sometimes prevent the vendor from selling to another."³⁶

§ 1527. Acts manifesting election.

The defrauded party may lose his right of rescission by any act done after discovery of the fraud which indicates a willingness to allow the transaction to stand, such as the acceptance or demand of any benefit under the transaction.³⁷ As it is entirely possible for a defrauded person to take the position that if payment or security is at once made he will let the transaction stand, but otherwise will claim the right to rescind, a demand of security does not necessarily indicate affirmance of the contract.³⁸ But if security is actually obtained with knowledge of the fraud this will amount to affirmance,³⁹ as will retention of goods by the seller as security for an unpaid balance of the price.⁴⁰ Delay or action assuming the validity of the transaction will not prevent rescission if the fraud had not been discovered prior thereto,⁴¹ even though considerable time has elapsed.⁴² The election to rescind must be communicated either by bringing legal proceedings, asserting ownership of

³⁶ *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914 B. 859. See also *supra*, § 1461.

³⁷ *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26, 34; *Bulkley v. Morgan*, 46 Conn. 393; *O'Donald v. Constant*, 82 Ind. 212; *Stokes v. Burns*, 132 Mo. 214, 33 S. W. 460; *Fowler v. Bowery Bank*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019; *Genet v. Delaware Canal Co.*, 170 N. Y. 278, 296, 63 N. E. 350; *Davis v. Gifford*, 182 N. Y. App. D. 99, 169 N. Y. S. 492; *O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. 1030, 30 Am. St. Rep. 862. But see *Flower v. Brumbach*, 131 Ill. 646, 23 N. E. 335.

³⁸ *Cortland Mfg. Co. v. Platt*, 83

Mich. 419, 47 N. W. 330; *Boyd v. Shiffer*, 156 Pa. St. 100, 27 Atl. 60.

³⁹ *Bridgeford v. Adams*, 45 Ark. 136; *Joslin v. Cowee*, 52 N. Y. 90.

⁴⁰ *James Music Co. v. Bridge*, 134 Wis. 510, 114 N. W. 1108.

⁴¹ *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902. And see decisions cited in previous notes.

⁴² In *Armstrong v. Jackson*, [1917] 2 K. B. 822, 830, an action for rescission because of fraud, *McCardie, J.*, said: "I may point out that mere lapse of time is no answer to a plea of rescission. Here some six years elapsed before the plaintiff claimed to rescind. But in *Rothschild v. Brookman*, 5 Bli. (N. S.) 165, and in *Oelkers v. Ellis*, [1914] 2 K. B. 139, six years

property fraudulently conveyed, or otherwise.⁴³ And such election when once made is conclusive, and precludes remedies based on a continued existence of the transaction.⁴⁴

§ 1528. Exclusive character of remedies.

Though the cases are in some conflict, it seems clear on principle that it is an election to affirm the contract to bring an action for deceit. Such an action can be based only on the assumption that the plaintiff has been induced to enter into a transaction to his damage. This is inconsistent with an assertion of the nullity of the transaction.⁴⁵ It has sometimes been

had also elapsed; and in *York Buildings Co. v. Mackenzie*, 3 Paton App. Cas. 378, eleven years had elapsed, in *Gillett v. Peppercorne*, 3 Beav. 78, fourteen years had elapsed, and in *Oliver v. Court*, 8 Price, 127, fifteen years had elapsed before the plaintiffs respectively commenced their proceedings to set aside the transaction complained of. In cases like the present the right of the party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud: see per Lord Westbury in *Rolfe v. Gregory* (1865), 4 D. J. & S. 576, 579.

"*Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64, 73; *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26; *Hammond v. Pennock*, 61 N. Y. 145, 155; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678.

"*Wright v. Zeigler*, 70 Ga. 501; *Kearney Milling Co. v. Union Pacific Ry. Co.*, 97 Iowa, 719, 66 N. W. 1059, 59 Am. St. Rep. 434; *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328; *Powers v. Benedict*, 88 N. Y. 605.

"In making an order after breach of a contract, *Jessel, M. R.*, said: "The plaintiffs could not at the same time obtain an order to have the agreement rescinded and claim damages against the defendant for breach of the agreement." *Henty v. Schröder*, 12 Ch. D. 666, 667. The following cases seem rather to support the view that it is not

necessarily a conclusive affirmance of the contract to bring an action for deceit: *Emma Silver Mining Co. v. Emma Silver Mining Co. of New York*, 7 Fed. 401; *Cohoon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; *Gutheil v. Goodrich*, 160 Ind. 92, 94; *Kimball v. Cunningham*, 4 Mass. 502, 505, 3 Am. Dec. 230; *Percy v. Benedict*, 15 Hun, 282. See also *Williamson v. Hannan*, 200 Mich. 658, 166 N. W. 829; *Russell v. Wilber*, 150 N. Y. App. D. 52, 134 N. Y. S. 463 (*cf. Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799, and earlier New York decisions there cited). But the statement of *Sanborn, J.*, in *Stuart v. Hayden*, 72 F. d. 402, 411, 36 U. S. App. 462, 18 C. C. A. 618, *affd.* in 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274, is unanswerable: "One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract, and sue for his damages; or he may rescind it, and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction, and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time." In *Nash v. Minnesota Title & Trust Co.*, 163 Mass.

held that if special damages have been suffered, an action based on deceit may be maintained in spite of a prior rescission.⁴⁶ Where all that the injured party seeks in the way of rescission is to refuse performance or further performance on his own part, this seems admissible.⁴⁷ If a man is induced by fraud to enter into a contract with A, instead of with B, and the fraud is discovered only after it is too late to make a similar contract, the defrauded person may say: "I should not be compelled to perform or to continue to perform the contract with A. I wish to rescind; but his fraud has done me an injury in spite of the rescission since I cannot now make a contract with B." But if instead of such merely negative rescission, the injured party seeks positive relief by way of restitution, this seems to exclude a right to recover damages. To meet a practical difficulty, it has been suggested that where a defrauded seller has reclaimed such part of the goods as he can reach, he should be allowed to recover damages for the remainder in an action of deceit, and some decisions, at least, allow this.⁴⁸ But the only theory upon which part of the goods can be reclaimed is that the whole contract is rescinded. If the whole contract is rescinded the seller's remedy for goods which he cannot reach is not an action for deceit but for conversion, or, on principles of quasi-contract, for the value of the goods.⁴⁹ Though it is true that full redress for the injury cannot always be obtained by rescission, it must

574, 40 N. E. 1039, 28 L. R. A. (N. S.) 753, 47 Am. St. Rep. 489, rescission allowed against one party to a fraud, without satisfaction of judgment was held no bar to an action of deceit against another party. In *Cohoon v. Fisher*, 146 Ind. 583, a distinction was attempted between an action begun for rescission and one begun for deceit. It was suggested that in the latter case there was perhaps a conclusive election to affirm the contract, whereas in the former case there was no conclusive election to set it aside. The distinction seems untenable.

* See cases in the following two notes.

* *Warren v. Cole*, 15 Mich. 265; *Moran v. Tucker*, 40 R. I. 485, 101

Atl. 327. See also *Atlanta &c. R. v. Hodnett*, 29 Ga. 461.

* See *Lenox v. Fuller*, 39 Mich. 268; *American Pure Food Company v. Elliott*, 151 N. C. 393, 396, 66 S. E. 451, 31 L. R. A. (N. S.) 910.

* *Farwell v. Myers*, 64 Mich. 234, 31 N. W. 128; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; *Powers v. Benedict*, 88 N. Y. 605. See also *Re Hirschman*, 104 Fed. 69; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101. The seller cannot sue on the contract for the agreed price of the remainder of the goods. *Reed v. McConnell*, 133 N. Y. 425, 435, 31 N. E. 22; *American Woolen Co. v. Samuelsohn*, 226 N. Y. 61, 123 N. E. 154.

be remembered that it is only an alternative remedy, and that in an action based on deceit, the plaintiff if he so elects may always recover full damages. An analogous question in regard to remedies for breach of warranty has been previously considered.⁵⁰

§ 1529. Restoration of consideration.

In a suit in equity for rescission a plaintiff who has received consideration commonly offers in his bill to restore the consideration, and whether such an offer is made or not the decree in such a suit will provide, not simply for the return by the defendant of what he has wrongfully acquired, but for the restoration of the consideration by the plaintiff.⁵¹ The same principles apply where rescission is exercised without the aid of equity. The injured party must make an offer to restore what he has received on condition of receiving in return what he was defrauded into parting with,⁵² and if the offer is rejected must hold as bailee what he has received and refrain from exercising acts of ownership.⁵³ The place of return is the place of the original delivery.⁵⁴ Accordingly, if the defrauded party is unable to restore what he has received, rescission is impossible.⁵⁵

⁵⁰ See *supra*, § 1464.

⁵¹ See *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 97 C. C. A. 486; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004; *Parker v. Simpson*, 180 Mass. 334, 343, 62 N. E. 401; *McNaught v. Equitable Life Ass. Soc.*, 136 N. Y. App. Div. 774, 121 N. Y. S. 447.

⁵² *Clarke v. Dickson, E. B. & E.* 148; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Samples v. Guyer*, 120 Ala. 611, 24 So. 942; *Herman v. Haffenegger*, 54 Cal. 161; *Adam, Meldrum Co. v. Stewart*, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; *Doylestown Agr. Co. v. Brackett & Co.*, 109 Me. 301, 84 Atl. 146; *Tisdale v. Buckmore*, 33 Me. 461; *Thomas v. Beals*, 154 Mass. 51, 54, 27 N. E. 1004; *Owen v. Button*, 210 Mass. 219, 96 N. E. 333; *Putney v. Schmidt*, 16 N. Mex. 400, 120 Pac. 720;

Rumsey v. Shaw, 212 Pa. St. 576, 578; *Brady v. Oliver*, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60; *Wright v. Bristol Patent Leather Co.*, 257 Pa. 552, 101 Atl. 844; *Friend Bros. Co. v. Hulbert*, 98 Wis. 183, 73 N. W. 784; *Duluth Music Co. v. Clancey*, 139 Wis. 189, 120 N. W. 854.

⁵³ *Davis v. Gifford*, 182 N. Y. App. D. 99, 169 N. Y. S. 492. It seems, however, that after the lapse of a reasonable time a defrauded buyer who has paid the price must be allowed to enforce his lien on the goods by appropriate methods, without thereby losing his right of action for restitution of the price.

⁵⁴ *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77. See also *supra*, § 1463. Cf. *Rood v. Priestly*, 58 Wis. 255, 16 N. W. 546.

⁵⁵ See cases cited in preceding notes.

§ 1530. Exceptions to the Rule.

This rule, however, is subject to the exception that if the consideration was worthless it need not be returned.⁵⁶ And one who attempts to rescind a transaction on the ground of fraud, mistake or otherwise, is not bound to restore that which he has received by virtue thereof, when, in any event, he is entitled to retain it as indisputably his own whatever may be the fate of his effort to rescind the transaction.⁵⁷ In other cases where on the particular facts it seems equitable to allow rescission without complete or perfect restoration of the consideration, the modern tendency seems to favor the relief, and courts of law adopting the more liberal rule in equity no longer adhere to the strict construction upheld in earlier decisions.⁵⁸ Thus diminu-

⁵⁶ *Dulaney v. Jones*, 100 Miss. 835, 57 So. 225; *Babcock v. Case*, 61 Pa. St. 427, 100 Am. Dec. 654. On this principle a fraudulent buyer's note which has not been negotiated by the seller need not be returned. It is enough if produced for surrender at the trial. *Wilcox v. San Jose Fruit Packing Co.*, 113 Ala. 519, 28 So. 376, 59 Am. St. Rep. 135; *Coghill v. Boring*, 15 Cal. 213; *Morse v. Woodworth*, 155 Mass. 233, 249, 27 N. E. 1010, 29 N. E. 525; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Wood v. Garland*, 58 N. H. 154; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 55, 30 N. E. 254, 28 Am. St. Rep. 548; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. 67. But see *contra*, *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875. It is otherwise in case of a note of a third person. *Northampton Nat. Bank v. Smith*, 169 Mass. 281, 61 Am. St. Rep. 283; *Cook v. Gilman*, 34 N. H. 556; *Spencer v. St. Clair*, 57 N. H. 9; *Baker v. Robbins*, 2 Denio, 136; *Whitcomb v. Denio*, 52 Vt. 382. Unless the note is worthless. *Mahone v. Reeves*, 11 Ala. 345; *Estabrook v. Swett*, 116 Mass. 303; *Duval v. Mowry*, 6 R. I. 479. Compare *Cook*

v. Gilman, 34 N. H. 556; *Spencer v. St. Clair*, 57 N. H. 9; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858. Other illustrations of worthless property may be found in *Dill v. O'Ferrrell*, 45 Ind. 268; *Haase v. Mitchell*, 58 Ind. 213; *Kent v. Bornstein*, 12 Allen, 342; *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

⁵⁷ *Cobb v. Tirrell*, 137 Mass. 143; *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646, citing *Cobb v. Fogg*, 166 Mass. 466, 479, 44 N. E. 534; *Bruce v. Anderson*, 176 Mass. 161, 162, 57 N. E. 354. The court adds: "In this respect the rule at law approaches that prevailing in equity. *Thomas v. Beals*, 154 Mass. 51, 55, 27 N. E. 1004; *Parker v. Simpson*, 180 Mass. 334, 343, 62 N. E. 401; *Atkins v. Atkins*, 195 Mass. 124, 132, 80 N. E. 806, 11 L. R. A. (N. S.) 273, 122 Am. St. Rep. 221; *Kley v. Healy*, 127 N. Y. 555, 561, 28 N. E. 593."

⁵⁸ In *Bassett v. Brown*, 105 Mass. 551, the court said: "This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (*Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103) and the sack that covered the rejected bale of cotton. *Morse v. Brackett*, 98 Mass. 205, and

tion in value of the consideration by lapse of time,⁵⁹ or by reasonable use before the discovery of the fraud,⁶⁰ or the application of the consideration for the defendant's benefit,⁶¹ or the use of part of the consideration in testing,⁶² will not prevent rescission, nor will inability to return the consideration when the inability is due to the wrongful conduct of the fraudulent party.⁶³ The matter has been thus summarized: "That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required."⁶⁴ In some cases even where restoration of the consideration is entirely possible, it has not been required. Thus where the wrongdoer has injured goods fraudulently obtained by him to a greater extent than the consideration he gave, it has been held that the defrauded person need not return the latter as a condition of rescission,⁶⁵ or where the party seeking relief has suffered for any reason a greater loss than the consideration which he re-

104 Mass. 494." Compare with these decisions the cases in the following notes. In equity if the inability of the injured party to make complete restitution is due to no fault on his part, and substantial justice can be done without it by proper terms in the decree, rescission will be allowed. *Payne v. Hiram Lindsey Co.*, 71 Wash. 293, 128 Pac. 678.

⁵⁹ *Armstrong v. Jackson*, [1917] 2 K. B. 822.

⁶⁰ *Gatling v. Newell*, 9 Ind. 572. Even where rescission is sought merely for breach of contract, valuable use of the property has been held not to preclude rescission. See *supra*, § 1460. A reasonable rental value, however, might properly be deducted if the use has been valuable. *Allen v. Talbot*, 170 Mich. 664, 137 N. W. 97.

⁶¹ *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663.

⁶² *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440, 443, 37 So. 199.

⁶³ *Clark v. Wells*, 127 Minn. 353, 149 N. W. 547, L. R. A. 1916 F. 476; *Hammond v. Pennock*, 61 N. Y. 145; *Hamrah v. Maloof*, 127 N. Y. App. Div. 331, 111 N. Y. S. 509; *Gates v. Raymond*, 106 Wis. 657, 82 N. W. 530. In the latter case the defendant fraudulently caused the plaintiff to become intoxicated and sell his horse and then lose at poker to the defendant and his associates the consideration.

⁶⁴ *Sloane v. Shiffer*, 156 Pa. St. 59, 64, 27 Atl. 67. But the fact that a defrauded buyer has disposed of the goods before discovery of the fraud will not excuse restoration. *Smith v. Brittenham*, 98 Ill. 188.

⁶⁵ *Phenix Iron Works v. McEvony*, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527.

tains.⁶⁶ Where circumstances permit, some courts also have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer.⁶⁷ This is the most satisfactory disposition of many cases. If property fraudulently obtained has got into the hands of a third person who is not a purchaser for value, he is not allowed to object to a claim of the defrauded party for the return of the property that the consideration has not been restored to the fraudulent person.⁶⁸ Frequently a fraudulent seller will refuse to receive the goods when offered in rescission of the bargain, and as to the rights of the buyer then, it has been said: "A purchaser who is defrauded by the seller, and who in the lawful exercise of his right to rescind renders the property to the seller, who refuses to receive it, is under no other obligation to him than to retain the property as his bailee and agent,⁶⁹ and, after notice of his intention, may in good faith dispose of the same for account of the owner. If he sells the property otherwise than in good faith, the extent of his liability would be the fair market value of the same."⁷⁰ Doubtless such a right of re-

⁶⁶ In *Page Belting Co. v. Prince*, 77 N. H. 309, 313, 91 Atl. 961, the court said: "Because of this fraud, the Wallaces claim to exercise an equitable right of rescission. It is objected that this cannot be done because they have kept the bonds received by them as a part of the repudiated transaction. While by the strict common-law rule one could not rescind save by putting the other party in *statu quo*, the theory has been much broken in upon since the distinction between legal and equitable relief has come to be largely disregarded; and the rule now in this jurisdiction is that the rescinding party is only required 'to do what equitably he ought to do.' *Mead v. Welch*, 67 N. H. 341, 342, 39 Atl. 970; *Thorpe v. Packard*, 73 N. H. 235, 60 Atl. 432. See, also, *Sipola v. Winship*, 74 N. H. 240, 66 Atl. 962.

⁶⁷ In view of the fact that the Wallaces have made a substantial loss in the transaction, even after retaining

the bonds, it seems plain that equity would not require that the bonds or their proceeds be given up."

⁶⁸ *Ladd v. Moore*, 3 Sandf. 589; *Evans v. Brooks*, 34 Okl. 55, 124 Pac. 599; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Warner v. Vallily*, 13 R. I. 483; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206; *Hale v. Bank of Baldwin*, 143 Wis. 303, 127 N. W. 969. See also *Wilson v. Burks*, 71 Ga. 862; *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43; *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146; *Brewster v. Wooster*, 131 N. Y. 473, 30 N. E. 489; *Mason v. Lawing*, 10 Lea, 264.

⁶⁹ *Stevens v. Austin*, 1 Met. 557; *Schoonmaker v. Kelly*, 42 Hun, 299; *Frost v. Lowry*, 15 Ohio, 200.

⁷⁰ If he uses the property as his own, he loses the right of rescission. *Mizell v. Watson*, 57 Fla. 111, 49 So. 149.

⁷¹ *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631. See

sale is allowable, but in view of the chance for subsequent dispute as to be propriety of the buyer's conduct, if it does not involve expense or any great degree of care, it would seem safer for a defrauded buyer who wishes to rescind the transaction to retain the goods on behalf of the fraudulent seller if the latter refuses to assent to rescission.

§ 1531. Rescission allowed only against fraudulent person.

As has already been seen,⁷¹ fraud may sometimes be of such a character as to preclude assent to a bargain by the defrauded person. If goods are obtained in this way no property passes to the fraudulent person, and the defrauded person's title may be asserted even against purchasers for value.⁷² But in the ordinary case of fraud, the defrauded person is induced to give his assent to the bargain. If the bargain is a non-negotiable executory contract which has been induced by the fraud of one contractor the other may, in spite of any assignment, refuse to be bound by the transaction,⁷³ since even a purchaser for value of a non-negotiable chose in action can stand in no better position than his assignor. If, however, title to a negotiable contract or to goods be secured by fraud, a purchaser from the fraudulent person acquires this title, and if he had no notice of the fraud and was not a volunteer, no equity exists against him. As commonly expressed, a purchaser for value of the voidable title of the fraudulent person acquires an indefeasible title.⁷⁴ Not only may the contract be avoided as against pur-

also *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168.

⁷¹ *Supra*, § 1488.

⁷² *Ibid.*; § 1517.

⁷³ Even though by statute the assignee of such a contract may sue in his own name, his rights are limited to those of his assignor. *Chrysler v. Renois*, 43 N. Y. 209. But if the assignee subsequently collects the claim in good faith, he cannot be deprived of the proceeds. *Fidelity Mut. L. Ins. Co. v. Clark*, 203 U. S. 64, 51 L. Ed. 91, 27 S. Ct. 19.

⁷⁴ *White v. Garden*, 10 C. B. 919; *Leask v. Scott*, 2 Q. B. D. 376; *Ste-*

venson v. Newnham, 13 C. B. 285, 303; *Lightman v. Boyd*, 132 Ala. 618, 32 So. 714; *Williamson v. Russell*, 39 Conn. 406; *Walp v. Mooar*, 76 Conn. 515, 517, 57 Atl. 277; *Mears v. Waples*, 3 Houst. 581, 4 Houst. 62; *Kern v. Thurber*, 57 Ga. 172; *Ohio & Mississippi R. R. v. Kerr*, 49 Ill. 458; *Titcomb v. Wood*, 38 Me. 561; *Hall v. Hinks*, 21 Md. 406; *National Bank of Bristol v. Baltimore & Ohio R. R.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; *Goodwin v. Mass. Loan & Trust Co.*, 152 Mass. 189, 198, 25 N. E. 100; *White v. Dodge*, 187 Mass. 449, 450, 73 N. E. 549;

chasers with notice,⁷⁵ but also against persons whose right was gratuitously acquired.⁷⁶ But unless it is unconscientious for the holder of the legal title to retain it, he will not be deprived of it. It is for this reason fraud of a third party "inducing the purchase of goods will not give the purchaser a right to rescind the contract—if the seller is not a party to the fraud, the contract must stand."⁷⁷

§ 1532. Double employment of agent.

If a party enters into a contract through an agent who was also secretly acting for the other party, the contract is not only unenforceable specifically against the principal,⁷⁸ but, on the ground of fraud if the other party knew of the double employment, and, it seems, of mutual mistake, if he did not, is subject unless ratified to a defence in any court;⁷⁹ and, for the same reason, if the agent enters into arrangements with third persons without the knowledge of his principal which give the agent an interest inconsistent with his duty to the principal, the latter may avoid the transaction.⁸⁰

Lee v. Portwood, 41 Miss. 109; *Porell v. Cavanaugh*, 69 N. H. 364, 41 Atl. 860; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Paddon v. Taylor*, 44 N. Y. 371; *Sinclair v. Healy*, 40 Pa. St. 417, 80 Am. Dec. 589; *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788; *Arnett v. Cloudas*, 4 Dana, 299.

⁷⁵ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

⁷⁶ *Mendenhall v. Treadway*, 44 Ind. 131; *Hogan v. Wixted*, 138 Mass. 270; *Gordon v. McCarty*, 3 Whart. 407; *Longenecker v. Church*, 200 Pa. St. 567, 575.

⁷⁷ *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 581, 40 N. E. 1039, 28 L. R. A. 753. See *supra*, § 1518.

⁷⁸ *Hesse v. Briant*, 6 De G. M. & G. 623; *Fish v. Leser*, 69 Ill. 394; *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1; *Marsh v. Buchan*, 46 N. J. Eq. 595, 22 Atl. 128. See also *Bunn v. Keach*, 214

Ill. 259, 264, 73 N. E. 419; *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378.

⁷⁹ *Findlay v. Pertz*, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30; *Bunn v. Keach*, 214 Ill. 259, 264, 73 N. E. 419; *Young v. Iowa Toolers, etc., Association*, 106 Ia. 447, 76 N. W. 822; *Hunter Realty Co. v. Spencer*, 21 Okl. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622; *Wiruth v. Lashmett*, 82 Neb. 375, 117 N. W. 887; *Hoerling v. Lowry*, 58 Wash. 426, 108 Pac. 1090; *Truslow v. Parkersburg Bridge, etc., R. Co.*, 61 W. Va. 628, 57 S. E. 51.

⁸⁰ *Panama & S. Pacific Tel. Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. App. 515; *Smith v. Sorby*, 3 Q. B. D. 552; *Findlay v. Perts*, 66 Fed. 427, 13 C. C. A. 559; *Alger v. Anderson*, 78 Fed. 729; *Young v. Hughes*, 32 N. J. Eq. 372; *Ritter v. Lehigh Valley R. Co. (Pa.)*, 7 W. N. Cas. 122. And see *Western Union Tel. Co. v. Union Pacific Ry. Co.*, 1 McCrary, 581; *Baltimore Sugar*

An exception to the general rule that an agent cannot accept employment from both parties, and that a contract entered into under these circumstances is fraudulent, has been laid down in some cases. It is universally admitted that if an agent or broker has any discretion, or if the principal is entitled to rely on him for his skill and judgment, it is fraudulent to act in a double capacity; but if an agent is employed merely as broker for the purpose of bringing parties together, and has nothing to do with fixing the price or terms of the bargain in question, he may act for both principals, and bargain for compensation from both.⁸¹ The exception has been denied, however, in other jurisdictions.⁸² The questions whether the agent can recover compensation and whether the contract is enforceable between the parties must receive the same answer, for where the agent is acting improperly for both parties the transaction may be rescinded on the application of either.⁸³ Other cases of fraudulent misconduct by an agent have been previously considered.⁸⁴

§ 1533. Contracts between a corporation and its officers.

In spite of the principle stated in the preceding section, it is settled "that directors may contract with agents or employes of their corporation, who are likewise directors, and that, though always subject to close scrutiny, and voidable for fraud or overreaching, such contracts are not *ipso facto* void;⁸⁵ that

Co. v. Campbell, etc., Co., 83 Md. 36, 34 Atl. 369; Landis v. Saxton, 89 Mo. 375, 1 S. W. 359; Kelsey v. New England St. Ry. Co., 62 N. J. Eq. 742, 48 Atl. 1001; Yeoman v. Lasley, 40 Ohio St. 190. Cf. Yellow Poplar Lumber Co. v. Daniel, 109 Fed. 39, 48 C. C. A. 204. But in Merchants' Line v. Baltimore & O. R. Co., 222 N. Y. 344, 118 N. E. 788, it was held that the fact that the plaintiff had bribed an employee, thinking him an official of the defendant corporation, did not invalidate a contract entered into later with the real official, who knew nothing of the bribery.

⁸¹ Green v. Robertson, 64 Cal. 75, 28 Pac. 446; Ranney v. Donovan, 78 Mich. 318, 44 N. W. 276; Webb v. Paxton 36,

Minn. 532, 32 N. W. 749; Knauss v. Gottfried, etc., Brewing Co., 142 N. Y. 70, 36 N. E. 867. Cf. Erland v. Gibbons, 176 N. Y. App. Div. 552, 163 N. Y. S. 582.

⁸² Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; Porter v. Woodruff, 36 N. J. Eq. 174.

⁸³ Fish v. Leser, 69 Ill. 394; New York Central Trust Co. v. Nat. Protection Ins. Co., 14 N. Y. 85; and cases cited *supra*, n. 78,79, see also *supra* § 1022.

⁸⁴ *Supra*, § 1022.

⁸⁵ Sotter v. Coatesville Boiler Works, 257 Pa. 411, 101 Atl. 744, 747, citing Union Pacific R. Co. v. Credit Mobilier of America, 135 Mass. 367, 376; Nye v. Storer, 168 Mass. 53, 55, 46 N. E.

when for compensation, and the latter is fair and reasonable, these contracts will be sustained;⁸⁶ further, that a contract of this kind may be ratified and made valid by acquiescence of the stockholders;⁸⁷ finally, that where a board of directors votes excessive salaries to certain of its members, who are also officers or employés of the corporation, even though such action may subsequently be ratified at a stockholders' meeting, when called in question by a minority stockholder, the action of the board is subject to review by a court in equity, and, if the finding of the latter tribunal is that the salaries in question are exorbitant, it may determine the value of the services rendered by the officers or employés in question, and restrain the corporation from paying in excess thereof.⁸⁸ But, of course, in such instances, ordinarily, there is no way of satisfactorily determining the value of services to be rendered in the future, when conditions, *ex necessitate*, may be essentially different from those in the past. Therefore, generally speaking, in cases of this character, a court of equity may deal only with the facts presently before it, and thus determine the reasonable compensation actually earned. Exceptional cases may arise, however, where, contemplating a continuance of an ascertained state of facts and guarding their decree accordingly, judicial tribunals may determine compensation to be paid in the future. . . .

"If courts may depart at will from the rule just stated, and

402. As to contracts made on behalf of one corporation with another by a director in both, see *Globe Woolen Co. v. Utica Gas &c. Co.*, 224 N. Y. 483, 121 N. E. 378.

⁸⁶ Citing *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8; *Sotter v. Coatesville Boiler Works*, 257 Pa. 411, 101 Atl. 744; *Fillebrown v. Hayward*, 190 Mass. 472, 478, 77 N. E. 45; *Fraker v. A. G. Hyde & Sons*, 135 N. Y. App. Div. 64, 119 N. Y. S. 879.

⁸⁷ *Sotter v. Coatesville Boiler Works*, 257 Pa. 411, 101 Atl. 744, citing *Kelley v. Newburyport & Amesbury Horse R. Co.*, 141 Mass. 496, 499, 6 N. E. 745. See also *Thomas v. Brown-*

ville &c. R. Co., 109 U. S. 522, 27 L. Ed. 1018, 3 Sup. Ct. Rep. 315.

⁸⁸ *Sotter v. Coatesville Boiler Works*, 257 Pa. 411, 101 Atl. 744, citing *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 310, 60 Atl. 941 *et seq.*; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 379, 27 N. E. 487; *Fillebrown v. Hayward*, 190 Mass. 472, 478, 77 N. E. 45. The Pennsylvania court added: "This rule is fully recognized by us in *Russell v. Patterson*, 232 Pa. 113, 81 Atl. 136, 36 L. R. A. (N. S.) 199."

substitute their judgments for the legally exercised discretion of the directors of private business corporations, in determining the question of future compensation to be paid to the latter's employes then there is no reasonable limit to the right of judicial interference with corporate management; but, fortunately, this is not the law." ⁸⁹

§ 1534. Fraud as to creditors.

A bargain may be vitiated not only by fraud of one of the parties aimed against the other, but by the fraud of one or both aimed against the creditors of one of them. Such transactions generally relate to executed transfers, and the decisions on them, therefore, fall outside the scope of this book except in so far as they show by analogy the invalidity of an executory transaction. Where the property transferred or surrendered is a chose in action, the matter has been previously touched upon.⁹⁰ It is possible, however, for an executory agreement to be fraudulent as against creditors, and without considering what may be the rights or remedies of creditors in attacking such an agreement, it may be said that as between the parties it is an illegal agreement.⁹¹

⁸⁹ *Sotter v. Coatesville Boiler Works*,
257 Pa. 411, 101 Atl. 744.

⁹⁰ See *supra*, § 397.

⁹¹ See *infra*, § 1739.

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§ 1535. Effect of mistake on contracts.

All writers who deal with the topic of mistake agree that there is great confusion of thought in discussions of the subject, but they attribute this confusion to different causes.¹ The chief causes though frequently not recognized as such seem to be,

1. Confusion as to whether mental mutual assent or an expression of assent is an essential element in the formation of a contract;

2. Borrowing from the Civil law classification and rules which are not appropriate to English law; and

3. Failure to distinguish between an attempted contract entirely void because of mistake, and a contract which is merely voidable.

¹ See 11 Columbia L. Rev. 197 (Roland R. Foulke).

The term mistake itself is moreover often used with two meanings. Story defines mistake as including some unintentional act, or omission, or error;² and this definition is often repeated. Another learned writer says "the conception of a mistake involves in the first place the idea of action as a mistake can never be predicated of a state of mind."³ In every-day speech mistake is doubtless used in two senses. When a man labors under a mistake his mental attitude is referred to, but it might also be said that one of his acts was a mistake. In legal phraseology, however, it seems that mistake is always merely a state of mind. Of course a state of mind produces no legal consequences unless some act capable of legal consequences takes place concurrently with the state of mind, and this is the only accurate meaning which can be attached to the statement often made that mistake as such has no legal effect; but what the effect of the act would be apart from the mental error, and whether this effect is changed because of that error, are two questions which must be separately considered. The subject of mistake properly includes only the second of these questions and involves the effect of erroneous ideas upon legal acts, or upon acts which would have been legal acts had it not been for the error.⁴ In this treatise the subject is necessarily confined to the effect of such erroneous ideas upon acts connected with the formation, performance or discharge of contracts.

§ 1536. Confusion concerning elements of contract.

If mental assent is a necessary element of contract, and if offer and acceptance are important merely as proving this mental assent, as the ultimate fact to be established, a failure of

² 1 Equity Jurisprudence (13th ed.), 108.

³ 11 Columbia Law Rev. 199 (Foulke).

⁴ An illustration of the danger of understanding mistake in the sense of act rather than in the act of state of mind is illustrated by the language in *Meek v. Hurst*, 223 Mo. 688, 696, 122 S. W. 1022, and *Wolz v. Venard*, 253

Mo. 67, 83, 161 S. W. 760, intimating that a mistake of a scrivener in writing a deed was of no consequence unless he was the agent of both parties, for otherwise it is said the mistake (apparently meaning the erroneous writing) would not be that of both parties. It is obvious that the mental error of both does not depend on the agency of the scrivener.

either party to express his actual intent is of vital importance as indicating that no assent existed though the appearance of assent might be established by an offer and acceptance. That is, if A said, "I offer to sell my horse" for a certain price when he meant he would sell his cow, and the offeree accepted the offer intending to buy the horse, there would be no contract because no mutual assent.

On the other hand, if the expression of assent by the parties is what constitutes a contract, there are the essential elements in the case in question. As has previously been shown,⁵ it seems clear that whatever difference there may be in the expressions of courts,⁶ the actual results of the decisions favor the objective theory. This is sufficiently indicated in the decisions at law on the parol evidence rule (which is necessarily based on the assumption that the written expression of the parties is controlling) and by the decisions on unwritten contracts enforcing liability although there may have been misunderstanding between the parties,⁷ for under the subjective view any misunderstanding between the parties would be fatal unless an estoppel could be made out. Doubtless the law is generally expressed in terms of subjective assent, rather than of objective expressions, the latter being said to be "evidence" of the former, as for example in the so-called parol evidence rule; but when it is established that this is no rule of evidence⁸ the whole subjective theory falls to the ground. Under the guise of conclusive presumptions of mental assent from external acts, the law has been so built up that it can be now expressed accurately only by saying that the elements requisite for the formation of a contract are exclusively external.

§ 1537. Elements of contract in equity.

It is in the decisions of courts of equity that expressions are most frequently found favoring the subjective theory. But though in a few cases promises are unquestionably enforced by

⁵ *Supra*, §§ 20, 94, 95, 606.

⁶ Which, however, in recent times often tend strongly to the objective side. "Assent in the sense of the law is a matter of overt acts, not of inward unanimity in motives, design, or the

interpretation of words." Holmes, J., in *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747.

⁷ See *supra*, § 94.

⁸ See *supra*, § 631.

equity which are not regarded as contracts in courts of law,⁶ it cannot be admitted that equity has a different fundamental theory of the elements of contract from that obtaining in courts of law. Equity professes to accept the legal conception of a contract; and indeed with the administration of legal and equitable remedies confided to the same hands, as is now common, it would be as difficult as it is objectionable to have two definitions; and if attention is fixed not so much on what courts of equity have said as on what they have done, it is clear that they, like courts of law, have adopted an objective standpoint. This is proved by the following circumstances:

(1) If the subjective theory were adopted, it would follow that in any case involving misunderstanding, that is a variance between the mental images of the proposed transaction formed by the two parties:

(a) There would be no occasion for the jurisdiction of equity. The agreement would be as invalid at law as in equity. The parol evidence rule does not forbid any proof which tends to show that no contract ever arose between the parties. It is true that the jurisdiction of equity to guard against a possible misuse of an apparent contract or conveyance might sustain occasional applications to a court of chancery on the principles of *quia timet*, but the bulk of decisions cannot be explained in this way.

(b) Any mistake, whether small or great, would have the effect of preventing a contract. An offer and acceptance must agree not simply in the most important matters but in every particular. If the court is seeking mental assent it must find that assent in all details.

(c) The fact that a mistake was favorable to the party making it would be immaterial.

(d) Negligence of a party subject to a misunderstanding would be immaterial in the absence of estoppel.

(e) Restoration by the plaintiff of the *status quo* could not be

⁶ For example, promises to give real estate where a promisee has entered and made improvements. (See *supra*, § 139.) Promises within the Statute of Frauds enforced by equity because of

part performance (see *supra*, § 494) do not fall in the same category since even at law a contract within the Statute of Frauds is recognised as a contract though unenforceable.

a condition of relief. The existence or non-existence of a contract cannot depend upon that. If no contract exists the appropriate remedy for such restoration would be a cross action by the defendant based on quasi-contractual principles.

2. There would be no propriety in the requirement by equity of unusually clear proof to justify relief by way of reformation. If the intent of the parties not expressed in the writing forms the contract, a preponderance of evidence should be sufficient for proof of the contract, as for proof of any other right.

3. Finally, the parol evidence rule is applicable in equity as well as at law. Where a case of fraud is alleged or such mistake as equity deems a basis for relief or a defence to a suit for specific performance is made out, the parol evidence rule is disregarded because equity will not allow it to work injustice.¹⁰ But aside from such cases, the memorials of the parties which they have agreed upon as the external expression of their will, establish the terms of the contract as conclusively in equity as at law.¹¹

If the fundamental nature of equity procedure is clearly kept in mind there will be little difficulty in harmonizing the apparent conflict of the statements by courts of law and courts of equity. When a court of equity says that one who has not the legal title to land is nevertheless the owner in equity, it is not denying rules established by courts of law or perhaps by statute for the transfer of real estate; it is saying that one who is confessedly not the formal owner should be given an owner's rights as against a certain person or persons.¹² So in dealing with contracts and conveyances made under a mistake, equity frequently denies one who has a legal contract or conveyance the right to enforce it (rescission) and subjects one who has made no legal contract or conveyance, to the same obligations as if he had (reformation); or unites the two forms of relief.

The practical importance of the distinction between this explanation of the action of a court of equity and that which is here criticised, is two-fold.

1. Where a conveyance is in question, the rights of a *bona fide* purchaser for value are recognized even though no estoppel

¹⁰ Tabor v. Cilley, 53 Vt. 487.

¹² See *supra*, § 446a.

¹¹ See *supra*, § 631.

could be found, *e. g.*, where the conveyance made under a mistake is not recorded or seen by the purchaser.

2. Not only in case of conveyances, but even if the transaction in question is an executory contract, under which an assignee could get no greater legal rights than his assignor, a court of equity is enabled to consider all the circumstances making it equitable or not to afford relief. If the question turned simply on what was the contract between the parties, only facts bearing on that issue would be pertinent. Negligence, lack of consideration for a sealed contract, lack of injury from the mistake or its effect on the rights of third parties, would be of no consequence.

The theoretical importance of the distinction in question is equally great. It furnishes a key to decisions at law and in equity which at first sight may be thought antagonistic, and combines them as parts of a harmonious system.

§ 1538. Confusion between void and voidable transactions.

Where a transaction concerns the transfer of title or possession from one party to another, the distinction between a void and a voidable transaction is readily brought to the notice of any one dealing with the subject. Where a horse is sold, or a negotiable note transferred, a subsequent purchaser for value in good faith will acquire indefeasible ownership if the original transaction was merely voidable. If, however, the transaction in question is a non-negotiable agreement, in an action thereon it will be generally practically unimportant for the defendant whether the transaction was void or was voidable by him. In either case he has an absolute defence; and though the other party to the transaction should assign his supposed contractual right to an innocent purchaser, the purchaser will have no greater right than the original contractor. To be sure if the agreement was merely voidable by one party, he would be at liberty to ratify the transaction and insist upon its performance but where either party has the option of avoiding the transaction, as is frequently the situation where there is mutual mistake of fact, ratification by one is impossible. A new mutual agreement seems essential in order to preclude either party from obtaining relief. But when it is remembered that such relief is not a matter of course, that one seeking relief must sus

tain a heavy burden of proof, that laches and a variety of circumstances may ultimately preclude the avoidance of the contract though it was originally voidable, it is obvious that even in the case of a non-negotiable contract a distinction must be made between a transaction voidable for mistake and one where the transaction was wholly void.

§ 1539. Distinction between transfer of title and enforceability of contract.

It is impossible to transfer ownership to something which does not exist. Accordingly if the parties to an agreement bargain for a transfer of title to supposedly specific goods under some mistake, the question whether title passes will depend upon whether the thing which exists is the very thing (as distinguished from a thing having the qualities) which the parties describe. For this question of transfer of title, therefore, the question is merely one of identity of the actual subject-matter with the agreed subject-matter.¹³ Of course the fact that the property passes does not preclude the possibility of rescission on account of failure of the subject-matter to correspond in character and quality to what was supposed. But non-existence of the subject of the bargain precludes the possibility of a sale, that is, a transfer of ownership, and equally precludes the possibility of a lease or bailment. The fact that a sale, lease, or bailment, is impossible, has led to the inference that there also cannot be a contract to transfer something which does not exist; but there is no difficulty in making such a contract, and parties who agree to buy or sell non-existent property have done this. If they are not liable it is because under the circumstances supposed they should be excused from liability rather than because the ordinary requirements for the formation of a contract do not exist.¹⁴ Where neither party is legally chargeable for the error of the other, the mutual mistake as well as impossibility will excuse both from liability. Where, however, as may not infrequently be the case, the buyer's error in regard to the existence of goods of the description in the contract is

¹³ See Williston on Sales, §§ 224, 225, for discussion of when this identity exists.

¹⁴ See *infra*, § 1946.

due to the express or implied representation of the seller that such goods do exist, the seller will not be excused from liability on the contract, unless their non-existence is due to their fortuitous destruction.

§ 1540. Distinction between fraud, honest misrepresentation, and mistake.

Fraud works legal consequences because it induces mistake on the part of the person defrauded; and honest misrepresentation when it produces legal consequences, does so for the same reason. Therefore the term mistake might well be used inclusively to cover all kinds of mental error, however induced, and fraud and honest misrepresentation would be subdivisions of the general heading mistake. It is usual, however, to use the term mistake as including only such mistake as is made without misrepresentation by the other party to the transaction; and the word is so used in this treatise. Sometimes the added connotation is introduced that the error is not due to the negligence or other breach of legal duty of the person laboring under the mistake,¹⁵ but this is to endeavor to confine the definition of mistake to cases where it has legal effect; and if the effort were carried to its logical conclusion it would be said that unless the mistake were mutual and related to a vital matter it was not a mistake. Such an attempt to give the definition of an ordinary English word a limited and artificial meaning is undesirable.

§ 1541. Effects of mistake.

The effect of mistake upon a bargain may be various: 1. A mistake may be such as to prevent any real expression of agreement, in which case the transaction is void. 2. There may be an expression of agreement which differs from the agreement intended by the parties. Here it may be equitable to reform the expression in conformity with the intention or, if not, to rescind the transaction. 3. There may be an expression of agreement and the expression may conform to the intention of the parties, but a mistake as to the way the agreement would apply to existing facts may make it equitable to rescind the transaction. 4. The mistake may be wholly without legal consequences.

¹⁵ *E. g.*, Cal. Civ. Code, § 1577. So 2 Pomeroy Eq. Jur., § 839.

In an earlier part of the book the question has been considered how far mistake prevents the formation of a contract;¹⁶ and the fourth class will be sufficiently indicated by assigning to it all cases not falling in the second or third class. In these two classes the parties have made contracts; the questions to be dealt with concern their right to avoid them altogether or to substitute others in their place.

§ 1542. Remedies for mistake.

The legal consequences of mistake in contractual transactions when it has effect but does not totally prevent the formation of a contract may be classified under three headings:

1. Reformation of the contract.
2. Rescission of the contract, which may involve merely freedom from liability, or may also involve a right of restitution either in *specie* or in money equivalent.¹⁷
3. Refusal of specific performance.

Mistake in order to have the effect last referred to need not fulfil the requisites for the affirmative relief of reformation or rescission, as the remedy of specific performance is said to be discretionary. This aspect of the subject has already been discussed,¹⁸ and attention here may be confined mainly to cases where reformation or rescission is in question. Either of these remedies generally implies the existence either of a contract or a conveyance to be reformed or rescinded; but often the possibility of injury from a written instrument though it is wholly invalid, will justify relief. Something should be said also of the right to recover property transferred, or its value, where the transfer was made on the erroneous assumption that a contract or bargain had been made.

§ 1543. Kinds of mistake—compromise.

Mistake has now been considered with reference to its effects upon a contract or sale, and also according to the remedy afforded by the law.

¹⁶ See *supra*, §§ 20, 94, 95, 95a.

¹⁷ It may thus involve reviving an obligation which by mistake has been discharged. In the following cases mortgages discharged by mistake were

revived: *Geib v. Reynolds*, 35 Minn. 331, 23 N. W. 923; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *McKensie v. McKensie*, 52 Vt. 271.

¹⁸ See *supra*, § 1425.

It next becomes necessary to define the kinds of mistake which produce the various effects referred to and entitle either or both parties to the remedies spoken of. The misunderstanding which renders an agreement void, has been considered previously.¹⁹ It remains therefore to consider what mistakes render contractual transactions voidable; and in what cases, if any, a mutual mistake as distinguished from a misunderstanding renders an agreement void, and to distinguish these cases from those where mistake has no legal effect.

In the first place there must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. Thus where a compromise is made, the fact that one or both parties was under a mistake in regard to the claim which was the subject of compromise, affords no ground for relief.²⁰ It should be observed, however, that even a compromise may be based on the assumed existence of some fact.²¹ The term compromise involves the conclusion that the parties assumed some question of fact or law was in dispute between them; but not necessarily all questions essential to the rights of the parties.

Moreover, the kind of mistake necessary to justify reformation must be distinguished from that required as a basis for rescission. If a writing does not contain what the parties had agreed or intended it should, the defect will be rectified unless too trivial to deserve the court's attention. But in order to justify rescission, the mistake must relate to an essential matter, since it is better to leave the parties with a contract approximating what they would have wished than with none;

¹⁹ *Supra*, §§ 94, 95.

²⁰ *Stewart v. Stewart*, 6 Cl. & F. 911; *Carlisle v. Barker*, 57 Ala. 267; *Troy v. Bland*, 58 Ala. 197; *Morris v. Munroe*, 30 Ga. 630; *Tyson v. Woodruff*, 108 Ga. 368, 33 S. E. 981; *Stover v. Mitchell*, 45 Ill. 213; *New York Life Ins. Co. v. Chittenden*, 134 Ia. 613, 112 N. W. 96, 11 L. R. A. 233, 120 Am. St. Rep. 444; *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268; *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143;

Sears v. Grand Lodge, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204; *Consolidated Fruit Jar Co. v. Wisner*, 103 N. Y. App. Div. 453, 93 N. Y. S. 128; *Lies v. Stub*, 6 Watts, 48; *Natcher v. Natcher*, 47 Pa. 496; *Bergenthal v. Fiebrantz*, 48 Wis. 435, 4 N. W. 89, and see cases *supra*, §§ 135-137.

²¹ *Rheel v. Hicks*, 25 N. Y. 289; *Trigg v. Read*, 5 Humph. 529, 544, 42 Am. Dec. 447; *Meinecke v. Sweet*, 106 Wis. 21, 81 N. W. 986.

unless in case the mistake is induced by misrepresentation of the other party. Any fact misrepresented which might naturally operate and did operate to induce the bargain will justify relief.²² But where neither party to the transaction is in fault for the other's error a stricter rule is applicable.

§ 1544. Mistake to justify rescission must relate to a fundamental assumption.

It is often said that a mistake in order to justify rescission must relate to the intrinsic nature of the bargain; and, in distinction from this, a mistake in regard to a collateral matter or in regard to some matter which formed merely the inducement to a contract is said to be without effect. It seems a better mode of statement to say that a mistake vitally affecting a fact or facts on the basis of which the parties contracted renders their contract voidable by an injured party. That is where the parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if the assumption is erroneous. This is a sound principle of justice, and should be applied without any further question as to whether the mistake is intrinsic or extrinsic, or whether it affects identity or quality. Though there may be no mistake as to the identity of a thing to which a contract relates, the basis of the bargain may so clearly be that the thing in question possessed certain qualities, or would fulfil a certain purpose as to make it inequitable to enforce the bargain if this assumption is not true.²³ Where the mistake in question is not such as to prevent the formation of a contract, the principle of justice warranting relief is based on something analogous to failure of consideration. There is a failure or prospective failure of the injured party, if not to receive what he bargained for, at least to receive what the parties supposed the bargain included.

²² See *supra*, § 1490.

²³ "A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not

be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." *Grymes v. Sanders*, Admr., 93 U. S. 55, 60, 23 L. Ed. 798.

§ 1545. Mistake in the formation and mistake in the performance of a contract.

A mistake may arise in the original agreement of the parties or in the performance of a contract as to which no mistake existed. Thus, when making their original bargain, the parties either may have used the name Blackacre in contracting, on the assumption that it was the designation of Whiteacre; or by their original contract may have correctly stated that Whiteacre was the subject of the bargain but thereafter a conveyance of Blackacre may have been made and accepted in supposed performance of the contract. The distinction between these cases, however, relates merely to the contract in which the mistake occurred. For even where the mistake is in the performance of the original contract, the performance itself if accepted, whether or not under a mutual mistake, will necessarily involve a further agreement. Moreover, where the transaction relates to land, the acceptance of a deed operates as a discharge of the original contract.²⁴ Whether this is true in a case of a transfer of personal property is properly a question of fact;²⁵ but in any event the acceptance of proffered performance at least involves an agreement to become the owner of what is offered. Therefore whether a court of equity rescinds or reforms the original contract, or merely the performance of the contract, it is, in the latter case as well as in the former generally, destroying or altering a bargain which the parties in fact made. If the situation is merely that one party to a contract has performed only in part, and there is neither a mistake as to the character of that part performance, nor a merger of the original agreement nor an agreement to take part performance as satisfaction, there seems no occasion to discuss mistake. Nothing need be rescinded or reformed. There is simply a right of action for breach of the original contract.²⁶

²⁴ See *supra*, § 926, *infra*, § 1918.

²⁵ See *supra*, §§ 700 *et seq.*

²⁶ In *Clark v. Stetson*, 115 Me. 72, 97 Atl. 273, 275, the court said: "The plaintiff and defendant agree that the purchase included all the stock on the farm, and all the farming implements and tools with a few exceptions.

There is no controversy over the stock. There is controversy over the hens and some of the implements. But the plaintiff himself inspected the premises before purchase, made out a long list of articles to be included in the sale, examined this list with the defendant, and they both agreed to its correctness.

§ 1546. Classification of the Civil law.

The Civil law, starting from the subjective standpoint that the existence of a contractual obligation or a transfer depends upon the will of the actor instead of on the natural reliance of one party to the transaction on words or acts of the other,²⁷ seeks to find what mistakes are so essential that the actor cannot be said to have accomplished a legal act. To this end a classification is made of misunderstanding where though there is an expression of mutual assent, there is no real assent, and essential error where though the parties mean the same thing by their expressions, and express assent, the actor does so under the assumption of the existence of an essential circumstance which in fact does not exist.

Essential error is divided into error (1), as to the nature of the transaction, (2), as to the person contracted with, and (3), as to the object to which the contract relates.²⁸

ness. When the plaintiff took possession, several of the articles which he supposed he had purchased had been taken or were withheld, and the defendant claimed that they were not included. This, however, did not prove that no contract had been made. If they had been taken by the defendant and belonged to the plaintiff, the plaintiff's legal rights were secure. But these rights grew out of the existence, and not out of the non-existence, of the contract itself."

²⁷ Even in the Civil law the emphasis seems increasingly laid on outward manifestation and reliance thereon. In the German Civil Code (Sec. 119, 120), it is indeed stated that a declaration of will may be avoided if made under a material mistake, or if incorrectly communicated; but it is also enacted (Sec. 122) that under these circumstances the declarant must compensate one who relies on the declaration. In the Swiss Code of Obligations, the editor (Rossel) says (p. 4), "Our Code has adopted the theory of declaration of will—the *Erklärungstheorie*, the intent of the

parties based on agreement of intention which they have reciprocally manifested, and not on their intention itself."

²⁸ "Cases of essential error. These cases agree in this, that the actor intends an expression of his will and a juristic result; but he does not express the juristic result which he intends,—rather he expresses another which he does not intend, without being aware, however, that he does not intend it. In cases of essential error, the transaction is invalid. . . . The particular cases of essential error are as follows:

"1. Error as to the nature of the transaction (*error in negotio*)—the actor intends to conclude a different transaction from that which he expresses; for example, he signs a bill of sale in the supposition that it is a lease.

"2. Error with respect to the person (*error in persona*)—the actor intends a different party than the one for whom he has expressed himself. But it is to be observed that this error is without interest to the actor in those cases in which the person is indifferent (e. g.,

This classification serves sufficiently to classify by their dramatic facts cases as they ordinarily arise; but in the English and American law, the classification has no further value. Neither the rights nor the remedies of the parties depend upon it. Misunderstanding may render an agreement void, but it may not be even voidable.²⁹ Error in regard to the person may render a transaction void; ³⁰ it may be rendered voidable,³¹ or it may be perfectly enforceable, the mistake having no effect.³²

A mistake as to the object to which the agreement relates may sometimes render the transaction void but sometimes only voidable.³³ A mistake as to the nature of the transaction may render it void,³⁴ or voidable;³⁵ or may have no effect at all.³⁶ Moreover, there are cases of mistake which do not fall within any of these categories which may, nevertheless, render a transaction voidable. No more specific rule can be given or is desirable than that already stated,—If the mistake vitally affects the basis upon which the parties contracted relief should

sales for cash), and hence does not influence the validity of the transaction.

"3. Error with respect to the object (*error in corpore*)—the actor intends a different object from the one he named in expressing his will. In contracts of sale, error as to qualities of the object which, according to mercantile understanding, determine the nature of the object (*error in substantia*) stand on the same basis as error with respect to the object.

"4. The so-called misunderstanding is on the same basis as essential error. That is to say, in contracts the error is essential if by reason thereof a mutual assent results in appearance only; each party errs with respect to the will of the other and expresses an intention which does not correspond thereto. The error may have to do with the nature of the legal relation (one pays a sum as loan, the other receives it as gift, so that there is neither a loan nor a gift), or the person of the other party (one obtains a loan from A, but believes he has obtained it from B, so that there

is no loan, but instead an 'unjust enrichment'), or the object (one intends to buy the Cornelian estate, the other to sell the Sempronian, so that no legal transaction results).

"Other kinds of mistake are without influence upon the validity of a legal transaction. . . . Also an error in the motive by reason of which the actor entered into the transaction, in general, is without influence upon its validity. But there are important exceptions." Baron, Pandekten, § 50, II, translated by Pound, Readings in Roman Law (2d ed.), 39.

²⁹ See §§ 94, 95.

³⁰ See *supra*, § 80.

³¹ See *supra*, § 1517.

³² *Ibid.*

³³ See *infra*, §§ 1559-1563.

³⁴ See *supra*, § 1488.

³⁵ As where a writing is negligently signed but the signature was induced by fraud. See *supra*, § 1516.

³⁶ As where a writing is negligently signed but there was no fraud. See *supra*, § 35.

be granted. The inadequacy of the classification just criticised seems to have been observed by the draftsmen of the German Civil Code, which contains a general provision not greatly differing from that here advocated.³⁷ It having been noted that the classification is merely for convenience of treatment, the situations which commonly arise may be considered.

§ 1547. Reformation of mistake in expression of contract.

Where a written agreement is not in conformity with the actual intention of the parties in a material matter, a court of equity will reform the writing in accordance with the actual agreement if innocent parties will not be affected thereby. The jurisdiction is confined to writings, but as to them it is clear.³⁸ "In the application of this principle, mistakes as to title have been corrected, the word 'heirs' substituted for 'successors,' omission of words of inheritance supplied, a deed reformed to bind a copartnership instead of an individual member, a mortgage in the name of an agent rectified by inserting the name of

³⁷ "If the declarant was, at the time of the declaration [of will] mistaken as to the substance of the same or did not at all intend to make such a declaration, he may contest the same, when it is to be assumed that he would not have made it, had he known the facts and had considered the matter advisedly. A mistake, relating to such qualities of persons or things, which in intercourse are considered material, shall be regarded as a mistake as to the substance of the declaration." German Civil Code, Sec. 119.

³⁸ *Fowler v. Fowler*, 4 DeG. & J. 250; *Walker v. Armstrong*, 8 DeG. M. & G. 531; *Hunt v. Rousmaniere's Admr.*, 1 Pet. 1, 13, 7 L. Ed. 27; *Walden v. Skinner*, 101 U. S. 577, 583, 25 L. Ed. 963; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 46 L. Ed. 64, 22 Sup. Ct. Rep. 10; *Philippine Sugar Estates Development Co. v. Government of Philippine Ids.*, 247 U. S. 385, 62 L. Ed. 1177, 38 Sup. Ct. 513; *Andrews v. Essex Ins. Co.*, 3 Mason,

6, 10; *Rogers v. Hinckle*, 249 Fed. 548, 161 C. C. A. 474; *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Cake v. Peet*, 49 Conn. 501; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Dunn v. O'Mara*, 70 Ill. App. 609; *Kinman v. Hill (Ia.)*, 156 N. W. 168; *Miller v. Davis*, 10 Kans. 541; *Inskoe v. Proctor*, 6 T. B. Mon. 311; *Canedy v. Marcy*, 13 Gray, 373; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Mahoney v. Minnesota, etc., Ins. Co.*, 136 Minn. 34, 161 N. W. 217; *Tesson v. Insurance Co.*, 40 Mo. 33, 93 Am. Dec. 293; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982; *Smith-Austernuhl Co. v. Jersey Rys. Advertising Co.*, 89 N. J. Eq. 12, 103 Atl. 388; *Albany City Sav. Bank v. Burdick*, 87 N. Y. 40; *Arlt v. Whitlock*, 65 N. Y. App. D. 246, 72 N. Y. S. 522; *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311; *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106.

the principal as mortgagor, and the principal substituted for a trustee who had been mistakenly designated and had bound himself as a contracting party.³⁹ If an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed, or otherwise."⁴⁰ An omission of an agreement by the grantee to assume encumbrances,⁴¹ or of a reservation in a warranty deed of certain encumbrances⁴² may similarly be supplied. Equity "will exercise its power to reform instruments, not only as between the original parties, but as to those claiming under them in privity, such as personal representatives, heirs, assigns, grantees, judgment creditors, or purchasers from them with notice of the facts."⁴³

§ 1548. Reasons and limits of reformation.

It is often said that in the exercise of this jurisdiction a court of equity is merely substituting the real transaction between the parties for the apparent one, but the explanation is inadequate. Even if it were granted that mental assent is essential to the formation of contracts,⁴⁴ it certainly cannot be claimed

³⁹ *Eustis Manufacturing Co. v. Saco Brick Co.*, 198 Mass. 212, 219, 84 N. E. 449, citing *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; *Hadlock v. Williams*, 10 Vt. 570; *Denys v. Shuckburgh*, 4 Y. & C. 42; *Colchester v. Culver*, 29 Vt. 111; *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Remington v. Higgins*, 54 Cal. 620; *Blakeman v. Blakeman*, 39 Conn. 320; *Hausman v. Burnham*, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; *Sparta School v. Mendell*, 138 Ind. 188, 37 N. E. 604.

⁴⁰ *Gaylord v. Pelland*, 169 Mass. 356, 359, 47 N. E. 1019, citing *Bernard's Township v. Stebbins*, 109 U. S. 341, 349, 27 L. Ed. 956; *Bullock v. Whip*, 15 R. I. 195, 2 Atl. 309; *Conover v. Brown*, 49 N. J. Eq. 156; *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; *Springfield Savings Bank v. Springfield Congregational Society*, 127 Mass. 516; *Chase v. Peck*, 21 N. Y.

581. See also *Harding v. Jewell*, 73 Me. 426; *Parsons v. Parsons*, 230 Mass. 544, 119 N. E. 1020.

⁴¹ *Williams v. Everham*, 90 Ia. 420, 57 N. W. 901; *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980.

⁴² *Zuspann v. Roy*, 102 Kan. 188, 170 Pac. 387. Other reservations were inserted in *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709; *Stines v. Hays*, 36 N. J. Eq. 369; *Uiklein v. Matthews*, 93 N. Y. App. D. 57, 86 N. Y. S. 924; *Marshall v. Homier*, 13 Okl. 264, 74 Pac. 368; *Baab v. Houser*, 203 Pa. 470, 53 Atl. 344; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275.

⁴³ *Schneider v. Bulger* (Mo. App.), 194 S. W. 737, 739, citing *Sicher v. Ramhousek*, 193 Mo. 113, 129, 91 S. W. 68. See also *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914 C. 1262.

⁴⁴ See *supra*, §§ 20, 94, 95.

that mental assent, which is unexpressed, constitutes a contract; and though parties have arrived at a definite understanding as to the terms of the proposed bargain, if they contemplate a writing as the first obligation binding upon them their mutual understanding prior to the writing will not make a contract.⁴⁵ Nor can even a fully expressed intention operate as a conveyance of land. Moreover, if there is, as undoubtedly is often the case, a contract prior to the erroneous writing expressing the actual intent, the writing has subsequently been accepted and agreed to as the contract or conveyance which shall be substituted for the original agreement. It is a confusing fiction to imagine that equity in reforming this later instrument is specifically enforcing an existing contract. An examination of the chancery cases shows no insistence on a binding agreement prior to the writing of which reformation is sought. Equity does insist that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain, for, otherwise, there would be no standard by which the writing could be reformed.⁴⁶ Knowledge by one party of the other's

⁴⁵ See *supra*, § 28.

⁴⁶ *Mackensie v. Coulson*, L. R. 8 Eq. 368, 375; *Hunt v. Rousmaniere's Adm'r*, 1 Pet. 1, 14, 7 L. Ed. 27; *Robertson v. Walker*, 51 Ala. 484; *Guilmartin v. Urquhart*, 82 Ala. 570, 1 So. 397; *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185; *Burt v. Los Angeles Olive Growers' Assoc.*, 175 Cal. 668, 166 Pac. 993; *Allen v. Kitchen*, 16 Idaho, 133, 100 Pac. 1052; *McGinnis v. Boyd*, 279 Ill. 283, 116 N. E. 672; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *White v. Shaffer*, 130 Md. 351, 99 Atl. 66; *Wood v. Standard Drug Store*, 192 Mich. 456, 158 N. W. 844; *Ellison v. Fox*, 38 Minn. 454, 38 N. W. 358; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022, 135 Am. St. Rep. 531; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483; *Ray v. Durham County*, 110 N. C. 169, 14 S. E. 646; *Allen v. Roanoke, etc., Co.*, 171 N. C.

339, 88 S. E. 492; *Mitchell v. Holman*, 30 Ore. 280, 47 Pac. 616; *Boyce v. Hamburg-Bremen Fire Ins. Co.*, 24 Pa. Super. 589; *Darden v. Vanlandingham* (Tex. Civ. App.), 189 S. W. 297; *Ledyard v. Hartford Fire Ins. Co.*, 24 Wis. 496; *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

In *Le Gendre v. Scottish Union & Nat. Ins. Co.*, 95 N. Y. App. Div. 562, 564, 88 N. Y. S. 1012, the court infringed upon this principle. The following extracts from the opinion explain the case: "We regard this as a plain case for the reformation of the policy. It is manifest that the plaintiff intended to insure the property contained in his residence. He doubtless knew, although even that has not been shown, that his house was on the north instead of the south side of the road; and it is evident that the erroneous description in the policy locating

mistake regarding the expression of the contract is equivalent to mutual mistake. Thus if one party before the execution of the instrument knew of or discovered the error in it, reformation will be allowed against him though the mistake is not strictly mutual.⁴⁷ And so reformation may be allowed to make an instrument conform to fraudulent misrepresentations.⁴⁸ Doubtless the mistake is one of law, but this should not preclude relief.⁴⁹

It is not enough to justify reformation that the court is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts.⁵⁰ Nor will equity

his house on the south side of the road was, at least so far as he is concerned, the result of some inadvertence or mistake. The defendant, however, contends that there was no mistake on his part. . . . Assuming . . . that the defendant meant to act in good faith and that it had no knowledge concerning the location of the property except that presented in the application, . . . plaintiff intended to procure insurance upon the household property in his residence and that is the property the defendant intended to insure, but in reducing their agreement to writing the word 'southerly' was erroneously inserted instead of the word 'northerly' as indicating the location of the residence of the assured with reference to the highway. The case, therefore, falls within the doctrine of the authorities that where there was no mistake in the agreement but merely a mistake in reducing it to writing the contract will be reformed." The answer to this is that the defendant never indicated any willingness to insure the plaintiff's property unless in a house on the southerly side of the road. Doubtless the correct description would not have prevented the defendant from issuing a policy; but the court is enforcing an agreement which it thinks the defendant would have been willing to make—not one it

ever expressed a willingness to make. See *infra*, n. 50.

⁴⁷ *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 37 L. Ed. 454, 13 Sup. Ct. 600; *Scott v. Spurr*, 106 Ky. 575, 184 S. W. 866; *Welles v. Yates*, 44 N. Y. 525. Cf. *supra*, § 1497.

⁴⁸ See *supra*, § 1525.

⁴⁹ See *infra*, § 1581.

⁵⁰ In *Barrow v. Barrow*, 18 Beav. 529, Romilly, M. R., said: "I am not aware of any case, and none has been produced to me, where, in the absence of fraud, such as the suppression of a fact that ought to have been communicated, this court has interfered to make a settlement conformable with what would have been the contract between the parties if all the facts material to be known by them had been there present to their minds."

In *Curtis v. Albee*, 167 N. Y. 360, 365, 60 N. E. 660, the court expressed this: "In the case before us both parties assented to the same thing, the one to sell and the other to buy a claim for \$2,036.54, and the assignment expresses precisely that and nothing else. Neither agreed to buy or sell a claim for \$1,191.28, and there was no mistake on the part of either in not thus describing the thing sold. A claim for the smaller amount was not in the mind of either party, for neither supposed it to exist, and hence their

reform a contract where acquired rights of *bona fide* purchasers for value would be disturbed.⁵¹ But neither creditors⁵² nor a trustee in bankruptcy⁵³ are such purchasers, and reformation may be had in spite of their adverse interest. Reformation nearly always involves rescission. If the instrument of which reformation is sought had no validity or effect, there would be no occasion to apply to equity unless by a bill *quia timet* in the cases where that might be appropriate to prevent an invalid document from injurious operation by its appearance of validity. Generally, therefore, the instrument of which reformation is sought is valid until avoided, and the first step towards the desired relief must be to rescind the written contract or conveyance into which the parties have entered; but where the parties clearly intended an instrument of a different tenor as to which their minds were at one, it is inequitable to destroy the transaction into which the parties actually entered except upon the terms of establishing a transaction into which they in-

minds could not have met on the transfer of such a claim. What the parties did not agree to cannot be added by the court. The defendant paid a small sum for a doubtful claim, large in amount, and ran the risk of losing what he paid for the chance of realising a great profit. He is entitled to the contract in the form in which it was made without interference by the court in the guise of reformation. The plaintiff got what he agreed to take and assigned what he agreed to assign, and he has no more right to a reformation of the contract than he would have to strike out a warranty of soundness from a bill of sale of a horse, because he and the purchaser both believed the horse to be sound when in fact it was unsound." See also *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *St. Anthony Falls Water Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199; *Webster v. Stark*, 10 Lea, 406, 413; *Hendricks v. Goodrich*, 15 Wis. 679. Cf. cases of alteration cited *infra*, § 1913, *ad fin.*

⁵¹ *Malden v. Menill*, 2 Atk. 8; *Early*

v. Owens, 68 Ala. 171; *Davidson v. Davidson*, 42 Ark. 362; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Mayor, etc., of Macon v. Dasher*, 90 Ga. 195, 16 S. E. 75; *Pence v. Armstrong*, 95 Ind. 191; *Dart v. Barbour*, 32 Mich. 287; *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207, Ann. Cas. 1918 D. 145; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Quick v. Stuyvesant*, 2 Paige, 84; *Ray v. Durham County*, 110 N. C. 169, 14 S. E. 646; *Coates v. Smith*, 81 Or. 556, 568, 160 Pac. 517; *Farmers' & M. Bank v. Citizens' Nat. Bank*, 25 S. D. 91, 125 N. W. 642; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. 786; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798. Thus where a note secured by mortgage had been transferred to a holder in due course, the mortgage could not be reformed. *Dunham v. W. Steele, etc., Co.*, 100 Mich. 75, 58 N. W. 627.

⁵² *Coates v. Smith*, 81 Or. 556, 568, 160 Pac. 517.

⁵³ *Zartman v. First Nat. Bank*, 216 U. S. 134, 54 L. Ed. 418, 30 Sup. Ct. 368.

tended to enter.⁵⁴ Circumstances may have supervened, however, making this impossible or inequitable, and in such a case rescission only is allowable.⁵⁵

§ 1549. Reformation can only make a writing express what parties intended should be written.

The province of reformation is to make a writing express the bargain which the parties desired to put in writing. Agreements of which they did not desire written expression will not be put into writing by decree of the court. Therefore, if parties intentionally make an oral agreement which is unenforceable for the reason that it is not in writing, the court cannot order a writing executed even though the parties erroneously supposed that their oral bargain was legally valid. Similarly, if the parties to a written instrument understand that part of their previous agreement has been omitted from the writing and rely on oral agreement with one another to vary or add in certain respects to the written agreement, whether they rely on moral obligation or believe that such a variation or addition is legally valid, equity cannot reform the writing by the insertion of the oral agreement.⁵⁶ Still more clearly if, because

⁵⁴ See *Laver v. Dennett*, 109 U. S. 90, 27 L. Ed. 867, 3 Sup. Ct. 73.

⁵⁵ Thus in *Abbott v. Dow*, 133 Wis. 533, 113 N. W. 960, the parties intending to convey lot 1, described, by a clerical error in their written contract, lot 2. Before discovery of the mistake, lot 1 was conveyed by the defendant, without fault on his part, to a purchaser for value without notice. The plaintiff was allowed rescission though the court said that except for the intervening rights of a third person, reformation would have been the proper remedy. See also *Jeakins v. Frazier*, 64 Kans. 267, 67 Pac. 854.

In *Brickey v. Linnertz*, 241 Ill. 187, 89 N. E. 342, a deed purported to convey land which the parties did not intend should be conveyed and which the grantor did not own; but the

grantor also did not own the land which the parties intended to be conveyed. The court rescinded the contract. See also *Macey v. Furman*, 90 Wash. 580, 156 Pac. 548.

⁵⁶ *Betts v. Gunn*, 31 Ala. 219; *Holland Blow Stove Co. v. Barclay*, 193 Ala. 200, 69 So. 118, L. R. A. 1915 D. 941; *Ligon's Adm. v. Rogers*, 12 Ga. 281; *Richardson v. Perrin*, 137 Ga. 432, 436, 73 S. E. 649; *Andrew v. Spurr*, 8 Allen, 412; *Brintnall v. Briggs*, 87 Ia. 538, 54 N. W. 531; *Mighill v. Rowley*, 224 Mass. 586, 113 N. E. 569; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718; *Trotter v. Brevoort*, 60 N. Y. App. D. 562, 69 N. Y. S. 1028; (*cf. Steinbach v. Prudential Ins. Co.*, 62 N. Y. App. D. 133, 70 N. Y. S. 809, 172 N. Y. 471, 65 N. E. 281); *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239;

of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make.⁵⁷

If, however, the mistake is of sufficient importance and the *status quo* can be restored, equity should rescind the whole transaction, unless the mistake is one of law and the court feels

Braun v. Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196; Pullen's Will, 166 Wis. 254, 165 N. W. 25.

In Hughes v. Payne, 27 So. Dak. 214, 217, 130 N. W. 81, the court said: "In a bill to reform a contract an allegation that, 'It was never conceived by either of the parties that it was necessary to reduce all of said contract to writing in order to make the same binding between the parties thereto,' negatives any theory of accidental omission, and does not present a cause for equitable relief. Clark v. Hart, 57 Ala. 390; Stodalka v. Novotny, 144 Ill. 125, 33 N. E. 534; Roundy v. Kent, 75 Iowa, 662, 37 N. W. 146; Andrew v. Spurr, 8 Allen, 412; Wise v. Brooks, 69 Miss. 891, 13 So. 836; Grieve v. Grieve, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. (N. S.) 1211."

In Meacham Con. Co. v. Hopkinsville, 164 Ky. 703, 707, 176 S. W. 187, the court said: "The authorities dealing with this question are not harmonious, some of them holding that when parties have deliberately entered into a written contract, with a full and clear understanding of its meaning and effect, neither of them will be allowed to say that the writing did not express their real intention or be permitted to vary or contradict its terms and conditions by evidence of prior or simultaneous verbal agreements or arrangements. Others hold that although the meaning and effect of the writing may have been fully understood, one of the parties, upon clear and convincing

evidence of a prior or present agreement that the terms and conditions as expressed in the writing should not be enforced or would not be binding may have it reformed to express the true intention and agreement of the parties at the time of its execution.

"This latter view was adopted by this court in the early case of Coger's Executors v. McGee, 2 Bibb, 321, 5 Am. Dec. 610."

"Other illustrative cases on the subject are Ware v. Cowles, 24 Ala. 446, 60 Am. Dec. 482; Stevens v. Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499; Rearich v. Swinehart, 11 Penn. St. 233, 51 Am. Dec. 540; Dwight v. Pomeroy, 17 Mass. 303, 9 Am. Dec. 148; Oliver v. Oliver, 4 Rawle, 141, 26 Am. Dec. 123; McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703; Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181. See also Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 854.

"If this were a private case between private individuals involving private rights, we would follow the rule laid down in Coger v. McGee, but we do not think the equitable principle announced in that case should be allowed to control this one. The mayor of the city was empowered by the council to execute this contract, and it does not appear that the council at any time consented or agreed that the contract as written should be construed otherwise than according to its terms."

⁵⁷ See the preceding section.

constrained by that circumstance; and though a direct decree of reformation could not be granted, it would be proper to make the decree of rescission conditional on the refusal of the defendant to assent to reformation.

§ 1550. Reformation of conveyances.

The commonest illustrations of reformation concern conveyances. Where a deed conveys a different or larger estate or right than was intended, and both parties shared an intent as to the estate which should have been conveyed, the grantor is allowed a reformation of the instrument so that it shall express this intent;⁴⁸ and under similar circumstances where a deed conveys a smaller estate or gives a smaller right than was intended, or inadequately describes an estate or right, the grantee is allowed a reformation of the instrument so that it shall express the real intention.⁴⁹ Where, however, the parties misap-

⁴⁸ *Baker v. Paine*, 1 Ves. Sr. 456; *Rob v. Butterwick*, 2 Price, 190; *Murray v. Parker*, 19 Beav. 305; *Iverson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66; *Philippine Sugar Estates Development Co. v. Government of Philippine Ids.*, 247 U. S. 385, 62 L. Ed. 1177, 38 Sup. Ct. 513; *Dulo v. Miller*, 112 Ala. 687, 20 So. 981; *Felton v. Leigh*, 48 Ark. 498, 3 S. W. 638; *Capelli v. Dondero*, 123 Cal. 324, 55 Pac. 1057; *Jackson v. Magbee*, 21 Fla. 622; *Dazey v. Binkley*, 285 Ill. 513, 121 N. E. 165; *Schlehofer v. United States Brewing Co.*, 189 Ill. App. 470; *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943; *Pritchett v. Frisby*, 23 Ky. L. Rep. 433, 63 S. W. 10; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166; *Boulden v. Wood*, 96 Md. 332, 53 Atl. 911; *Tarbell v. Bowman*, 103 Mass. 341; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501; *Peques v. Mosby*, 15 Miss. 340; *Cassidy v. Metcalf*, 66 Mo. 519; *Tapley v. Herman*, 95 Mo. App. 537, 69 S. W. 482; *Cox v.*

Hall, 54 Mont. 154, 168 Pac. 519; *Busby v. Littlefield*, 31 N. H. 193; *Searles v. Churchill*, 69 N. H. 530, 43 Atl. 184; *Walker v. Bourgeois*, 88 N. J. Eq. 124, 102 Atl. 250; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559; *Andrews v. Gillespie*, 47 N. Y. 487; *Gallup v. Bernd*, 132 N. Y. 370, 30 N. E. 743; *Ring v. Mayberry*, 168 N. C. 563, 84 S. E. 846; *Maxwell v. Wayne Nat. Bank*, 175 N. C. 180, 95 S. E. 147; *Hamilton v. Asslin*, 14 S. & R. 448; *Baab v. Houser*, 203 Pa. 470, 53 Atl. 344; *Haines v. Stare*, 249 Pa. 494, 95 Atl. 81; *Lawrence v. Staigg*, 8 R. I. 256; *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 884; *Davidson v. Greer*, 3 Sneed, 384; *Ross v. Armstrong*, 25 Tex. Sup. 354, 78 Am. Dec. 574; *May v. Adams*, 58 Vt. 74, 3 Atl. 187; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829; *Allen v. Yeater*, 17 W. Va. 128; *Hagenah v. Geffert*, 73 Wis. 636, 41 N. W. 967; *Reade v. Armstrong*, 7 Ir. Ch. 266, 375; *M'Cormack v. M'Cormack*, 1 L. R. Ir. 119.

⁴⁹ *Barstow v. Kilvington*, 5 Ves. 593; *Johnson v. Bragge*, [1901] 1 Ch. 28; *Warren v. Crow*, 195 Ala. 568, 71 So.

prehended the extent of the grantor's interest and a conveyance of a half interest in an estate was made, which it was supposed was the whole of the grantor's right, for a consideration based on the supposed extent of the right, equity refused to reform the conveyance so that it would convey an additional right in fact owned by the grantor, without further consideration than that originally fixed for the half interest.⁶⁰

§ 1551. Reformation of releases.

A release though general in terms will be reformed so as to cover merely the right with regard to which the parties were dealing and exclude rights of which they were ignorant.⁶¹ This principle has sometimes been extended so as to exclude from the operation of a release unknown or unexpected consequences

92; *Hataway v. Carnley*, 198 Ala. 39, 73 So. 382; *Fuller v. Hawkins*, 60 Ark. 304, 30 S. W. 34; *Seegelken v. Corey*, 93 Cal. 92, 28 Pac. 849; *Palmer v. Hartford Co.*, 54 Conn. 488, 9 Atl. 248; *Taylor v. Glens Falls Co.*, 44 Fla. 273, 32 So. 887; *Kerchner v. Frasier*, 106 Ga. 437, 32 S. E. 351; *Way v. Roth*, 159 Ill. 162, 42 N. E. 321; *Benner v. Dove*, 283 Ill. 318, 119 N. E. 349; *Walls v. State*, 140 Ind. 16, 38 N. E. 177; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Hallam v. Corlett*, 71 Iowa, 446, 32 N. W. 449; *Stead v. Sampson (La.)*, 155 N. W. 978; *Bodwell v. Heaton*, 40 Kans. 36, 18 Pac. 901; *White v. Curd*, 86 Ky. 191, 5 S. W. 553; *Thomas v. Conrad*, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084; *Levy v. Ward*, 33 La. Ann. 1033; *Frantom v. Nelson*, 142 La. 850, 77 So. 867; *Philpott v. Elliott*, 4 Md. Ch. 273; *Hodge v. Cole*, 140 Mass. 116, 2 N. E. 774; *Chambliss v. Person*, 77 Miss. 806, 28 So. 21; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 960; *Palmer v. Wood*, (Mo. 1918), 201 S. W. 857; *Gwyer v. Spaulding*, 33 Neb. 573, 50 N. W. 681; *Hitchins v. Pettingill*, 58 N. H. 386; *Lewis v. Ferris (N. J. Eq.)*, 50 Atl. 630; *Steinbach v. Prudential Ins. Co.*, 172

N. Y. 471, 65 N. E. 281; *Manheimer v. Kuhn*, 173 N. Y. App. D. 135, 159 N. Y. S. 437; *Davenport v. The Widow, and Heirs of Sovil*, 6 Oh. St. 459; *Bradshaw v. Provident Trust Co.*, 81 Or. 55, 158 Pac. 274; *McLeod v. Kirkland (Tex. Civ. App.)*, 184 S. W. 721; *Darden v. Vanlandingham (Tex. Civ. App.)*, 189 S. W. 297; *Lord v. Horr*, 30 Wash. 477, 71 Pac. 23; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Smith v. McCune*, 78 W. Va. 307, 88 S. E. 846; *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106; *Gimbel v. Tolman*, 161 Wis. 382, 154 N. W. 628.

⁶⁰ *Jeakins v. Frasier*, 64 Kans. 267, 67 Pac. 854.

⁶¹ *Ramsden v. Hylton*, 2 Ves. Sr. 304; *Cholmondeley v. Clinton*, 2 Mer. 171, 352; *Lindo v. Lindo*, 1 Beav. 496, 506; *Lyall v. Edwards*, 6 H. & N. 337, 348; *London & South Western Ry. Co. v. Blackmore*, L. R. 4 H. L. 610, 623; *Gandy v. Macaulay*, 31 Ch. Div. 1; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353; *Reggio v. Warren*, 207 Mass. 525, 93 N. E. 805, 32 L. R. A. (N. S.) 340; *Dambmann v. Schulting*, 75 N. Y. 55, 62. See also *infra*, § 1825.

of a known right to which the release applied and was intended to apply. Thus where a release is given by one injured in an accident and more serious injuries develop than were supposed to exist at the time of the settlement, it is a question of fact whether the parties assumed as a basis of the release the known injuries, or whether the intent was to make a compromise for whatever injuries from the accident might exist whether known or not. On a fair interpretation not only of the language of the instrument, but of the intention of the parties, the latter supposition is more likely, but presumably out of tenderness for injured plaintiffs some courts have gone very far in finding the facts in accordance with the former possibility.⁶²

⁶² Thus in *Great Northern Ry. Co. v. Reid*, 245 Fed. 86, 89, 157 C. C. A. 382, the court said: "The release itself is as broad as it could be made, acquitting the company of all liability arising on account of the injuries received by appellee, whether then appearing or growing out of the same by development in the future, or arising or to arise out of any and all personal injuries sustained at any time or place while in the employ of the railway company prior to the date of the release. In such a release, however, the general language will be held not to include a particular injury, then unknown to both parties, of a character so serious as clearly to indicate that, if it had been known, the release would not have been signed. This was the conclusion reached in *Lumley v. Wabash R. Co.* (C. C. A. 6th Circuit), 76 Fed. 66, 22 C. C. A. 60. See, also, *Tatman v. Philadelphia, B. & W. R. Co.* (Del. Ch.), 85 Atl. 716."

"The rule unquestionably applies to settlements of the kind here involved that they neither can nor ought to be impeached and set aside for fraud or mistake, except upon clear and convincing proofs. *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147."

"We agree with the court below that

it should not be disturbed as it respects the injury to his foot. *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60, is authority for the partial impeachment of the release. Upon the general question of annulling such a release, see, further, *Great Northern Ry. Co. v. Fowler*, 136 Fed. 118, 69 C. C. A. 106, where the authorities are aptly and clearly discussed and distinguished; also *Tatman v. Phil. B. & W. R. Co.*, *supra*." See also *Gold Hunter Min. & Co. v. Bowden*, 252 Fed. 388, 164 C. C. A. 312; *Alabama & Ry. Co. v. Jones*, 73 Miss. 110, 19 So. 105. Cf. *Seymour v. Chicago & N. W. Ry. Co.*, 181 Iowa, 218, 164 N. W. 352, 357, where in a similar case the court said: "There was still no mutual mistake which entitles to relief. That must be a mutual mistake of fact and not error in opinion, and relief must be had in equity, or at all events, upon terms approved by equity. *Tatman v. Railway* (Del. Ch.), 85 Atl. 716, 720, is a suit in equity and deals with what is beyond all question an honest mutual mistake. A settlement was held not to be binding, but the relief granted is made to depend upon a return of what had been received in settlement. This is, in effect, a description of *Great Northern R. Co. v. Fowler*, 136 Fed. 118, 69 C. C. A. 106,

§ 1552. Effect of parol evidence rule and Statute of Frauds on right of reformation of executed transactions.

The right of reformation wherever allowed is necessarily an invasion or limitation of the parol evidence rule, since when equity reforms a writing it enforces an oral agreement at variance with the writing which the parties had agreed upon as a memorial of their bargain. This limitation is necessary to work justice, and there seems no more reason to object to it in case of reformation than in case of rescission for fraud or for mistake. In either case, unless the mistake precludes the existence of a contract at law,⁶² it should not be denied that the writing correctly states the actual contract or conveyance which has been made, but as it is inequitable to allow the enforcement of it, and (where reformation is appropriate) as justice requires the substitution of another in its place, equity gives relief; and to that end necessarily admits any relevant parol evidence.

and of *Nelson v. Minneapolis Railway Co.*, 61 Minn. 167, 63 N. W. 486. And it is in cases of like effect that it is held honesty in representing what is in fact untrue is no reason for not setting aside a settlement made because of mutual mistake. See *Pendarvis v. Gray*, 41 Tex. 326; *First Nat. Bank v. Hackett*, 159 Wis. 113, 149 N. W. 703; *Tatman v. Railway* (Del. Ch.), 85 Atl. 716, 721; *Culbertson v. Blanchard*, 79 Tex. 486, 15 S. W. 700; *Houston & T. C. R. Co. v. Brown* (Tex. Civ. App.), 69 S. W. 651; *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548. It is said in the *Tatman* Case that in order to invalidate a release on account of mutual mistake, the mistake must relate to a past or present fact material to the controversy, and not to an opinion respecting future conditions or results of present facts. It cites *Chicago & N. W. Railway v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147; *Nelson v. Chicago & N. W. Railway*, 111 Minn. 193, 126 N. W. 902; *Houston v. Brown* (Tex. Civ. App.), 69 S. W. 651; *Homuth v. Metropolitan Street Railway*, 129 Mo. 629, 31 S. W. 903,

and distinguishes the *Houston* case. And the case of *Winter v. Great Northern Ry. Co.*, 118 Minn. 487, 136 N. W. 1089, is readily distinguishable from the case at bar. And so of *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60, and *Union Pacific Railway v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. In *Chicago & N. W. Railway v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147, a suit in equity to rescind, approved in the *Tatman* Case, complainant compromised and released a claim for a broken hip. She knew when she settled that her hip had been broken, and that it was a bad break. She was induced by the statement of her own physician, who was also the company's physician, to believe, and did believe, that she would be well within a year, and she settled upon that basis. She was mistaken, and her injury and disability turned out to be permanent. It is held her mistake was not a mistake of fact, but a mistake in opinion." *Colorado Springs & C. Ry. v. Huntling* (Colo.), 181 Pac. 129; *Miles v. New York Cent. R.* 178 N. Y. S. 673.

⁶² See *supra*, § 94.

This is fully recognized so far as executed transactions are concerned irrespective of whether the relief sought is rescission or reformation, and also where the question concerns the rescission of executory contracts.⁶⁴

The effect of the Statute of Frauds is not equally simple, for here equity, if it seeks to enforce an oral agreement by rectifying a contract or conveyance, is compelled to qualify a positive statutory enactment. Nevertheless, since equity has not shrunk from preventing the Statute of Frauds from working a fraud in cases where there has been part performance,⁶⁵ there seems little reason where a conveyance has actually been made for hesitation in granting reformation; and, indeed, reformation of a conveyance in accordance with a prior oral agreement is almost universally allowed in England and in the United States, without regard to whether an increase or diminution of the terms of the conveyance is required.⁶⁶ In Massachusetts

⁶⁴ See as illustrating the free introduction of parol evidence in accordance with the statement in the text: *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Blackburn v. Randolph*, 33 Ark. 119; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Pierson v. McCahill*, 21 Cal. 122; *Murray v. Dake*, 46 Cal. 644; *Arbaney v. Usel*, 61 Colo. 311, 157 Pac. 204; *Park Bros. v. Blodgett, etc., Co.*, 64 Conn. 28, 29 Atl. 133; *Wall v. Arrington*, 13 Ga. 88; *Hunter v. Bilyeu*, 30 Ill. 228; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *Gray v. Woods*, 4 Blackf. 432; *Hausbrandt v. Hofler*, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289; *Proctor v. Fife*, 97 Kans. 431, 155 Pac. 931; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Farley v. Bryant*, 32 Me. 474; *Ordeman v. Lawson*, 49 Md. 135; *Bush v. Merriman*, 87 Mich. 260, 49 S. W. 567; *Popplein v. Foley*, 61 Md. 381; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559; *Forester v. VanAuken*, 12 N. Dak. 175, 96 N. W. 301; *Coates v. Smith*, 81 Or. 556, 160 Pac. 517; *Christ v. Dffenbach*, 1 Serg. & R. 464, 7 Am. Dec. 624;

Huss v. Morris, 63 Pa. 367; *Tabor v. Cilley*, 53 Vt. 487; *Western Min. & Mfg. Co. v. Peytona, etc., Co.*, 8 W. Va. 406.

⁶⁵ See *supra*, § 494.

⁶⁶ *Johnson v. Bragge*, [1901] 1 Ch. 28; *Blackburn v. Randolph*, 33 Ark. 119; *Wall v. Arrington*, 13 Ga. 88; *Hunter v. Bilyeu*, 30 Ill. 228; *Schwass v. Hershey*, 125 Ill. 653, 18 N. E. 272; *McGinnis v. Boyd*, 279 Ill. 283, 116 N. E. 672; *Dutch v. Boyd*, 81 Ind. 146; *Louisville, etc., R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Gelpcke, etc., Co. v. Blake*, 15 Iowa, 387, 83 Am. Dec. 418; *Conaway v. Gore*, 24 Kans. 389; *Athey v. McHenry*, 6 B. Mon. 50; *Noel v. Gill*, 84 Ky. 241, 1 S. W. 428; *Levy v. Ward*, 33 La. Ann. 1033; *Bond v. Dorsey*, 65 Md. 310, 4 Atl. 279; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Ruhling v. Hackett*, 1 Nev. 360; *Bellows v. Stone*, 14 N. H. 175; *Hitchins v. Pettingill*, 58 N. H. 386; *Wirtz v. Guthrie*, 81 N. J. Eq. 271, 87 Atl. 134, 137; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, *n.*; *Rider v. Powell*, 28 N. Y. 310; *Bearda-*

and South Carolina, however, a distinction is taken between a suit by the grantor to diminish the property conveyed to the grantee and a suit by the latter to secure more than the conveyance purports to grant. In the latter case if there is no written memorandum of the original contract, containing all of its terms, reformation is not allowed.⁶⁷ In defence of the rule generally prevailing, it may be said (1) that a constructive trust on the part of the defendant arises when he has received a conveyance of a greater amount than the parties intended, or where he has failed to convey all that was intended; or (2) that to allow the transaction to stand would operate as a fraud.⁶⁸ The English court has been influenced doubtless by the necessities of the situation. A transaction while purely executory may be rescinded if it cannot be reformed, and the Statute of Frauds would not stand in the way of this, but rescission might work more injustice than it would cure when a conveyance has actually been made. To allow reformation or give no relief is then the only choice.

§ 1553. Executory contracts in England.

Where reformation has been sought of an executory contract, the English courts have felt insuperable difficulty due not only to the Statute of Frauds (which happened to be applicable in nearly all the cases where reformation was sought) but also to the parol evidence rule. If a complainant seeks to reform an executory contract and to get specific performance of it as reformed, it has been held that "It is perfectly clear, that if the answer refuses to admit that there was a mistake in the par-

ley v. Duntley, 69 N. Y. 577, 584; Davis v. Ely, 104 N. C. 16, 10 S. E. 138, 5 L. R. A. 810, 17 Am. St. Rep. 667; Davenport v. The Widow and Heirs of Sovil, 6 Oh. St. 459; Ormsby v. Longworth, 11 Oh. St. 653, 666; Stites v. Wiedner, 35 Ohio St. 555; Smith v. Butler, 11 Ore. 46, 4 Pac. 517; Schettiger v. Hopple, 3 Grant (Pa.), 54; Huss v. Morris, 63 Pa. St. 367; Johnson v. Johnson, 8 Baxt. 261; Bumpas v. Zachary (Tex. Civ. App.), 34 S. W. 672; Goodell v. Field, 15 Vt. 448;

Petesch v. Hambach, 48 Wis. 443, 4 N. W. 565; Allen v. Kitchen, 16 Idaho, 133, 100 Pac. 1052.

⁶⁷ Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Goode v. Riley, 153 Mass. 585, 587, 28 N. E. 228; Kennedy v. Poole, 213 Mass. 495, 498, 100 N. E. 635, L. R. A. 1917 A. 600; Westbrook v. Harbeson, 2 McC. Ch. 112. See also Andrews v. Youngstown Coke Co., 39 Fed. 353, 354.

⁶⁸ See Wirtz v. Guthrie, 81 N. J. Eq. 271, 87 Atl. 134.

ticular matter, and you do not put a new construction upon it either the bill must be dismissed, or if the defendant suggests a new view which he is willing to submit to, then the Court has in some cases executed the contract with the variation as admitted or suggested by the answer."⁶⁸ The defendant may, however, set up the mistake as a reason why a court of equity should refuse to enforce a contract against him according to its terms, and in this case also the English court will give only limited relief.⁷⁰ The illogical character of any objection to the reformation of an executory contract has been observed in England,⁷¹ and in one case, at least, reformation of such a contract has been allowed, where the Statute of Frauds had been satisfied.⁷² But generally without much distinguishing between

⁶⁸ Lord St. Leonards in *Wilson v. Wilson*, 5 H. L. C. 40, 65.

⁶⁹ "Our opinion is, that where persons sign a written agreement upon a subject, obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for this purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties, sued in equity upon it, may perhaps be entitled in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the omitted term." Knight Bruce, L. J., in *Martin v. Pycroft*, 2 De G. Mc. N. & G. 785, 795. See, however, *Jervis v. Berridge*, L. R. 8 Ch. 351.

⁷¹ "To refuse rectification, therefore, on the ground that to grant it would offend against a rule of law, appears to me to strike at the root of equitable jurisdiction in the matter, while to grant relief where the error has crept into one document and refuse it where it is embodied in two is inconsistent with equitable principle, for equity regards the substance rather than the

form of a transaction. It is to be observed that the rule in question, which excludes parol evidence to contradict a written agreement, applies with even greater force to a deed." *Thompson v. Hickman*, [1907] 1 Ch. 550, 562.

⁷² *Olley v. Fisher*, 34 Ch. D. 367. In this case the court rectified an executory agreement and in the same proceeding specifically enforced it as rectified, the Statute of Frauds being no bar because there had been part performance. The court followed a suggestion in *Fry on Specific Performance* that wherever the Statute of Frauds creates no bar there is no difficulty in entertaining an action for the reformation of an executory contract, and the specific performance thereof. This decision seems not to have been cited subsequently by the English court. It seems inconsistent with the language at least of other English cases. *Fry's treatment of the subject* has been thus commented upon by an English writer (*Ashburner, Equity*, 543): "The learned author appears to deny (s. 814) that there is any distinction as to rectification between executed and executory contracts; but the authorities are based on this distinction."

the objection of the parol evidence rule and that of the Statute of Frauds, the English court has refused reformation where a conveyance has been made in exact conformity with a prior written contract, the error being in the executory contract.⁷³ To allow reformation, it is said, would be in effect first to reform an executory contract and then enforce it as reformed; and doubtless this is true, but it is not so clear why it is objectionable.

§ 1554. Executory contracts which are not within the Statute of Frauds in the United States.

In the United States the parol evidence rule is no objection to reformation, and an executory contract may undoubtedly be reformed when this does not infringe on the Statute of Frauds. Thus where an insurance policy fails to conform to the application though supposed to do so, or to the intention of the parties, and the error is unnoticed when the policy is delivered, it will be reformed.⁷⁴ So a bill of lading,⁷⁵ a promissory note,⁷⁶ or bond,⁷⁷ or other contract,⁷⁸ may be reformed. Therefore, a bond signed by one partner on behalf of the partnership under the mutual mistake of the partners and the obligee of the bond that one partner had authority to execute a bond in connection with the firm business on behalf of the others, will be reformed so as to charge the other partners.⁷⁹

⁷³ *Woollam v. Hearn*, 7 Ves. 211; *May v. Platt*, [1900] 1 Ch. 616; *Thompson v. Hickman*, [1907] Ch. 550. In these cases it is not clear how far the objection is based on the Statute of Frauds, and how far on the parol evidence rule.

⁷⁴ *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Woodbury Savings Bank v. Insurance Co.*, 31 Conn. 517; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Keith v. Globe Insurance Co.*, 52 Ill. 518, 4 Am. Rep. 624; *Mercantile Insurance Co. v. Jaynes*, 87 Ill. 199; *Home Insurance Co. v. Myer*, 93 Ill. 271; *Longhurst v. Insurance Co.*, 19 Iowa, 364; *Ben Franklin Insurance Co. v. Gillett*, 54 Md. 212; *Humboldt Fire Ins. Co. v.*

R. K. LeBlond, etc., Co., 96 Ohio St. 442, 118 N. E. 121.

⁷⁵ *Aradalou v. New York & Co. R. Co.*, 225 Mass. 235, 244, 114 N. E. 297.

⁷⁶ *Hathaway v. Brady* 23 Cal. 121.

⁷⁷ *Neininger v. State*, 50 Ohio St. 394, 40 Am. St. Rep. 674.

⁷⁸ *Upton Mut. Co. v. American Shipbuilding Co.*, 251 Fed. 707.

⁷⁹ *Moore v. Stevens*, 60 Miss. 809; *Wharton v. Woodburn*, 4 Dev. & Bat. 507; *James v. Bostwick*, *Wright* (Oh.), 142; *Purviance v. Sutherland*, 2 Oh. St. 478; *McNaughten v. Partridge*, 11 Oh. 223, 38 Am. Dec. 731; *Sale v. Dishman's Ex'rs*, 3 Leigh, 548, 555; *Kyle v. Robert's Ex'r*, 6 Leigh, 495; *Galt's Ex'rs v. Calland's Ex'r*, 7

§ 1555. Executory contracts which are within the Statute in the United States.

Even where an executory contract relates to land and is within the Statute of Frauds, many American authorities allow its reformation whether a deed has subsequently been executed in conformity with the written contract or not.⁸⁰ In other decisions, however, American courts have declined to reform such an executory contract, especially if it is sought to enlarge the terms of the writing, unless there has been such part performance or other circumstances as will make a failure to reform work a fraud upon the complainant.⁸¹ The latter cases seem sound. Where the only effect of a refusal to reform a contract is the loss of an executory bargain which the parties intended to make, it seems impossible to give relief on any principle that would not justify the entire destruction of the Statute.

There seems little reason to distinguish between enlarging the terms of the writing and diminishing them. In either case

Leigh, 594; *Parker v. Cousins*, 2 Gratt. 372, 390, 44 Am. Dec. 388. In some cases without resort to a court of equity, relief has been granted to the other partners at law. *Minor v. Wiloughby*, 3 Minn. 225; *Dickerman v. Ashton*, 21 Minn. 538; *Thomas v. Joslin*, 30 Minn. 388, 15 N. W. 675; *Henry County v. Gates*, 26 Mo. 315; *Human v. Cuniffe*, 32 Mo. 316; *Fagely v. Bellas*, 17 Pa. 67 (disapproved in *Boston Co. v. Smith*, 13 R. I. 27, 36, 43 Am. Rep. 3); *Jones v. Horner*, 60 Pa. 214; *Alcorn's Ex'r v. Cook*, 101 Pa. 209.

⁸⁰ *Murphy v. Rooney*, 45 Cal. 78 (cf. *Baume v. Morse*, 13 Cal. App. 456, 110 Pac. 350); *Trout v. Goodman*, 7 Ga. 383; *Hunter v. Bilyeu*, 30 Ill. 228; *Carson v. Davis*, 171 Ill. 497, 500, 49 N. E. 701; *Popplein v. Foley*, 61 Md. 381; *Olson v. Erickson*, 42 Minn. 440, 44 N. W. 317; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Bellows v. Stone*, 14 N. H. 175, 201; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Workman v. Guthrie*, 29 Pa. 495, 510, 72 Am. Dec. 654; *Campbell v. Fetterman's Heirs*, 20 W. Va. 398, 410. See also

Durham v. Taylor, 29 Ga. 166 (contract in consideration of marriage); *Cooper Grocery Co. v. Neblett* (Tex. Civ. App.), 203 S. W. 365 (guaranty).

⁸¹ *Osborn v. Phelps*, 19 Conn. 63, 4 Am. Dec. 133; *Allen v. Kitchen*, 18 Idaho, 133, 100 Pac. 1052; *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Climmer v. Hovey*, 15 Mich. 18; *Wirt v. Guthrie*, 81 N. J. Eq. 271, 87 Atl. 134; *Davis v. Ely*, 104 N. C. 16, 16 S. E. 138, 5 L. R. A. 810, 17 Am. St. Rep. 667; *Safe Deposit &c. Co. v. Diamond Coal &c. Co.*, 234 Pa. 100, 8 Alt. 54, L. R. A. 1917 A. 596; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910. And courts which have declined to reform executed deeds by the inclusion of a greater quantity of land than that conveyed (see *supra*, § 1552, *ad fin.*) would a *fortiori* hold the same in regard to an executory contract. In most of the cases in the note preceding this, the discussion was slight, and in some of them there may have been such equitable circumstances as to justify reformation on the ground that otherwise a fraud would be worked.

a contract is being enforced at variance with the writing and to the disadvantage of one of the parties. The question ultimately resolves itself into this: how far may the court go in disregarding the Statute in order to prevent it from working injustice? It should be observed that the statute interposes no obstacle to rescission of the transaction by the court,⁸² and in any case where there is such part performance of a contract for the sale of land as to avoid the effect of the local statute,⁸³ there is no more difficulty in reforming the written contract, than if the contract originally was not within the statute. Nor is there any doubt that if the defendant sets up the mistake in bar to a suit to enforce the contract as written, the court may refuse to enforce the contract except on the plaintiff's assent to modify the writing to correspond to the real agreement.⁸⁴

§ 1556. Voluntary or illegal writings.

It may be supposed that a voluntary conveyance or obligation under seal does not express the intention of the donor, either because it gives too much or gives too little. If it gives more than the donor intended, a court of equity will reform it though the donee knew nothing of the mistake.⁸⁵ On the other

⁸² *Davis v. Ely*, 104 N. C. 16, 10 S. E. 138, 5 L. R. A. 810, 17 Am. St. Rep. 667.

⁸³ See *supra*, § 494.

⁸⁴ *M. Sigbert Aves Co. v. Haslam*, 37 N. Dak. 122, 163 N. W. 265; and see *supra*, § 1425.

⁸⁵ *Lister v. Hodgson*, L. R. 4. Eq. 30; *Mitchell v. Mitchell*, 40 Ga. 11; *Andrews v. Andrews*, 12 Ind. 348; *Spencer v. Spencer*, 115 Miss. 71, 75 So. 770; *Day v. Day*, 84 N. C. 408; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

In *Ellis v. Ellis*, 26 T. L. Rep. 166, this principle was applied though the mistake seems to have been rather of law than of fact. A husband transferred securities of large value to his wife, intending them as a gift to her absolutely. When he made the gift he knew of his marriage settlement, but did not realize that the gift would

come within the operation of a clause therein under which his wife covenanted to settle all after-acquired property. It having been decided that the gift came within the operation of that clause, the husband brought this action for the purpose of obtaining a revocation of the gift upon the ground that it was made under a mistake of fact, it was held, that the gift being voluntary, and having been made under a mistake of fact, the husband was entitled to have it set aside.

In *Hood v. Mackinnon*, [1901] 1 Ch. 476, the mistake must certainly be considered negligent, but it was held that an appointment of part of a fund by deed poll, made in entire forgetfulness by the appointer of an earlier appointment of part of the fund to the same person, might be rescinded on the ground of mistake.

hand, if the instruments gave less than the donor intended the donee can get no relief,⁸⁶ unless there have been such improvements made by the grantee as to give the donee a special equity. These cases sufficiently show that in reforming instruments equity is not, as often said, restoring the real transaction and setting aside merely the apparent one. If the real transaction were what the parties to a contract or conveyance intended as distinguished from what they expressed, the same would be true in the case of gifts; and no different rules should be applied to volunteers from those applicable to parties who give value. In truth, the basis of the rule concerning volunteers, is simply that it is not just to let a gift stand which was greater than the donor intended, and, on the other hand, a volunteer who gave no consideration cannot ask for the enforcement of an intention which has remained purely executory. It is immaterial that a party against whom relief is asked received no consideration, if the complainant gave consideration. Therefore, equity will reform an instrument against sureties.⁸⁷ If a writing was part of an illegal transaction equity will not reform it at the suit of a party to the illegality.⁸⁸

§ 1557. Rescission.

Where reformation is possible, it is generally the only remedy permissible, since the mistake of the parties related to their expression only, and to decree rescission and freedom from all bond would be an unnecessary violation of their intent. But where the error is in the substance of the bargain, not in its expression—that is where the mistake relates to the way the

⁸⁶ *Jackson v. Wolfe*, 127 Ark. 54, 191 S. W. 938; *Peters v. Priest*, 134 Ark. 161, 203 S. W. 1042; *Fickes v. Baker*, 36 Cal. App. 129, 171 Pac. 819; *Shears v. Westover*, 110 Mich. 505, 68 N. W. 266; *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343; *Hout v. Hout*, 20 Oh. St. 119; *Dennis v. Dennis*, 4 Rich. Eq. 307; *Wiley v. Hodge*, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852.

⁸⁷ *Olmsted v. Olmsted*, 38 Conn. 309; *United States v. Cushman*, 2 Sumn. 426, Fed. Cas. No. 14,908; *Keith v.*

Henkleman, 68 Ill. App. 623, *affd.* 173 Ill. 137, 50 N. E. 692; *State ex re* *Frank v. Frank*, 51 Mo. 98; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Prior v. Williams*, 3 Abb. App. Dec. 624; *Wiser v. Blachly*, 1 Johns. Ch. 607; *Butler v. Durham*, 3 Ire. Eq. 589; *Neininger v. State*, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

⁸⁸ *Gilmore v. Thomas*, 252 Mo. 147, 158 S. W. 577; *Edwards v. Boyle*, 3 Okl. 639, 133 Pac. 233.

agreed terms will apply to the external world, rescission with restitution of whatever has been parted with, is the only relief possible, though this may be sought in a variety of ways appropriate for different situations, namely:—

1. If the agreement is in writing, by a direct proceeding in equity for rescission. Where a conveyance or even a contract relating to land has been made, this is the only satisfactory relief.

2. In case of any contract written or oral, one whose promise is still executory may promptly offer to return anything received by him, and if his offer is refused and he is sued for failure to perform his promise, may set up as a defence to an action at law or suit in equity the facts justifying rescission.

3. One who has paid money under a mistake justifying rescission may use in general assumpsit, or its modern local equivalent, on principles of *quasi-contract* for its recovery; and to a great degree similar redress is allowable for the recovery of the value of goods or services.

The character of mistake justifying relief should not differ, whatever tribunal or remedy may be appropriate to a particular case. The doctrines governing mistake have mainly, but not exclusively been developed in equity but at the present time the differences between the two jurisdictions on the subject tend to become confined to the propriety of a particular remedy and not to extend to the fundamental basis of right; though this result has not as yet been wholly achieved. Knowledge by one party that the other is under a mistake as to such a matter as would make the transaction voidable if the mistake were mutual, if accompanied by any circumstances deemed inequitable and perhaps generally without more, will have the same effect as mutual mistake in justifying rescission.⁸⁹

⁸⁹ *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, 11 Sup. Ct. 972, 999; *Wyche v. Green*, 26 Ga. 415; *Shelton v. Ellis*, 70 Ga. 297; *McCormick v. Miller*, 102 Ill. 208, 40 Am. Rep. 577; *Montgomery County v. American Emigrant Co.*, 47 Ia. 91; *Freeman v. Croom*, 172 N. C. 524, 90 S. E. 523; *International L. Ins. Co. v. Stuart* (Tex. Civ. App.), 201 S. W. 1088. See also

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35 L. Ed. 1063; *Medical Society v. Gilbreth*, 208 Fed. 899; *Campbell v. Hatchett*, 55 Ala. 548; *Webb v. Hammond*, 31 Ind. App. 613, 68 N. E. 916. How far silence under such circumstances is fraudulent is considered *supra*, §§ 1497-1499.

§ 1558. Mistake as to the person contracted with.

As has been seen, an offer can be accepted only by the person to whom it is addressed;⁹⁰ and a transaction, therefore, where the parties have not agreed to contract each with the other is void; but the fact that one or both of the parties are under a mutual mistake as to who the party is, with whom he is contracting, will not have this effect. In most of the cases where such circumstances have been shown, the mistake was induced by fraud;⁹¹ but there seems no reason to doubt that not only where the mistake was induced by fraud, but also where there was a mutual mistake, without misrepresentation the transaction would be voidable. Whether a unilateral mistake of one party as to the identity of the person with whom he was dealing would justify avoidance of the contract, would logically depend on the general question whether unilateral mistake should justify rescission.⁹² As the jurisdiction of equity is confined to written contracts, and as a mistake of identity is not generally made in a written contract, any possible relief ordinarily must be given by a court of law.

An error in regard to person may occur not only with reference to parties to the contract but also with reference to other persons who may be referred to in it as a means of defining the thing to be done or the property to be transferred. In the latter case the mistake concerns the identity of the subject-matter of the contract.⁹³

⁹⁰ See *supra*, § 80.

⁹¹ The cases are collected, *supra*, § 1517.

⁹² See *infra*, §§ 1573 *et seq.* In *Jones v. Chicago, B. & Q. R. Co.*, 102 Neb. 853, 170 N. W. 170, a flour company, having a contract to sell a quantity of flour to F at a price much below the existing market price by mistake had entered the contract on its books as one with the plaintiff, and therefore shipped the flour to him with a draft for the price, which he paid. The seller discovering its mistake obtained redelivery of the flour from the carrier, the plaintiff in the meantime having obtained the bill of lading by paying

the draft. The Court sustained the seller's contention on the ground that there was no meeting of minds, and no contract. There seems reason to suppose that the plaintiff had good reason to guess from the amount of the draft and from the fact that he had ordered no flour, that a mistake had been made. If so the sale though not void would be voidable, and the decision correct. On any other assumption it is inconsistent with the views expressed in this treatise of the requisites for the formation of a contract and of the impropriety of allowing rescission for unilateral mistake.

⁹³ Thus where a remainder (Colyer

§ 1559. Error in regard to an object to which the contract relates.

When the performance of a contract requires the existence of a specific thing, and at the time the contract is made the thing does not exist, it is obvious that completion of the transaction is impossible, and that the parties would not have entered into the agreement had they known the facts. Though the agreement is impossible of performance it does not, however, necessarily follow that the party who has in terms undertaken the performance which requires the existence of the thing in question, is not liable for failing to perform. It is necessary to distinguish cases where he takes the risk of his ability from cases where both parties assume the existence of the thing. In the latter case it is inequitable to charge the promisor. The situation is possible both where real estate and where personal property is the non-existing object.

§ 1560. Non-existence of goods sold.

The Uniform Sales Act ⁹⁴ states the rule applicable to an attempted sale of non-existent goods.

Section 7.—[DESTRUCTION OF GOODS SOLD.] (1.)

Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

v. Clay, 7 Beav. 188; *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826. See also *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779, or annuity (*Strickland v. Turner*, 7 Ex. 208), or insurance policy (*Scott v. Coulson*, [1903] 2 Ch. 249; *Riegel v. American Life Ins. Co.*, 140 Pa. 193, 21 Atl. 392, 11 L. R. A. 857, 23 Am. St. Rep. 225), is bargained for under a mutual mistake as to the existence of the life tenant or annuitant or person insured, the thing which the parties were bargaining for may fairly be said not to have existed. Other cases may easily be supposed where a mutual mistake as to the existence of a

person while not affecting the character of the promised performance would make the performance impossible,—*e. g.*, a contract to paint a portrait of a third person who unknown to the parties to the contract is dead. In still other cases such a mistake would merely affect the value of the performance, *e. g.*, a contract to buy and sell stock in a company of which the president, whose management largely contributed to the value of the stock, unknown to the parties, had died.

⁹⁴ The States where this statute is in force are enumerated, *supra*, § 506.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.⁹⁵

Section 8.—[DESTRUCTION OF GOODS CONTRACTED TO BE SOLD.] (1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—⁹⁶

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.⁹⁷

⁹⁵ Subsection (1) corresponds to section 6 of the English Sale of Goods act, except that "the parties purport to sell" has been substituted in the first line for the words "there is a contract for the sale of," and "agreement" is twice substituted in the last line, for "contract." The other provisions of the American section are new.

⁹⁶ This clause "applies where the

specific goods perished after the contract was made or so greatly deteriorated in quality as to be substantially changed in character." *Automatic Time Table Advertising Co. v. Automatic Time Table Co.*, 208 Mass. 253, 94 N. E. 462.

⁹⁷ Subsection (1) corresponds to section 7 of the English statute with changes of phraseology similar to those referred to in the preceding note; and

An agreement, other than a sale, which requires for its performance the existence of a specific thing would doubtless be governed by the same principles.

§ 1561. A sale of specific goods is void if goods not in existence.

In regard to the correctness of the principle of law stated in the first subsection of the statute just quoted there can be no doubt where the statute has not been enacted as well as where it is in force. There are not many decisions exactly in point,⁸⁸ but no question has ever been raised in regard to the result, though different reasons have been suggested for treating the sale as void. Sometimes the result is put upon the ground of impossibility, sometimes upon the ground of mistake, and sometimes on the lack of mutual assent owing to the mistake. So far as the existence of a sale is concerned, that is, the actual transfer of title to property, of course there is absolute impossibility. The real question, however, is whether the buyer and seller are excused from all liability. Even though there is no sale the seller may be liable on an obligation of warranty or contract,⁸⁹ and similarly the buyer might be liable on an obligation to pay the price. No such obligation, however, exists on either side. Though the essential elements of a contract—mutual assent and consideration—exist, the promise of each party is subject to an excuse of which it must be assumed without analogy in the English Act.

⁸⁸ *Hastie v. Couturier*, 9 Ex. 102; a. c., on appeal, *Couturier v. Hastie*, 5 H. L. C. 673; *Strickland v. Turner*, 7 Ex. 208; *Gibson v. Pelkie*, 37 Mich. 380; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249. In the case first cited the parties purported to make a sale by means of bills of lading of a cargo of corn. In fact at the time the bargain was made the corn, owing to fermentation, rendering its future preservation impossible, had already been sold at an intermediate port by the ship's captain. It was held that the bargain was void and the purchaser not bound for the price. In *Strick-*

land v. Turner, the parties purported to sell an annuity payable during the life of a third person. At the time the bargain was made the third person had already died, so that no annuity existed. It was held that the buyer could recover the price paid. Similarly in *Gibson v. Pelkie*, the bargain related to a judgment which did not exist. In *Bates v. Smith*, Long, J., said: "If it appears that the subject-matter of a contract was not, and could not have been in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party."

⁸⁹ See *infra*, § 1934.

tion on his part that he will necessarily wish to avail himself, so that the bargain is in effect void. The seller is excused from any such obligation by the doctrines both of impossibility and mistake. As the obligation would relate to a specific thing, the nonexistence of the thing, without his fault, excuses him.¹ Apart from the doctrine of impossibility the mutual mistake under which the parties labored would excuse the seller from any obligation. On the part of the buyer there is no question of impossibility. It is entirely possible for him to pay the price. If the promise, however, was expressly or impliedly conditional upon the transfer of title, which would generally be the case, the nonperformance of this condition, for whatever reason, would necessarily excuse him.² Even though his promise to pay the price was not conditional, the destruction of the goods for which the price was to be paid would be such failure of consideration as to excuse him from paying the price if he had not already paid it, and would justify him in recovering it if he had already paid it.³ The doctrine of mutual mistake would also excuse the buyer as well as the seller. It is not accurate, however, to say that there is no mutual assent; ⁴ the parties do, in fact, assent to the same thing. The mistake which they make is ground for excusing them from the bargain they made. It is not a ground for saying they never made a bargain.⁵

§ 1562. Partial destruction of the goods prior to the sale.

The English Sale of Goods Act makes no provision in regard

¹ *Taylor v. Caldwell*, 3 B. & S. 826. See also *The Tornado*, 108 U. S. 342, 2 S. Ct. 746, 27 L. Ed. 747; *Arthur v. Blackman*, 63 Fed. 536; *Fresno Milling Co. v. Fresno C. & I. Co.*, 126 Cal. 640, 59 Pac. 140; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Terry v. Bissell*, 26 Conn. 23; *Walker v. Tucker*, 70 Ill. 527; *Price v. Pepper*, 13 Bush, 42; *Pinkham v. Libbey*, 93 Me. 575, 45 Atl. 823, 49 L. R. A. 693; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Thomas v. Knowles*, 128 Mass. 22; *Gilbert & Co. v. Butler*, 146 Mass. 82, 15 N. E. 76; *Goldman v. Rosenberg*,

116 N. Y. 78, 22 N. E. 259; *Stewart v. Stone*, 127 N. Y. 500, 23 N. E. 595, 14 L. R. A. 215; *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Lovering v. Coal Co.*, 54 Pa. St. 291; *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052; *Board of Education v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868.

² See *supra*, §§ 675, 838.

³ *Strickland v. Turner*, 7 Ex. 208.

⁴ This view is suggested by *Benjamin, Sale* (5th Eng. ed.), 139.

⁵ See *supra*, §§ 20, 94, 95.

to the case of deterioration or partial destruction of the goods unknown to the parties at the time they entered into a sale. The principles which govern the case are, moreover, not so simple as those which relate to total destruction. Several cases may be supposed, the simplest of which is that a portion of the goods is destroyed. In such a case it is impossible for the buyer to fulfil his whole bargain; and impossibility, without his fault, should excuse him, as in case of total destruction. The buyer also should be excused from liability to pay the price for the same reasons as those given in the preceding section. It may be, however, that the buyer wishes to take the goods that remain, in spite of the destruction of the remainder. If he so desires, he should have the right.⁶ Here it becomes important to observe that mutual mistake as to the existence of the subject-matter does not necessarily make the transaction void, but entitles the parties only to such relief as may be equitable. So, likewise, impossibility can excuse the seller no further than the impossibility in fact exists. The only doubt is, upon what terms the buyer may proceed. If a separate price was originally agreed upon for the goods which now remain, there seems no reason why the buyer should not be entitled to them upon paying this price, and so the Sales Act provides. To be sure the seller never agreed to sell those goods separately, though he agreed on a divisible price, but as the remaining goods which were the subject of the bargain are destroyed, the seller cannot well be put in a worse position than contemplated by the bargain if he is obliged to give up the remainder; he is not left with goods on his hands undisposed of. The buyer, however, even though the contract was divisible is not bound to take the goods unless he wishes. A part of the goods may not serve his purpose. Therefore, he has an option to take the goods or reject them. If the price for the goods which remain is not fixed by the contract, while the buyer may also claim the goods, he can claim them only according to the terms of the contract. The French Civil Code allows him to take them at a valuation,⁷ but this seems to force upon the seller a bargain which he did not make.

⁶ See *Scott v. Little Dale*, 8 E. & B. 815, stated *infra*, n. 13.

⁷ Code Civil, Art. 1601.

§ 1563. Inferior quality of the goods.

A more troublesome case arises where none of the goods are totally destroyed but all, or a material part of them, are inferior in condition to what the parties supposed when the bargain was made. In regard to such a case it has been said that "the only question is whether the article has been so far destroyed as no longer to answer to the description of it given by the contract,"⁸ and this statement is warranted by the language of the leading English case.⁹ This language, however, was used at a time when the doctrines of implied warranty had not been developed. More than ten years later the same eminent judge who wrote the opinion in that case was unwilling to lay down broadly as a general rule of law that a seller impliedly

⁸ Chalmers, *Sale of Goods Act* (5th ed.), 20.

⁹ *Barr v. Gibson*, 3 M. & W. 390. In this case the defendant sold to the plaintiff, in England, by deed poll, a vessel, and covenanted that he had then "good right, full power, and lawful authority" to sell the same. At the time the transaction took place the ship was aground on the coast of the Prince of Wales island, and had been left by the crew. She was five feet above water on one side and with her masts standing. Her bulk ends were strained. If there had been facilities at hand, and it had been a different season of the year, she might have been got off and repaired. The captain, in fact, sold the ship as she lay for £10 three days after the sale to the plaintiff. The plaintiff sued the defendant in an action of covenant for breach of the covenant quoted above. The court held that the question was whether the subject of the transfer bore the character of a ship and held that "the ship did continue to be capable of being transferred as such at the time of the conveyance though she might be totally lost within the meaning of a contract of insurance. . . . The covenant . . . of the defend-

ant that he had power to transfer her as a ship at the time of executing the deed was not broken." This decision may be supported. The action was upon a covenant and the decision depended simply on the question whether the defendant had broken that covenant. No question of mistake or failure of consideration could enter into the case. The language of Parke, B., however, goes farther than the case required. He said: "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. *Parkinson v. Lee*, 2 East, 314; *Keilw.* 91; 1 Rolle's Abr., *Action sur case* (P.), pl. 4, p. 90. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy or in serviceable condition." At the present day it is clear that there would be a warranty of quality if the buyer had no opportunity of inspection, as was the case here. It seems also clear that the fact that the ship was aground at the time of the bargain was so material that the buyer could have rescinded the transaction on account of mistake.

warranted title to the goods sold,¹⁰ and it was not until 1868 that the English court clearly stated the modern law of implied warranty of quality.¹¹ The ground of implying a warranty of quality must be that the buyer is justified in assuming that the seller represents that the goods to which the bargain relates are merchantable, and such an implication is now made in many cases. At the present time, therefore, it seems clear that the test of whether an article answers the description of it given by the contract is not adequate. The description may be in such general terms as to be accurate and yet the quality of the goods may be materially inferior to what the buyer is entitled to expect. If no representation can be implied but both parties justifiably suppose that they are dealing with goods in ordinary merchantable condition, and the goods are not in such condition, whether because of some accident or because they never were in good condition, even though the circumstances are such that the seller is not liable as a warrantor, at least there is a mutual mistake of a material fact, which should excuse the seller from liability and justify the buyer in rescinding the transaction. It may well be that even under the English statute nearly this result would be reached by treating goods as having "perished" within the meaning of the Sale of Goods Act, "not only if they were physically destroyed, but also if they had ceased to exist in a commercial sense; that is, if their merchantable character as such has been lost."¹² It seems better, however, to reach the desired result directly than by putting an artificial meaning

¹⁰ *Morley v. Attenborough*, 3 Ex. 500. The case related to a sale by a pawnbroker and Parke, B., distinguished it from the case of an ordinary shopkeeper selling goods.

¹¹ *Jones v. Just*, L. R. 3 Q. B. 197.

¹² This suggestion is made in Benjamin, *Sale* (5th Eng. ed.), 140, citing several cases where freight was held not payable under a charter party requiring delivery of the goods as a condition, when the goods were so deteriorated as to be unfit for the purposes for which such goods are

ordinarily used. *Duthie v. Hilton*, L. R. 4 C. P. 138; *Asfar v. Blundell*, [1896] 1 Q. B. 123. See also *Nickoll v. Ashton*, [1901] 2 K. B. 126. This result was reached in *Rendell v. Turnbull*, 27 N. Zealand, L. R. 1067, under the New Zealand Sale of Goods Act (which is identical with the English Act in the section in question), where a lot of potatoes unknown to the parties at the time of the bargain had started "second growth" to such an extent as to be unfit for human food. See also *infra*, §§ 1569, 1570.

upon such words as "perished" or "destroyed." If the seller knows of the destruction or deterioration of the goods the case would not fall within the terms of section 7 of the Sales Act but the seller would then be liable if not in deceit at least on an implied warranty, and the buyer would thus be fully protected.

The right of the buyer, however, to take the goods if he wishes seems clear.¹³

§ 1564. Rules of the Civil law.

The question of the destruction of the subject-matter of the sale has been much discussed in the Civil law, and the rules of the Roman Law have been thus summarized:

"If the thing which it has been agreed to buy and sell has, unknown to both parties, ceased to exist at the time at which the contract is made, the contract is void. The vendor must return the purchase money, if he has been paid; and if he alone knew that the property no longer existed he is further liable to compensate the purchaser in damages for any loss which he may sustain through nonperformance, whereas if the purchaser alone knew it, he is bound to pay the purchase money, and has

¹³ In *Scott v. Littledale*, 8 E. & B. 815, 820, a contract was made to sell the cargo of the "Star" and it was agreed that the cargo was equal to a certain sample. The sample on which the contract was made was by mutual mistake supposed to be a sample taken from the cargo which was bought and sold, whereas it was not. The consequence was that the defendants could not possibly perform the contract. Though they might have purchased tea equal to the sample and delivered it, that would not have been a fulfilment of this contract, which was for the purpose and sale of a specific cargo *ex Star*. In an action by the buyer for non-delivery of the cargo, the defendants set up these facts by way of equitable defence. In the argument for the defendants, Crompton, J., interposed: "The plaintiff

by his declaration says that he was always ready and willing to accept the cargo *ex Star*; if he was, were not you bound at least to deliver that cargo? Do you not claim too large a relief?" Counsel replied: "In the contemplation of a court of equity there was no contract, because the contract was founded on a mistake of both parties to it;" but Lord Campbell, C. J., delivering the opinion of the court, said: "We are all of opinion that the plea cannot be supported. It is founded on the assumption that in equity this contract would be void at the option of the vendor. But we are of opinion that the contract would be held to be still subsisting, and that the relief in equity, if any, would be partial or conditional. We have no authority in this Court to settle such equities."

no rights himself against the vendor. If both were aware that the property no longer existed, the contract is void. Where the thing has ceased to exist only in part, the contract is void, and the purchaser can recover any purchase money which he has paid, only where less than half of it is left, or where the portion wanting is the portion for which mainly the purchaser can show that he bought it. Otherwise the contract stands, the purchase money being proportionately abated. On the same principle a sale of the inheritance of a living third person, or of a person who does not and never has existed, is void, though Justinian legalized sales of the inheritance of a living person to which the vendor hoped to succeed, provided that person assented, though he was not thereby bound to leave it to the vendor at all."¹⁴ It may be assumed that the modern Civil law would follow the same principles except in so far as express Code provisions may modify them. In France the Civil Code provides: "If at the moment of the sale the thing sold had wholly perished, the sale shall be void. If a part only of the thing has perished it is at the option of the buyer to abandon the sale or to demand the remaining part, having the price determined by valuation."¹⁵ The German Code contains no specific provision in regard to the matter, but it is covered by the general provisions in regard to impossibility, mistake, and dependency of the obligations in bilateral contracts.¹⁶ The Code of Louisiana contains the following provision: "When the certain and determinate substance, which was the object of the obligation, is destroyed, is rendered unsaleable, or is lost, so that it is absolutely known not to exist, the obligation is extinguished, if the thing has been destroyed or lost, without the fault of the debtor, and before he was in default. Even when the debtor is in default, if he has not taken upon himself fortuitous accidents, the obligation is extinguished, in case the thing might have equally been destroyed in the possession of the creditor, if it had been delivered to him. The debtor is bound to prove the fortuitous accident he alleges. In whatever manner a thing stolen may have been destroyed or lost, its loss does not dis-

¹⁴ Moyle, *Contract of Sale in the Civil Law*, 21.

¹⁵ Art. 1601.

¹⁶ German Civ. Code, Secs. 306, 319, 320, 323.

charge the person who carried it off, from the obligation of restoring its value." ¹⁷

§ 1565. Mistake as to title to personal property.

As the seller of personal property impliedly warrants his title,¹⁸ unless the buyer clearly agrees to take merely such title as the seller may have, it is seldom necessary in jurisdictions where rescission is allowable for breach of warranty¹⁹ to invoke the doctrine of mistake as a justification of the buyer's right of rescission for defective title to goods which he has bought, since there will be either a warranty or the buyer will have agreed to buy and pay for only such right as the seller might have; but wherever the parties have based their contract on the assumption that the seller has title there seems no reason why there should not be rescission on the ground of mistake even though there is no warranty.²⁰ Thus where the plaintiff bought chattels for value at an execution sale which were not the property of the judgment debtor but of a third person, recovery was allowed from the judgment creditor of the money paid.²¹

¹⁷ Art. 2219.

¹⁸ See *supra*, §§ 975-979, 1063, 1129, 1162.

¹⁹ See *supra*, § 1461.

²⁰ *Claffin v. Godfrey*, 21 Pick. 1; *King v. Doolittle*, 38 Tenn. 77; *Stocks v. Sheboygan*, 42 Wis. 315. As to bargains for patents which turn out to be invalid, see *supra*, § 137.

²¹ *Dresser v. Kronberg*, 108 Me. 423, 81 Atl. 487, 36 L. R. A. (N. S.) 1218, Ann. Cas. 1913 B. 542. The court said (page 425): "We are aware that the courts in some jurisdictions notably in Indiana and Illinois, have denied recovery from the judgment creditor, but we are unable to assent to the force of the reasoning by which that conclusion is reached. *Dunn v. Frazier*, 8 Blackf. (Ind.) 432; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40, see note to same, 3 L. R. A. 440; *England v. Clark*, 5 Ill. 487. The decisions in Indiana are placed upon

the ground that the doctrine of *caveat emptor* applies with full force in all judicial sales and that the purchaser buys at his peril. This statement when rightly interpreted is true but it simply means that there is no guaranty or warranty of title because the purchaser takes and can only take whatever title the debtor has. Therefore in the absence of fraud the law will not ordinarily relieve a purchaser from a defective title and a partial failure of consideration, as for instance an outstanding incumbrance or a lien for taxes. *Ritter v. Henshaw*, 7 Iowa, 97; *Parker v. Rodman*, 84 Ind. 256. But the doctrine is not carried to the extent that in case of absolute failure of title the purchaser is without remedy. Even the States which deny a right of action against the creditor, grant it against the judgment debtor. *McGhee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124; *Price v. Boyd*, 1 Dana

§ 1566. Mistake as to existence or title to real estate.

In contracts to sell real estate the contract is construed unless a contrary intention is expressed, as binding the seller to convey a good title;²² but when an actual conveyance has been made there are certainly no implied warranties and generally the assumption is made that the buyer takes the risk of the seller's title except to the extent that the seller by the express terms of the deed warrants its validity.²³ Where, however, the property to which the contract relates has no existence (not simply is not owned by the seller), it seems probable that an attempted conveyance could be set aside for mistake;²⁴ and it seems, further, that if the grantor's supposed title or right to convey was based on his holding some office or having some authority, or upon some other fact and it clearly appeared that the parties contracted on the mutual erroneous assumption that the grantor had the office, or the authority, or that the necessary facts existed, the transaction will be rescinded.²⁵

(Ky.), 434; *Geoghegan v. Ditto*, 59 Ky. 433, 74 Am. Dec. 413; *Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460; *Westerfield v. Williams*, 59 Ind. 221; *Coan v. Grimes*, 63 Ind. 21."

²² See *supra*, § 923.

²³ See *supra*, § 926.

²⁴ In *Hitchcock v. Giddings*, 4 Price, 135, *Richards, C. B.*, said: "Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed and a bond given for that sum as the purchase money, when, in point of fact, I had not an inch of the land, so sold, to sell?"

In the actual case the plaintiff had purchased and taken a conveyance from the defendant of an interest in real estate which had, however, been cut off by the suffering of a common recovery. It was held that a bond given by the plaintiff for the price must be delivered up for cancellation. *Cf.* with cases cited, *supra*, § 926. See

also *Blakeman v. Blakeman*, 39 Conn. 320.

²⁵ *Hitchcock v. Giddings*, 4 Price, 135; *United States v. Gridley*, 186 Fed. 544; *O'Neal v. Phillips*, 83 Ga. 556, 10 S. E. 352; *Phillips v. O'Neal*, 85 Ga. 142, 11 S. E. 581, 87 Ga. 727, 13 S. E. 819; *Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460; *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; *Earle v. Bickford*, 6 Allen, 549, 83 Am. Dec. 651; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Clark v. Carter*, 234 Mo. 90, 136 S. W. 310; *Martin v. McCormick*, 8 N. Y. 331; *Thomas v. Bartow*, 48 N. Y. 193, 198; *McKibben v. Doyle*, 173 Pa. 579, 34 Atl. 455, 51 Am. St. Rep. 785; *Bigham v. Madison*, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267; *Irick v. Fulton*, 3 Gratt. 193. See also *Miller v. Thompson*, 40 Nev. 35, 160 Pac. 775. *Cf.* *Erkens v. Nicolin*, 39 Minn. 461, 40 N. W. 567. On their facts some of these cases are not easy to reconcile with those cited *supra*, § 926.

In England the distinction is taken between a case where the price for the conveyance has been paid (where no recovery is allowed),²⁶ and a case where mistake is urged as a defence to an obligation to pay the price or as a reason for cancelling it (where relief is allowed).²⁷ But the distinction is worthless. The conveyance has been given in both cases. If the grantee has got what the parties intended he should have—namely, just what the conveyance gives him—he can neither recover the price if he has paid it, nor, if he has not, defend against his contract to pay it. On the other hand, if the contract was made on the mistaken assumption of an essential fact of which the grantee did not take the risk, he should have as complete a right to recover a price which he has paid as to defeat the recovery of a price which he has not paid.

§ 1567. Mistake as to the existence of ore.

In mining leases the lessee commonly agrees to pay a royalty, varying with the amount of ore mined and also agrees to mine annually at least a certain quantity. It is a question of construction whether such a lease is made on the assumption by both parties that ore exists in such quality that it is commercially possible to extract the agreed amount; or whether the lessee takes the risk of this and binds himself to perform in any event.²⁸ If the lessee's agreement is in terms rather to pay :

²⁶ *Clare v. Lamb*, L. R. 10 C. P. 334.

²⁷ *Hitchcock v. Giddings*, 4 Price, 135. This decision is distinguished on this ground in *Clare v. Lamb*, L. R. 10 C. P. 334.

²⁸ Cases of the latter sort are: *Bute v. Thompson*, 13 M. & W. 487; *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665, 37 L. Ed. 1215; *McDowell v. Hendrix*, 67 Ind. 513; *Valley City Milling Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074; *Wharton v. Stoutenburgh*, 46 N. J. L. 151; *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Corona Coal & Coke Co. v. Dickinson*, 261 Pa. 589, 104 Atl. 741. Cf. *Monnett v. Potts*, 10 Ind. App. 191, 37 N. E. 729. Cases of the former sort are: *Clifford v. Watts*, L. R. 5 C. P. 577; *Ridgely v. Conewago Iron Co.*, 53 Fed.

988; *Brooks v. Cook*, 135 Ala. 219, 3 So. 960; *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458; *L. R. A. 1916, F.1*; *Fritsler v. Robinson*, 70 Ia. 500, 31 N. W. 61; *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570; *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N. W. 427; *Hewitt Iron Min. Co. v. Dessau Co.*, 129 Mich. 590, 89 N. W. 365; *Diamond Iron Min. Co. v. Buckeye Iron Min. Co.*, 70 Minn. 500, 7 N. W. 507; *Buchanan v. Layne*, 95 Mo. App. 148, 68 S. W. 952; *Cook v. Andrews*, 36 Ohio St. 174; *Brick Co. v. Pond*, 38 Ohio St. 65; *Muhlenberg v. Henning*, 116 Pa. 138, 9 Atl. 144; *Boyer v. Fulmer*, 176 Pa. 282, 35 Atl. 235; *Bannan v. Graeff*, 186 Pa. 648, 4 Atl. 805; *Virginia Iron & Co. v. ...*

minimum sum than to mine a minimum quantity, it is natural to infer that he agreed to take the risk of the existence of the ore, but if the agreement in terms is to mine a certain quantity, the surrounding circumstances may indicate that in making the agreement, the parties assumed the existence of the ore as a matter of course, rather than imposed the risk of possibility on the lessee; and in case of doubt the modern tendency seems rather to favor this construction.²⁹

§ 1568. Mistake as to insurance risk.

As an insurance premium is paid on the assumption that the insurer is assuming a risk, the premium may be recovered if no risk attached, as where in marine insurance the plaintiff had no goods on board the ship to which the insurance could apply;³⁰ or where a voyage insured was not entered upon;³¹ or where, under any contract of insurance, the property to which the insurance related, had been destroyed prior to the contract of insurance,^{31a} or for any other reason, not involving fraud of the insured, the risk did not attach.³²

§ 1569. Collateral mistake generally immaterial.

It is generally said that mistake as to a collateral matter has no effect upon a contract. The boundaries of such a rule are not very exactly fixed, but it means that where the persons and things to which the contract relates are the very persons and things the parties had in mind, and the transaction is the kind of transaction they had in mind, mistakes as to other facts are unimportant. There is considerable opportunity for casuistry in a discussion whether a mistake relates to the very object of the contract or only to its inducement or to some quality

Graham (Va.), 98 S. E. 659. See also *Nordyke, etc., Co. v. Kehler*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.

²⁹ See, *e. g.*, the discussion in *Virginia Iron &c. Co. v. Graham* (Va.), 98 S. E. 659.

³⁰ *Martin v. Sitwell*, 1 Show. 156; *Toppan v. Atkinson*, 2 Mass. 385;

Steinback v. Rhineland, 3 Johns. Cas. 269.

³¹ *Stevenson v. Snow*, 3 Burr. 1237.

^{31a} *Hallock v. Commercial Insurance Co.*, 26 N. J. L. 268; *Hughes v. Mercantile, etc., Insurance Co.*, 44 How. Pr. 351.

³² *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. 706. See further, *supra*, § 757.

thereof;³³ and if whatever facts are assumed by the parties as the fundamental basis of their bargain are said to go to the identity or existence of the subject-matter of the contract, and all other facts are said to be collateral, mistake as to a collateral fact is merely another name for immaterial mistake. But it is not satisfactory terminology to use collateral in this sense since a mistake may not so far affect the identity of the subject-matter (*e. g.*, of a sale) as to prevent the property from passing and yet may make the transaction voidable. Nomenclature should distinguish between these two kinds of mistake. Undoubtedly it is true that in contracts to buy or sell with no warranty goods specified or particularly described, the fact that the goods are better or worse than supposed or possess different qualities not affecting identity will ordinarily be immaterial,³⁴ and the same principle is applicable to other contracts

³³ As for instance in *Cotter v. Luckie*, [1918] N. Zeal. L. R. 811, where a "polled Angus bull" was sold by auction, delivered to the buyer, and kept by him for four days; when, the bull proving impotent, the buyer sought to rescind the transaction. The conditions of the auction provided that no error or misdescription should annul a sale; but the court held that the animal was only "nominally" a bull and that no title had ever passed.

³⁴ *Kennedy v. Panama &c. Mail Co.*, L. R. 2 Q. B. 580; *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496; *Dortic v. Dugas*, 55 Ga. 484; *McCobb v. Richardson*, 24 Me. 82, 41 Am. Dec. 374; *Stewart v. Bank*, 104 Me. 578, 72 Atl. 741; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; *Cavanagh v. Tyson*, 227 Mass. 437, 116 N. E. 818; *Costello v. Sykes*, (Minn. 1919), 172 N. W. 907; *Sample v. Bridgforth*, 72 Miss. 293, 16 So. 876; *Brown v. Fagan*, 71 Mo. 563; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441; *Dambmann v. Schulting*, 75 N. Y. 55; *Sankey's Exr's*

v. First Nat. Bank, 78 Pa. 48; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

In *Smith v. Becker*, [1916] 2 Ch. 86, 100, the court seems to have assumed that unless the mistake in question involved impossibility of performance a contract was enforceable. *Phillimore, L. J.*, said: "The parties contracted on August 1, odd as it may be, without knowledge of the embargo which had taken place on July 31. If, instead of the embargo, there had been a conflagration at Hamburg, and all the crop of sugar had been at Hamburg, and all of it had been destroyed, then I think the contract of August 1 would have been no contract, and no proceedings could have been taken for arbitration under it. But I do not think that it is made out by the plaintiffs, and I do not think it is at all likely that they could make out, that the embargo has that effect. As has been pointed out by other members of the Court, there are two ways in which the purchaser can take delivery here. He can take delivery on ship or he can take delivery into a named

than those of purchase and sale, where the nature or quality of some object is involved.³⁵ For the same reason no right to recover money paid will lie because of a mistake which merely affects the desirability of making the payment, when there is

warehouse or *lagerhaus*. Dealing with the embargo only as made on July 31—and that is what we have to deal with, regardless altogether of the war between Germany and Russia, which began probably on August 2, and regardless of the war between Great Britain and Germany, which began at 11 o'clock on the evening of August 4, all of which are events which happened after the contract, and which are provided for by the war clause—one sees no reason why on July 31 or August 1, the purchaser should not have named a warehouse into which the sugar, if not already there, could have been delivered without any interference by the German Government and without any violation of such embargo as we have had suggested. Perhaps it is always unwise to use words which have a technical meaning in a not strictly technical sense, and I prefer to substitute for the word 'embargo' the words 'prohibition of export,' and I see no reason why prohibition of export should have prevented a transfer from one warehouse to another, or a *notional* transfer of property in the warehouse from seller to buyer. Therefore it does not seem to me that the plaintiffs have made out that the contract was void or even voidable as entered into under a common mistake of fact. Therefore I think that their application for an injunction fails."

³⁵ In *Cavanagh v. Tyson, etc., Co.*, 227 Mass. 437, 116 N. E. 818, a contractor sought to be relieved of a contract because of the unexpectedly difficult soil in which the contract must be performed. The court said (p. 820): "The question presented is whether the

erroneous belief of the plaintiff and defendant is a mutual mistake of fact of sufficient importance to make the contracts void. Such result can follow only when the mistake relates to a fact which is of the very essence of the contract, the material element in the minds of both parties, and material in the sense that it is one of the things contracted about. *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96; *Winston v. Pittsfield*, 221 Mass. 356, 108 N. E. 1038; *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621, note; *Steinmeyer v. Schroepfel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 233, note.

"In the case at bar the character of the fill through which the piles were to be driven was of importance only in the determination of the price to be demanded and paid for the performance of the work. Had the burden of performance proved less than anticipated it will scarcely be claimed that the defendant could in an appropriate action have had relief from the contract through rescission or to recover any excess in payment over reasonable compensation. Yet, such would be the defendant's right if the contract were void *ab initio*. *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531. In the case at bar the mistake of fact is collateral to the essential thing contracted about, and therefore does not invalidate the contract. *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708. See *Long v. Athol*, *supra*; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Winston v. Pittsfield*, *supra*; *Young v. Holyoke*, 225 Mass. 140, 114 N. E. 62."

no mistake as to what the money is paid for, or the facts giving rise to the supposed obligation to pay it.³⁶

§ 1570. When collateral mistake is material.

Mistake concerning collateral matters may sometimes, however, afford ground for relief. Where a mistake as to the quantity, quality, or characteristics of the subject of a bargain is due to a mutual mistake regarding some means or measure which the parties took for fixing the quantity, quality, or value of the performance rendered by one party, it seems clear that there may be rescission.³⁷ In some cases, moreover, the difference between the real and supposed quality or nature of the thing is so extreme that without any preliminary error as to the means of determining these matters, a contract based on a mutual mistake in regard to quality or characteristics has been rightly held voidable. As an illustration of this it may be supposed that a bargain is made for the sale of a specific bar of metal understood to contain a certain proportion of silver. Through some mistake the understanding of the parties may be erroneous, and the bar may be base metal instead of gold or silver as supposed.³⁸

It will be noticed that there is an actual sale of the bar in question. There was a clear expression of assent to the sale of that particular bar. The case, therefore, is one of rescission of

³⁶ *Harris v. Loyd*, 5 M. & W. 432; *Aiken v. Short*, 1 H. & N. 210; *Cleveland Cliffs Iron Co. v. East Itasca, etc., Co.*, 146 Fed. 232, 237-238, 76 C. C. A. 598; *Brooks v. Hall*, 36 Kans. 697, 14 Pac. 236; *First Nat. Bank v. Burkham*, 32 Mich. 328; *Langevin v. St. Paul*, 49 Minn. 189, 196, 51 N. W. 817, 15 L. R. A. 766; *Southwick v. First Nat. Bank*, 84 N. Y. 420, 434; *Youmans v. Edger-ton*, 91 N. Y. 403, 411. And see *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

³⁷ *E. g.*, where a survey (*McMahan v. Terkhorn*, (Ind. App. 1917), 116 N. E. 327; *Gilroy v. Alis*, 22 Ia. 174; *Coon v. Smith*, 29 N. Y. 392; *Jenks v. Fritz*, 7 W. & S. 201, 42 Am. Dec. 227); appraisement (*Freeman v. Jeffries*, L. R. 4 Ex. 189), inventory (*Sheffield*

v. Hamlin, 26 Hun, 237), or assay (*Cox v. Prentice*, 3 M. & S. 344), is made the basis of the bargain. See also *Nordyke, etc., Co. v. Kehlror*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600; *Wheadon v. Olds*, 20 Wend. 174. Cf. *Buffalo v. O'Malley*, 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137.

³⁸ The supposition is based on *Cox v. Prentice*, 3 M. & S. 344. In that case there was an error in the assay and the case therefore belongs with those in the preceding note; but at least if the difference in value was extreme, it may be supposed that even though there had been no assay, relief would have been given. See also *Terry v. Bissell*, 26 Conn. 23, 32.

a sale on equitable grounds. As in most cases where chattels are involved, the remedy is at law.³⁹ Similarly, where a watch was sold on the assumption that it was gold, when in fact it was base metal, rescission was permitted.⁴⁰ The same result follows if the subject-matter is essentially better instead of essentially worse than supposed. Where parties bargained for the sale of a cow under the mutual impression that the cow was barren, the seller was held not bound to deliver the animal when it was discovered to be a breeder.⁴¹ The same principle is involved in some cases of sales of real estate which did not have the timber,⁴² or ore⁴³ which the parties supposed, and which formed the main inducement to the bargain. So where land was leased with the expectation that a wooden building could lawfully be erected thereon, and unknown to the parties, two days before, a municipal ordinance forbade this, the lease was rescinded.⁴⁴ And where water power was leased for the purpose of grinding pulp, an unknown limitation in the lessor's right, precluding such use, was held to bar recovery of rent.⁴⁵ Another illustration of

³⁹ See *supra*, §§ 1369 *et seq.*

⁴⁰ *Sparling v. Marks*, 86 Ill. 125.

⁴¹ *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919 (see also *Cotter v. Luckie*, [1918] N. Zeal. L. R. 811, stated, *supra*, § 1569, n. 33). Cf. *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610. Neither in England nor in Illinois or Michigan (prior to the enactment of the Sales Act) was rescission allowed merely for breach of warranty (see *supra*, § 1462). Therefore, the decisions referred to in this and the preceding note must be rested on the ground suggested in the text. If A buys from B, and pays for a mass of oats at a fixed sum per bushel, the quantity being estimated by the quantity of a portion of the mass which has been measured, which both suppose to contain 500 bushels, though in fact it contains but 500 half-bushels, A can recover from B for the excess of the estimated over the real quantity. *Wheaton v. Olds*, 20 Wend. 174. And

see *Devine v. Edwards*, 87 Ill. 177. So a contract for letting seats from which to see an expected coronation procession was held unenforceable because unknown to the parties at the time they entered into the agreement the plan of a procession had been abandoned. *Clark v. Lindsay*, 88 L. T. Rep. 198; *Griffith v. Brymer*, 19 T. L. Rep. 434. See also German Civil Code, Sec. 119, quoted *supra*, § 1546, n. 37.

⁴² *Thwing v. Hall & Ducey Lumber Co.*, 40 Minn. 184, 41 N. W. 815; *Blygh v. Samson*, 137 Pa. 368, 20 Atl. 996.

⁴³ *Dale v. Roosevelt*, 5 Johns. Ch. 174.

⁴⁴ *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094. See also *Williams v. Miller*, 68 Cal. 290, 9 Pac. 166, where an agreement to pasture cattle was based on the mistaken assumption that adequate pasturage existed on the tract in question.

⁴⁵ *Bedell v. Wilder*, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871. But see *Albany Heights Realty Co. v.*

the same principle is found where parties enter into a contract to sell on the assumption that the goods to which the bargain relates are then in good condition. This matter is covered by special provisions in the Sales Act.⁴⁶ Where relief has been granted because a bid has been given under a miscalculation⁴⁷ the mistake is not only unilateral but is collateral. The bidder knows the sum of money he bids and the only mistake which he makes relates to its quality or characteristic—its equality to the total of certain items the bidder intended to include. It may be urged that the bidder meant to bid this total, and that the sum he did bid was a different thing. But he was not asked to add up items or bid the total of items, he was asked for a bid in gross and made such a bid.⁴⁸ On the other hand, a mistake as to the book value of bank stock due to the fraudulent manipulation of the books by a bank clerk, so that the book value appeared to be more than twice what it was in reality, was held no ground for rescission.⁴⁹

§ 1571. Mistake as to area of land.

Another large group of cases should be noticed in connection with collateral mistake. Where a conveyance of land is for a gross price, though the land was supposed by the parties to contain a certain area, and this has been so stated, relief has generally been denied.⁵⁰ But if the difference is great and the court

Vogt, 182 N. Y. App. D. 736, 169 N. Y. S. 1049.

⁴⁶ Sections 7, 8. See *supra*, § 1560.

⁴⁷ See *infra*, § 1578.

⁴⁸ Cases may be added where it is more open to argument whether the mistake was collateral or went to the identity of the thing. One who bought land was allowed to recover his payment because a house supposed by both parties to be wholly on the granted premises, was partly on adjoining land. *McKay v. Coleman*, 85 Mich. 60, 48 N. W. 203. A contract for the sale of a life insurance policy was held voidable because both parties supposed that the insured was living at the time, whereas he was dead. *Scott v. Coulson*,

[1903] 2 Ch. 249; *Riegal v. American Life Ins. Co.*, 140 Pa. 193, 21 Atl. 392, 11 L. R. A. 857, 23 Am. St. Rep. 225. See also *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750.

⁴⁹ *Costello v. Sykes*, (Minn. 1919), 172 N. W. 907, Hallam, J., diss. See also *Kennedy v. Panama &c. Mail Co.*, L. R. 2 Q. B. 580; *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496. Cf. *Emmerson's Case*, L. R. 1 Ch. App. 433.

⁵⁰ *Capshaw v. Fennell*, 12 Ala. 780; *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 209; *Wright v. Wright*, 34 Ala. 194; *Wilson v. Browning*, 61 Ala. 80; *Young v. Craig*, 2 Bibb, 270; *Harrison v. Talbot*, 2 Dana, 258; *Innis v. McCrummin*, 12 Mart. (La.) 425,

is satisfied that the price was in fact influenced by the supposed area, relief has been allowed.⁶¹ Obviously where land is contracted to be sold at a certain price an acre or a foot and settlement is made on the assumption that the tract contains a certain number of acres, if this assumption proves erroneous recovery may be had for the deficiency or excess by the party

13 Am. Dec. 379; *Gormley v. Oakley*, 7 La. 452; *Stull v. Hurtt*, 9 Gill, 446; *Smallwood v. Hatton*, 4 Md. Ch. 95, 100; *Stebbins v. Eddy*, 4 Mason, 414; *Noble v. Googins*, 99 Mass. 231; *Frenche v. Chancellor*, 51 N. J. Eq. 624, 27 Atl. 140, 40 Am. St. Rep. 548; *Marvin v. Bennett*, 8 Paige, 312; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Ketchum v. Stout*, 20 Oh. 453; *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Stevens v. McKnight*, 40 Ohio St. 341; *Rodgers v. Olshoffsky*, 110 Pa. 147, 2 Atl. 44; *Rich v. Scales*, 116 Tenn. 57, 91 S. W. 50; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282; *Darling v. Osborne*, 51 Vt. 148; *Yost v. Mallicote's Ad'm*, 77 Va. 610. See also *Painter v. Wilson*, 197 Pa. 434, 47 Atl. 349; *Smith v. Evans*, 6 Binn. 102; *Kreiter v. Bomberger*, 82 Pa. 59, 22 Am. Rep. 750.

⁶¹*Thomas v. Perry*, 1 Pet. C. C. 49; *Mosher v. Lack* (Cal. App.), 181 Pac. 813; *Gardner v. Kiburg* (Ia.), 168 N. W. 814; *Biggs v. Lexington &c. R.*, 79 Ky. 470, 474; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Nave v. Price*, 108 Ky. 105, 55 S. W. 882; *Newton v. Tolles*, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593; *Couse v. Boyles*, 4 N. J. Eq. (3 Green Ch.) 212, 38 Am. Dec. 514; *Wear v. Rose*, 16 N. J. Eq. 290; *Straus v. Norris*, 78 N. J. Eq. 488, 79 Atl. 611; *Rich v. Scales*, 116 Tenn. 57, 91 S. W. 50; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Ladd v. Pleasants*, 39 Tex. 415; *Yost v. Mallicote's Adm.*, 77 Va. 610; *Wardell v.*

Birdsong, 115 Va. 294, 78 S. E. 564. See also *Coppage v. Equitable &c. Trust Co.* (Del. Ch.), 102 Atl. 788. But see *Jolliffe v. Baker*, 11 Q. B. D. 254; *Palmer v. Johnson*, 13 Q. B. D. 351.

In *McMahan v. Terkhorn* (Ind. App.), 116 N. E. 327, 329, the court quoted with approval a classification in *Harrison v. Talbot*, 2 Dana, 258: "Sales in gross may be subdivided into various subordinate classifications: First, sales strictly and essentially by the tract, without reference, in the negotiation or in the consideration, to any estimated or designated quantity of acres; second, sales of like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might exceed, or fall short of that which was mentioned in the contract; third, sales in which it is evident from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency; fourth, sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties."

injured by the mistake.⁵² Rescission of the whole contract will not generally be allowed.⁵³

§ 1572. Mistake as to the character of money or securities.

If payment is made in counterfeit money, the creditor may treat the payment as a nullity, and recover upon his original claim.⁵⁴ This is true of foreign money as well as domestic.⁵⁵ The counterfeit bills must be returned without unnecessary delay, however, as a condition of rescission, for though intrinsically worthless they may enable the debtor to recoup his loss from the person from whom he received them.⁵⁶ Rescission is also allowed of the transfer of securities other than money, which are forged or void for other reasons;⁵⁷ but where a bank takes

⁵² *Shovel v. Bogan*, 2 Eq. Abr. 688; *Hays v. Hays*, 126 Ind. 92, 25 N. E. 600, 11 L. R. A. 376; *Wolcott v. Frick*, 40 Ind. App. 236, 238, 81 N. E. 731; *Henn v. McGinnis*, 182 Ia. 131, 165 N. W. 406; *Calhoun v. Teal*, 106 La. 47, 30 So. 288; *Tarbell v. Bowman*, 103 Mass. 341; *Wilson v. Randall*, 67 N. Y. 338; *Gallup v. Bernd*, 132 N. Y. 370, 30 N. E. 743; *Bailey v. Snyder*, 13 S. & R. 160; *Lawrence v. Staigg*, 8 R. I. 256; *Barnes v. Gregory*, 1 Head, 230; *Farenholt v. Perry*, 29 Tex. 316; *Ladd v. Pleasants*, 39 Tex. 415; *Western Mining, etc., Co. v. Peytona Co.*, 8 W. Va. 406.

⁵³ *Biggs v. Lexington &c. R.*, 79 Ky. 470, 476, and see cases in the preceding note. But see *Coons v. North*, 27 Mo. 73.

⁵⁴ *Jones v. Ryde*, 5 Taunt. 487; *United States Bank v. Georgia Bank*, 10 Wheat. 333, 6 L. Ed. 334; *United States v. Morgan*, 11 How. 154, 13 L. Ed. 643; *Wingate v. Neidlinger*, 50 Ind. 520; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *Atwood v. Cornwall*, 25 Mich. 142, 28 Mich. 336, 15 Am. Rep. 219; *Markle v. Hatfield*, 2 Johns. 455, 3 Am. Dec. 446; *Burrill v. Watertown Bank, etc., Co.*, 51 Barb. 105; *Bank v. Buchanan*, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199,

10 Am. St. Rep. 617; *Chalmers v. Harris*, 22 Tex. 265; *Pindall's Ex'rs v. Northwestern Bank*, 7 Leigh, 617.

⁵⁵ *Young v. Adams*, 6 Mass. 182.

⁵⁶ *Simms v. Clark*, 11 Ill. 137; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *Boyd v. Mexico Bank*, 67 Mo. 537, 29 Am. Rep. 515; *Thomas v. Todd*, 6 Hill, 340; *Raymond v. Baar*, 13 S. & R. 318, 15 Am. Dec. 603; *Pindall's Ex'rs v. Northwestern Bank*, 7 Leigh, 617. But some authorities hold it unnecessary to return paper which is absolutely worthless. *Snyder v. Reno*, 38 Ia. 329; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203.

⁵⁷ *Brown v. Watts*, 1 Taunt. 353; *Jones v. Ryde*, 4 Taunt. 488; *Phillips v. Cockayne*, 3 Camp. 119; *Young v. Cole*, 3 Bing. N. C. 724; *Westropp v. Solomon*, 8 C. B. 345; *Gompertz v. Bartlett*, 2 E. & B. 849; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203; *Clark v. Young*, 231 Mass. 156, 120 N. E. 397; *McGoren v. Avery*, 37 Mich. 120; *Wood v. Sheldon*, 42 N. J. Law, 421, 36 Am. Rep. 523; *Webb v. Odell*, 49 N. Y. 583; *Leary v. Miller*, 61 N. Y. 488; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Maldaner v. Beurhaus*, 108 Wis. 25, 84 N. W. 25.

bills purporting to have been issued by itself it cannot rescind the transaction.⁵⁸ Nor can an individual who pays a note purporting to bear his own signature as maker or indorser.⁵⁹ It is doubtless the same reason, namely, a duty to discover and prevent the error, that has led to the universally prevailing rule that a drawee who pays a bill of exchange on which the drawer's name is forged, cannot recover the payment.⁶⁰ It is generally held, however, that one who has thus received payment of a bill of exchange to which the drawer's name was forged, must restore the payment if guilty of negligence in failing to discover the forgery.⁶¹ And so if a bank pays a draft or check on the mistaken assumption that the drawer has sufficient funds to his credit to meet the instrument, no recovery of payment can be made if this assumption turns out to be an error.⁶²

See also *Hallett v. New England, etc., Co.*, 106 Fed. 217. *Cf. Sample v. Bridgforth*, 72 Miss. 293, 16 So. 876.

⁵⁸ *Cocks v. Masterman*, 9 B. & C. 902; *Simms v. Clark*, 11 Ill. 137; *Wingate v. Neidlinger*, 50 Ind. 520; *Atwood v. Cornwall*, 25 Mich. 142, 28 Mich. 336, 15 Am. Rep. 219; *Thomas v. Todd*, 6 Hill, 340; *McDonald v. Allen*, 8 Baxt. 446; *Pindall's Ex'rs v. Northwestern Bank*, 7 Leigh, 617.

⁵⁹ *Mather v. Maidstone*, 18 C. B. 273; *Hubbard v. Southern Pac. Co.*, 256 Fed. 761 (C. C. A.); *Tyler v. Bailey*, 71 Ill. 34, 37; *Jones v. Miners & Merchants Bank*, 144 Mo. App. 423, 123 S. W. 829; *Johnston v. Commercial Bank*, 27 W. Va. 343, 55 Am. Rep. 315. But see *contra Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24.

⁶⁰ See *supra*, § 1160.

⁶¹ *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; *State Bank v. First Nat. Bank*, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100; *Williamsburgh Trust Co. v. Tum Suden*, 120 N. Y. App. Div. 518, 105 N. Y. S. 335; *Ellis v. Ohio Life Ins. Co.*, 4 Oh. St. 628, 64 Am. Dec. 610; *Greenwald v. Ford*, 21 S. Dak. 28, 109 N. W. 516; *People's*

Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; *Rouvant v. San Antonio Bank*, 63 Tex. 610; *Canadian Bank v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955 (s. c. 46 Wash. 657, 91 Pac. 185). See also *Bank of Williamson v. Williamson County Bank*, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; and cases decided under the Negotiable Instruments Law, cited *supra*, § 1160.

⁶² *Chambers v. Miller*, 13 C. B. (N. S.) 125; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *St. Louis, etc., Co. v. Johnston*, 133 U. S. 566, 573, 33 L. Ed. 683, 10 Sup. Ct. 390; *American Nat. Bank v. Miller*, 185 Fed. 338, 107 C. C. A. 456; *First Nat. Bank v. Devenish*, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394; *American Exchange Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; *Wasson v. Lamb*, 120 Ind. 514, 517, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; *Manufacturers' National Bank v. Swift*, 70 Md. 515, 17 Atl. 336; *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026, 33 L. R. A. (N. S.) 963; *First Nat. Bank v. Burkham*, 32 Mich. 328;

A drawee who pays a genuine bill of exchange to which invalid security, as a forged bill of lading, is attached, is likewise unable to recover the payment.⁶³

If, however, one who receives payment from a drawee or maker is not the owner of the instrument, as if he claims through a forged indorsement, the payment may be reclaimed,⁶⁴

Germania Bank v. Boutell, 60 Minn. 189, 193, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; *National Bank v. Berrall*, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160. Cf. *Irving Bank v. Wetherald*, 36 N. Y. 335; *Whiting v. City Bank*, 77 N. Y. 363; *Hull v. Bank, Dudley (S. Car.)*, 259; *Spokane & Eastern Trust Co. v. Huff*, 63 Wash. 225, 115 Pac. 80, 33 L. R. A. (N. S.) 1023, Ann. Cas. 1912 D. 491. But see *contra*, *Merchants' Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120; *Merchants' Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89 (cf. *Boylston Bank v. Richardson*, 101 Mass. 287).

In *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128, 34 Am. Rep. 300, a bank which had certified a check under the mistaken belief that the drawer's account justified it, was allowed to rescind the certification, no change of position having taken place on the faith of it.

In *Kerrison v. Glyn, Mills & Co.*, 105 L. T. Rep. (N. S.) 721, the appellant who lived in England, had a standing arrangement with a firm of bankers in New York by virtue of which they were to honor the drafts up to £500 of a company carrying on business in Mexico, in which the appellant was interested, the appellant agreeing to put them in funds, by making needed deposits from time to time, to their credit at the respondents' bank in London. On the 21st of Oct., 1907, the New York firm wrote to the appellant informing him that the Mexican company had

been credited with £500, and requesting him to pay that amount to their account with the respondents. On receipt of this letter on the 30th of Oct. the appellant paid £500 to the respondents to the credit of the New York firm. Earlier on the 30th of Oct. the New York firm became bankrupt, and the appellant on becoming aware of this fact on the 31st of Oct. immediately applied to the respondents for the repayment of the £500. The respondents claimed a right to retain it in reduction of the indebtedness of the New York firm to them. It was held that the money had been paid under a mistake of fact, and that the respondents were not entitled to retain it.

⁶³ *Thiedemann v. Goldschmidt*, 1 DeG. F. & J. 4; *Leather v. Simpson*, L. R. 11 Eq. 398; *Guaranty Trust Co. v. Hannay*, 119 L. T. (N. S.) 321; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, 20 L. Ed. 366; *Goets v. Bank of Kansas City*, 119 U. S. 551, 30 L. Ed. 515, 7 Sup. Ct. 318; *Alton v. First Nat. Bank*, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144, 34 Am. St. Rep. 285; *First Nat. Bank v. Burkham*, 32 Mich. 328; *Springs v. Hanover Nat. Bank*, 145 N. Y. App. Div. 188, 130 N. Y. S. 87, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241; *Craig v. Sibbett*, 15 Pa. 238. Cf. *Guaranty Trust Co. v. Grotrian*, 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689; *Hannay v. Guaranty Trust Co.*, 187 Fed. 686, rev'd 210 Fed. 810, 127 C. C. A. 360.

⁶⁴ *Esdaille v. La Nauze*, 1 Y. & C. 394; *Star Fire Ins. Co. v. New Hampshire Bank*, 60 N. H. 442; *Corn Exch.*

since the drawee's payment is made and received as a discharge of the instrument, and unless the person to whom payment is made is the owner, the rights of the true owner are not discharged.⁶⁵ So where paper is sold (as distinguished from presented for payment) recovery may be had if the instrument is not genuine,⁶⁶ or if security accompanying it is not genuine.⁶⁷

But the fact that a party to the instrument is insolvent at the time of a sale of it, will not justify a rescission of the bargain,⁶⁸ unless the seller knew of the insolvency. In that case the transaction is voidable,⁶⁹ and indeed the seller impliedly warrants that he knows nothing which would impair the validity of the instrument or render it valueless;⁷⁰ and is therefore liable in damages, if he has such knowledge, as is one who sells an instrument to which a signature is forged.⁷¹

§ 1573. Unilateral mistake.

In two classes of cases mistake of one party only to a contract undoubtedly justifies affirmative relief as distinguished from a mere refusal to enforce the contract specifically against him:

Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655. But if by lapse of time before suit the position of the person receiving payment is changed, the payment cannot be recovered. *London, etc., Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7.

⁶⁵ *First Nat. Bank v. Bremer*, 7 Ind. App. 685, 34 N. E. 1012.

⁶⁶ See *supra*, § 1162.

⁶⁷ *Jones v. Huggefords*, 3 Metc. 515; *Ross v. Terry*, 63 N. Y. 613, 614; Uniform Sales Act, Sec. 36; Uniform Warehouse Receipts Act, Sec. 44, *supra*, § 1063.

⁶⁸ *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651; *Bicknell v. Waterman*, 5 R. I. 43; *Burgess v. Chapin*, 5 R. I. 225. But see *Harris v. Hanover Bank*, 15 Fed. 786. This principle is not applicable to bank notes. One who pays, even innocently, with the notes of a broken bank cannot retain the

benefit of the transaction. *Owenson v. Morse*, 7 T. R. 64; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Lightbody v. Ontario Bank*, 11 Wend. 9, s. c. *sub nom.* *Ontario Bank v. Lightbody*, 13 Wend. 101, 27 Am. Dec. 179; *Roberts v. Fisher*, 43 N. Y. 159, 3 Am. Rep. 680; *Westfall v. Braley*, 10 Oh. St. 188, 75 Am. Dec. 509.

⁶⁹ *Fenn v. Harrison*, 3 T. R. 757, 759; *Henry v. Allen*, 93 Ala. 197, 9 So. 579; *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Day v. Kinney*, 131 Mass. 37, 38; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Rothmiller v. Stein*, 143 N. Y. 581, 592, 38 N. E. 718, 26 L. R. A. 148; *Bicknell v. Waterman*, 5 R. I. 43, 48; *Burgess v. Chapin*, 5 R. I. 225, 227, 228.

⁷⁰ Uniform Neg. Inst. Law, Sec. 65. See, *supra*, § 1162.

⁷¹ *Ibid.*

1. Where the mistake was known to the other party to the transaction.⁷²

2. Where the person against whom relief is sought is in the position of a donee or volunteer.⁷³

The first of these rules is based on obvious justice; the second is in accordance with a far-reaching principle of courts of equity concerning volunteers. Under this head also must be included not only cases where a gift was intended, but cases where there is a total failure of supposed or expected consideration, as where money paid under a mistake is recovered.

§ 1574. Recovery of money paid under a mistake of fact.

One who by error in computation,⁷⁴ or by mistake of any fact,⁷⁵ pays a real or supposed creditor more than is his due, or pays a debt previously discharged, may recover the over-payment; and generally speaking money paid over under a mutual mistake of an essential fact, or under a unilateral mistake as to such a fact where the defendant has parted with nothing and the plaintiff has not received an expected return, may be recovered.⁷⁶ In most of the cases there was a mutual mistake of

⁷² See *supra*, §§ 1525, 1557.

⁷³ See *supra*, § 1556.

⁷⁴ *Millett v. Holt*, 60 Me. 169; *Davis v. Krum*, 12 Mo. App. 279; *Hanson v. Jones*, 20 Mo. App. 595.

⁷⁵ *Citizens' Bank v. Rudisill*, 4 Ga. App. 37, 60 S. E. 818; *International Bank v. Bartalott*, 11 Ill. App. 620; *Chickasaw County, etc., Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443; *Rhodes v. Lambert*, 22 Ky. L. 691, 58 S. W. 608; *Beasley v. Allen*, 11 Rob. (La.) 502; *Stevens v. Burgess*, 61 Me. 83; *Baltimore & S. R. Co. v. Faunce*, 6 Gill, 68, 46 Am. Dec. 655; *State Sav. Bank v. Buhl*, 129 Mich. 193, 88 N. W. 471, 56 L. R. A. 944; *Garrison v. Murphy*, 2 Neb. (Unof.) 696, 89 N. W. 766; *Tinslar v. May*, 8 Wend. 561; *Woodruff v. Clafin Co.*, 198 N. Y. 470, 91 N. E. 1103, 28 L. R. A. (N. S.) 440; *Pool v. Allen*, 29 N. C. 120 (7 Iredel Law); *Mitchell v. Walker*, 8 Ired. L. 243; *Guild v. Baldridge*, 2 Swan, 295;

Hummel v. Flores (Tex. Civ. App.), 39 S. W. 309.

⁷⁶ *Milnes v. Duncan*, 6 B. & C. 671; *Newsome v. Graham*, 10 B. & C. 234; *Chatfield v. Paxton*, cited 2 East, 471, n.; *Union Nat. Bank v. McKey*, 102 Fed. 662, 42 C. C. A. 583; *Jackson v. White*, 194 Fed. 677, 115 C. C. A. 71; *Walker v. Mock's Admr.*, 39 Ala. 568; *Hunt v. Matthews*, 132 Ala. 236, 31 So. 613; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, 110 Pac. 322; *Young v. Kimber*, 44 Colo. 448, 98 Pac. 1132, 28 L. R. A. (N. S.) 626; *Gilson v. Boston Realty Co.*, 82 Conn. 383, 73 Atl. 765; *Stanley Rule, etc., Co. v. Bailey*, 45 Conn. 464; *Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182; *Charleston, etc., R. Co. v. Augusta Stockyard Co.*, 115 Ga. 70, 41 S. E. 598; *Rosenbaum v. Drumm Comm. Co.*, 146 Ill. App. 229; *Devine v. Edwards*, 101 Ill. 138; *Board of Highway Commrs. v. Bloomington*, 253

fact, but if the element of failure of consideration exists, this is enough to entitle the plaintiff to recover, though he alone was acting under a mistake. The defendant is a mere volunteer and it is immaterial what was his mental attitude. But if, in spite of even a mutual mistake, and a failure of the exact consideration expected, it nevertheless seems to the court that the defendant has such moral right to what he received as to make recovery inequitable, it will be denied.⁷⁷ Where A under a mistaken belief in his liability to B, on direction of the latter pays

Ill. 164, 97 N. E. 280; *Daily v. Board of Comm'rs*, 165 Ind. 99, 74 N. E. 977; *State v. Mutual Life Ins. Co.*, 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S.) 256; *Jackson v. Creek*, 47 Ind. App. 541, 94 N. E. 416; *Reister v. Bruning*, 47 Ind. App. 570, 94 N. E. 1019; *Nat. Bank v. Myers*, 65 Kans. 122, 69 Pac. 164; *Lowe v. Wells, Fargo & Co. Express*, 78 Kan. 105, 96 Pac. 74; *Williams v. Shelbourne*, 19 Ky. L. 1924, 44 S. W. 110; *Lyon v. Mason, etc., Co.*, 102 Ky. 594, 44 S. W. 135, 19 Ky. L. 1642, 44 S. W. 135; *Hetukias v. Bon Air, etc., Iron Co.*, 108 Mo. 34, 78 Atl. 1108; *Citizens' Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *George's Creek, etc., Co. v. County Commissioners of Allegany County*, 59 Md. 255; *Stoakes v. Larson*, 108 Minn. 234, 121 N. W. 1112; *Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598; *Roberts v. Neale*, 134 Mo. App. 612, 114 S. W. 1120; *Jenkins v. Clopton*, 141 Mo. App. 74, 121 S. W. 759; *Himmelberger-Harrison Lumber Co. v. Dallas*, 165 Mo. App. 49, 146 S. W. 95; *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970, 137 Am. St. Rep. 746; *Garrison v. Murphy*, 2 Nebr. (Unof.) 696, 89 N. W. 766; *McDonald v. Metropolitan Life Ins. Co.*, 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548; *Redington Hub Co. v. Putnam*, 76 N. H. 336, 82 Atl. 715; *Sarasohn v. Miles*, 52 N. Y. App. D. 628, 65 N. Y. S. 108; *Durkin v. Cranston*, 7 Johns. 442; *Waite v. Leggett*, 8 Cow. 195, 18 Am. Dec. 441; *Burr v. Veeder*, 3 Wend. 412;

Carnegie Trust Co. v. Battery Place Realty Co., 67 N. Y. Misc. 452, 122 N. Y. S. 697; *Montgomery v. Fry*, 127 N. C. 258, 37 S. E. 259; *Luther v. Hunter*, 7 N. Dak. 544, 75 N. W. 916; *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896; *City Bank of Norfolk v. Peed (Va.)*, 32 S. E. 34; *Bart v. Pierce County*, 60 Wash. 507, 111 Pac. 582, 31 L. R. A. (N. S.) 1151; *Milwaukee, Town of, v. County of Milwaukee*, 114 Wis. 374, 90 N. W. 447.

⁷⁷ In *Badeau v. United States*, 130 U. S. 439, 32 L. Ed. 997, 9 Sup. Ct. 579, the United States sought to recover money paid Badeau on the assumption that he was entitled to receive it as a retired army officer. Inasmuch as he was receiving compensation from the government as a member of the diplomatic service the court held that his right to compensation as an army officer ceased. Though the the mistake under which the payment was made was one of law the court recognized that this would not bar recovery, but nevertheless held that "inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex aequo et bono*, he ought to return." See also *Walker v. United States*, 139 Fed. 409; *Monroe National Bank v. Catlin*, 82 Conn. 227, 73 Atl. 3; *Keener, Quasi-Contracts*, p. 34.

C a claim which C has against B, A cannot recover the payment from C.⁷⁸ If the payment was voluntarily and intentionally paid by A to C to satisfy the latter's claim against B, and C had a genuine claim against B, it seems clear that no recovery should be allowed. C is a purchaser of the money for value and in good faith.⁷⁹ Where, however, C has no valid claim against B, but only thinks he has, he is not a purchaser for value, and if he is allowed to retain the money, it must be on the vaguer ground that under the particular circumstances of the case it is unjust to deprive him of what he has received.⁸⁰

⁷⁸ *Aiken v. Short*, 1 H. & N. 210; *Whitehurst v. Mason*, 140 Ga. 148, 78 S. E. 938; *Ferguson v. Hirsch*, 54 Ind. 337; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Moors v. Bird*, 190 Mass. 400, 77 N. E. 643; *Winalow v. Anderson* (N. H.), 102 Atl. 310, L. R. A. 1918 C. 173; *Ball v. Shepard*, 202 N. Y. 247, 95 N. E. 719; *Belloff v. Dime Sav. Bank*, 118 N. Y. App. D. 20, 103 N. Y. S. 273, *affd.* 191 N. Y. 551, 85 N. E. 1106. But see *Guild v. Baldrige*, 2 Swan, 295.

⁷⁹ See *supra*, § 1531. It is assumed in the text that taking money in payment of an antecedent debt is a taking for value. *Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313; *Benjamin v. Welda State Bank*, 98 Kan. 361, 158 Pac. 65, L. R. A. 1917 A. 704; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Hatch v. Fourth National Bank*, 147 N. Y. 184, 41 N. E. 403; even though similar taking of negotiable paper (see *supra*, § 1146), or of chattels (see *Williston, Sales*, § 620), possibly may not be.

⁸⁰ In *Strauss v. Hensey*, 9 App. D. C. 541; *Walker v. Conant*, 69 Mich. 321, 37 N. W. 292, 13 Am. St. 391, and *Grand Lodge v. Towne*, 136 Minn. 72, 161 N. W. 403, L. R. A. 1917 E. 344, a person had forged and sold a mortgage on another's property. Later he forged a larger mortgage on the same property, arranging with the subsequent mortgagee that a part of the

loan should be used to pay the prior mortgage, and the second mortgagee made this payment directly to the first mortgagee and paid the balance to the fraudulent person, who was supposed to be the mortgagor's agent. On discovery of the fraud the second mortgagee sued the prior mortgagee to recover the amount paid the latter. Neither mortgagee was negligent. In the Michigan case the action failed; in the District of Columbia and Minnesota cases it was successful. *Russell v. Richard*, 6 Ala. App. 73, 60 So. 411; *Ex parte Richard*, 180 Ala. 580, 61 So. 819, also is similar in its facts and the decision follows that of the Michigan court, the ground of decision in both cases being that the money had been lent to the swindler, and that it was the swindler's money, not the plaintiff's, which the defendant received. As there was no mortgage or mortgage debt, due from anyone to the defendant, but only the counterfeit appearance thereof (in which respect the situation differs from that in *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, and other cases in the preceding note), it seems correct to allow recovery; and it does not seem material whether the plaintiff paid the defendant with his own hand or by the hand of the borrower, so long as the money which was paid was dedicated by the plaintiff to that purpose and the borrower was merely executing

And where the payment by A to C is made by A not for the discharge of C's claim against B but for another purpose, the fact that C supposes the payment was made to discharge his claim against B should not preclude recovery unless C has changed his position or other special circumstances make recovery inequitable.⁸¹

§ 1575. Recovery of the value of goods or services rendered under a mistake.

The same principle of justice which requires the return of money paid under a mistake, requires that other benefits received under a similar mistake should likewise be restored.⁸² If the transferee still has possession of all or part of what has been transferred, or of anything received by him in exchange for it, when demand is made upon him or when he discovers the real facts, a mistake of such a character as ever to justify rescission should subject him to a duty to return *in specie* what he has in his possession; and a failure to perform the duty should involve ~~liability for its value~~.⁸³ Where what was transferred under a mistake was money, other money is the exact equivalent, so that the mere fact that the money originally received by him is no longer in his possession does not preclude rescission. It may be supposed, however, that goods or serv-

a trust when he paid it. That the plaintiff would undoubtedly have lent the whole sum to the fraudulent person, if the latter previously had paid the prior mortgage from his own funds seems immaterial.

⁸¹ In *Hathaway v. Delaware County*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. 909, the plaintiff had in exchange for a forged note of the defendant county delivered to the forger, a former treasurer of the county, a check payable to A, the existing treasurer. The forger delivered this check to A in payment of a shortage in the forger's accounts, and A so applied it. The plaintiff was allowed to recover. In *Continental Caoutchouc &c. Co. v. Dunlop &c. Co.*, 90 L. T. (N. S.) 474, one who, when under a duty, to

pay a particular creditor of another, paid the wrong creditor, was held entitled to recover the payment. See also *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. (N. S.) 263. In *Koontz v. Central Nat. Bank*, 51 Mo. 275, and *Munroe v. Bonanno*, 16 N. Y. App. D. 421, 45 N. Y. S. 61, one who had by mistake paid a debt due from another was allowed to recover the payment.

⁸² In this connection may be considered goods or services rendered under an invalid or unenforceable contract. See *supra*, § 1479, and topics therein referred to.

⁸³ *Johnson v. Saum*, 123 Iowa, 145, 98 N. W. 599; *Goff v. Gott*, 5 Sneed, 562; *supra*, § 94, *ad fin.* Cf. *Hendricks v. Goodrich*, 15 Wis. 679.

ices have been transferred, and that neither they nor traceable products of them are in existence, but that, nevertheless, a pecuniary benefit has been received from their use. It may be argued with great force that on principles of quasi-contract, recovery of the value of this benefit should be permitted; but it may be replied that to allow such recovery is, in effect, to force a bargain upon an innocent defendant for what he may not have desired to buy on such terms.⁸⁴ In spite of the latter argument it seems the lesser evil, if the plaintiff has been guilty of no negligence, to allow recovery of the value of the benefit received to the extent that the services or property have been of direct pecuniary advantage to the recipient. That is, if he has made or saved money from what he received, *e. g.*, if he would have bought similar property at the market price had he not received that in question, he should pay the value to him of what he has acquired.

§ 1576. Demand.

If the defendant knew that the benefit which he received was given under such a mistake as would justify its recovery, he is liable without demand of restitution first being made upon him;⁸⁵ and it seems that if ignorant of the facts at first, subsequent discovery of them subjects him to immediate liability.⁸⁶ But if he remains ignorant of the facts, a demand is necessary before an action can be maintained.⁸⁷ Without regard, however, to the question whether the plaintiff could bring action without a prior demand, it has been generally held that unless the de-

⁸⁴ In *Concord Coal Co. v. Ferrin*, 71 N. H. 33, 51 Atl. 283, 93 Am. St. Rep. 496, the plaintiff delivered coal to the defendant on the assumption that the defendant was to pay the reasonable value thereof in cash. The defendant received the coal on the assumption that its value was to be credited on a debt due the defendant from a third person. So far as appeared, neither party was negligent in its assumption. The court denied recovery of the fair value of the coal.

⁸⁵ *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161; *Martin v. Home*

Bank, 30 N. Y. App. Div. 498, 52 N. Y. S. 464, *affd.*, 160 N. Y. 190, 54 N. E. 717; *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628.

⁸⁶ *Sheppard v. Lang*, 122 Ga. 607, 50 S. E. 371; *Earle v. Bickford*, 6 Allen, 549, 83 Am. Dec. 651; *Bishop v. Brown*, 51 Vt. 330.

⁸⁷ *Freeman v. Jeffries*, L. R. 4 Exch. 189; *Worley v. Moore*, 77 Ind. 567, 569; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337; *Gillett v. Brewster*, 62 Vt. 312, 20 Atl. 105; *Stocks v. Sheboygan*, 42 Wis. 315.

fendant has been guilty of fraudulent concealment, the Statute of Limitations begins to run from the time that a payment under mistake was made.⁸⁸

§ 1577. Unilateral mistake as to contents of writing.

Where the signer of a writing has made an innocent mistake without carelessness, whether induced by fraud or not, the writing is not his expression, and there is no contract.⁸⁹ But if a man acts negligently, and in such a way as to justify others in supposing that the writing is assented to by him, he will be bound both at law and in equity. Accordingly, even if an illiterate executes a deed under a mistake as to its contents, he is bound if he did not require it to be read to him or its object except explained.⁹⁰ And much more, if the signer is not illiterate, "it will not do for him to enter into a contract and when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."⁹¹ Though declining to decree rescission for such a reason, a

⁸⁸ *Bree v. Holbech*, 2 Doug. 654; *Baker v. Courage*, [1910] 1 K. B. 56; *Richardson v. Bales*, 66 Ark. 452, 51 S. W. 321; *Maxwell v. Walsh*, 117 Ga. 467, 43 S. E. 704; *Schultz v. Board*, 95 Ind. 323; *Brown v. Edes*, 37 Mo. 318; *Ely v. Norton* (1 Halst.), 6 N. J. L. 187; *State Hospital v. Philadelphia County*, 205 Pa. 336, 54 Atl. 1032. See also *Board v. Veghte*, 44 N. J. L. 508. A contrary conclusion has been reached in Texas where the statute does not begin to run until by the exercise of reasonable diligence the plaintiff should have discovered his rights. *Standford v. Finks*, 45 Tex. Civ. App. 30, 35, 99 S. W. 499; and the same result has been reached in several States by statute. *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; *West v. Fry*, 134 Iowa, 676, 112 N. W. 184, 11 L. R. A. (N. S.) 1191; *German Security Bank v. Columbia F. & T. Co.*, 27 Ky. L. Rep. 581, 85 S. W. 761; *Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99, and such is the rule generally adopted by courts of

equity. *Brooksbank v. Smith*, 2 Y. & C. Ex. 58; *Ecclesiastical Commrs. v. North Eastern Ry. Co.*, 4 Ch. D. 845, 860; *Ainsfield v. More*, 30 Neb. 385, 402, 46 N. W. 828; *Hall v. Graham*, 112 Va. 560, 72 S. E. 105; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501.

⁸⁹ See *supra*, § 1488.

⁹⁰ *Supra*, § 35.

⁹¹ *Supra*, § 35. See also *supra*, § 90b. In *Williams v. Leisen*, 72 N. J. L. 410, 60 Atl. 1096, the defendant testified when sued on a written contract for the purchase of books that the plaintiff's agent told him that he wanted to get some influential citizens to indorse the work and the defendant signed the slip supposing that it was merely an indorsement of the work. This was held insufficient to excuse the defendant. But see *Carlisle Banking Co. v. Bragg*, [1911] 1 K. B. 489, (C. A.); *Bank of Ireland v. McManamy*, Ir. Rep., [1916] 2 K. B. 161.

court of equity, in its discretion, may refuse specific enforcement on that account.⁹² And if the promisee was guilty of fraud, the fraud will be a defence to an action by him, though the promisor was negligent in failing to read the contract.⁹³

§ 1578. Relief sometimes allowed for unilateral mistake in other cases.

As to other cases than those referred to in a preceding section,⁹⁴ the expressions are numerous that mistake, in order to justify relief, must be mutual or the error of one party must be known to the other. That this is true of reformation is nowhere doubted; but some cases afford countenance for the doctrine that unilateral mistake while the contract is still executory and the parties can be put in *statu quo*, may afford ground for rescission.⁹⁵ This has been most frequently attempted where a

⁹² *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1. And see *supra*, § 1425.

⁹³ *Warden v. Reser*, 38 Kans. 86, 16 Pac. 60; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691, 63 N. J. L. 307, 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. Rep. 617. But see *Reid v. Bradley*, 105 Iowa, 220, 74 N. W. 896; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14.

⁹⁴ § 1573.

⁹⁵ In *Moffett, etc., Co. v. Rochester*, 91 Fed. 28, 32, 33 C. C. A. 319, 62 U. S. App. 392, the court speaking of this doctrine said: "The court below adopted the opinion which has been sometimes expressed obiter by judges, and frequently quoted by text writers, that equity will not reform a written contract unless for the mistake of both parties, but may rescind and cancel one upon the ground of a mistake by either. Thus, it is said in *Dulany v. Rogers*, 50 Md. 533: 'A mistake on one side may be ground for rescinding, but not for reforming, a written agreement,' See also *Diman v. Providence, etc., Railroad Co.*, 5 R. I. 130; *Hearne v. Insurance Co.*, 20 Wall. 488, 491, 22 L. Ed.

395; *Smith v. Mackin*, 4 Lans. 41. The opinion seems to have originated in the observation in *Mortimer v. Shortall*, 2 Dru. & War. 373, that 'a mistake on one side might be a ground for rescinding a contract, but could never be relied on as a reason for taking from a man what he thought he was to get under his agreement,'—an observation which is neither lucid nor logical when read disconnected with the context. What the proposition means, and all it means, is that a contract cannot be reformed into a new contract for the mistake of one party only, but may be rescinded for a mistake of one party whenever the circumstances of the case are such that it would be inequitable to allow the other party to enforce it, and inadequacy of consideration alone is not such a circumstance. *Eyre v. Potter*, 15 How. 42, 58, 59, 14 L. Ed. 592. A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms as reduced to writing although expressing the understanding of one party, did not express that of the other.

price was bid which because of erroneous arithmetical processes or by the omission of items was based on a mistake. Rescission has been allowed in several cases of this and other kinds,⁹⁶

In all the reported cases where there was not the element of mutual mistake, or mistake of one side with knowledge on the other, there was, in the language of Addison, [on Contracts] 'some undue influence, misrepresentation, surprise, or abuse of confidence,' or the contract was so oppressive as to be unconscionable." The decision from which this quotation is taken was reversed in the Supreme Court (see the following note); but the correctness of the principles stated in the above quotation is reaffirmed in *Star-Chronicle Pub. Co. v. New York Evening Post*, 256 Fed. 435, 443, 167 C. C. A. 563, and the contract in suit was specifically enforced in spite of the defendant's unilateral mistake, the court citing in support of its allowance of this remedy, *Tamplin v. James*, 15 Ch. D. 217; *May v. Platt*, [1900] 1 Ch. 616; *Swaisland v. Dearsley*, 29 Beav. 430; *Dyas v. Stafford*, 7 L. R. Ir. 606.

* In *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500, L. R. A. 1917 D. 741, a suit to recover the amount of a certified check deposited with the plaintiff's bid for the erection of a church, the court held that a mistake in computation of the bid owing to the omission of an important item of the cost, justified a cancellation of the contract and a recovery of the deposit. The court said: "This case upon its facts is not distinguishable from *Moffett H. & Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108, 20 Sup. Ct. Rep. 957, except that there notice of the error was given when the bids were opened; but that can be of no consequence, since under the statute there applicable the bid could not be withdrawn after being submitted. The court rescinded the accepted proposal to construct certain municipal im-

provements. This power of a court of equity to rescind or cancel a contract entered while one party labored under a mistake as to a fact of impelling importance to him in entering it is recognized in *Brown v. Lamphear*, 35 Vt. 252. And in speaking of the case of *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 130, the court in *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110, says: 'This case recognizes another rule of equity,—that where there has been a material mistake upon one side the court may rescind and cancel the agreement, where it can do so without injustice to the other party. There are two principal classes of cases in which this power of the court is exercised. One includes cases of executory contracts and the like, where the parties can be put in *statu quo*. In these cases the parties have not, in reality, agreed; their minds have not met; and if one, without fault on his part, has bound himself to something materially different from what he supposed it to be, which can be annulled without loss or injustice to the other side, it is deemed . . . inequitable to enforce it.' See also *Smith v. Mackin*, 4 Lans. 41; *School Comrs. v. Bender*, 36 Ind. App. 164, 72 N. E. 154; *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91, and *Werner v. Rawson*, 89 Ga. 619, 15 S. E. 813, where the vendor made a mistake in respect to the purchase price of land and the contract had been executed, still the court rescinded the deal, holding: 'while a court of equity will not reform a written contract upon the ground of mistake, unless the mistake is shown to be common to both parties, yet it may exercise its powers to grant relief, in a proper case, by rescinding and cancelling the writing upon the

though denied in others.⁹⁷ Where relief is allowed it is generally said to be essential that the party seeking relief shall not have been guilty of negligence.⁹⁸ *and no other party to have been negligent*

ground of a mistake of facts material to the contract by one party only.'

"In *Scott v. Hall*, 58 N. J. Eq. 42, 43 Atl. 50, where the vendor in a conditional sale contract agreed to transfer the chattels to the one in possession for \$525, on the mistaken supposition that there was \$650 due on the contract, instead of \$950 and the check for \$525 was already in the hands of the vendor's agent when the mistake was discovered, the court rescinded the bargain, Vice Chancellor Pitney, saying: 'Now it seems to me plain enough that, having agreed upon a sum based on \$650 being due, when there was in fact \$950 due, this court ought to relieve him from a contract made upon such mistaken basis, unless, before notice, the other party has so acted upon it as that it would be unjust to him to be compelled to submit to rescission. Now in this case notice was given immediately to defendant's counsel and while the affair was unfinished and not concluded in the manner in which the parties intended to conclude it; for it was their intention that there should be a written transfer of the title.'

"So here there was to be a formal contract executed. That a mistake by one party as to price is material and ground for holding that the minds of the parties did not meet, see *Rowland v. New York, N. H. & H. R. Co.*, 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839; and *Webster v. Cecil*, 30 Beav. 62, 54 Eng. Reprint, 812."

The court distinguished *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224; and *Tatum v. Coast Lumber*

Co., 16 Idaho, 471, 101 Pac. 957, and other authorities cited in the annotation to that case in 23 L. R. A. (N. S.) 1109, on the ground that there the person laboring under a mistake had been guilty of negligence. In the Minnesota case the court and jury found that there was no negligence, but it seems difficult to reconcile the omission of structural iron from the computation of the cost of the church with freedom from negligence. See also further on the question of unilateral mistake, *Starr-Chronicle Pub. Co. v. New York Evening Post*, 256 Fed. 435, 167 C. C. A. 563; *Barfield v. Price*, 40 Cal. 535; *Neill v. Midland R. Co.*, 20 L. T. (N. S.) 864; *Georgia Code*, § 4579; *Norton v. Bohart*, 105 Mo. 615, 631, 16 S. W. 598; *Harper v. Newburgh*, 159 N. Y. App. D. 695, 145 N. Y. S. 59; *Buck v. Equitable Life Assur. Soc.*, 96 Wash. 683, 165 Pac. 878; *Fearon Lumber & Veneer Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137, 140. In England where counsel consent to a compromise under a mistake of fact, the mistake though unilateral may be ground for relief if no prejudicial change of situation has occurred, *Hickman v. Berens*, [1895] 2 Ch. 638, but it cannot be confidently assumed that this rule has broader application than to mistakes of counsel. See *Fowler v. Sugden*, 115 L. T. 51.

⁹⁷ *American Water Softener Co. v. United States*, 50 Ct. Cl. 209; *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224; *Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; *Griffin v. O'Neil*, 47 Kan. 116, 27 Pac. 826, 48 Kan. 117, 29 Pac. 143; *Leonard v. Howard*, 67

⁹⁸ See cases cited in the preceding notes and also *infra*, § 1596.

§ 1579. Criticism of relief for unilateral mistake.

It is obvious that a doctrine which permits the rescission of a contract on account of unilateral mistake approaches nearly to a contradiction of the objective theory of mutual assent in the formation of contracts to which the modern law seems generally to have tended.⁹⁹ There is indeed a distinction between saying that the contract exists when one party is under an error as to the terms of the supposed agreement or as to some vital fact affecting their import, and saying that the contract may be rescinded; for (1) Equitable jurisdiction extends only to writings unless the property in question is land or unique in character, and therefore excludes most transactions entered into either orally or by informal writings not adopted as a memorial of the bargain. (2) Not every error would be sufficient to permit relief. (3) Relief probably would not be given if the party guilty of the error had been seriously negligent. (4) Relief would not be given if there had been a change of position on the part of the other party. (5) In some jurisdictions advantage could be taken of the error only in a court having equity powers, and relief given only if the error was clearly established by more than a mere preponderance of evidence.

But it can hardly be supposed that equitable and legal doctrines in regard to the formation and enforcements of contracts will permanently be kept in separate compartments,¹ and equitable defences are now so generally allowed that a defendant

Oreg. 203, 212, 135 Pac. 549; Southbridge Roofing Co. v. Providence Cornice Co., 39 R. I. 35, 97 Atl. 210; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. Whatever distinctions there may be in the facts of these cases as compared with those in the preceding note, there is no doubt that the courts in the cases cited in this note were antagonistic to the views expressed in the preceding note. See also Newsome v. Brasell, 118 Ga. 547, 45 S. E. 397; Crilly v. Board of Education, 54 Ill. App. 371; Griffin v. O'Neil, 48 Kan. 117, 29 Pac. 143; Wilson v. Western North Carolina Land Co., 77 N. C. 445; Borden v. Richmond, etc., R. Co.,

113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632; Pittsburg Valve, etc., Co. v. Klingelhofer, 210 Pa. 513, 60 Atl. 161; Electric Light Co. v. Poor District, 21 Pa. Super. 95; Taylor Cotton Oil Co. v. Early-Foster Co. (Tex. Civ. App.), 205 S. W. 965; Coates v. Buck, 93 Wis. 128, 67 N. W. 23, and see the following section.

⁹⁹ See *supra*, §§ 20, 94, 95, 1536, 1537.

¹ "The general rule appears to be that for relief on the ground of mutual mistake the injured party may elect either the law or the equity side of the court." *Henn v. McGinnis*, 182 Ia. 131, 165 N. W. 406, 407.

sued at law on a contract which he is entitled to have rescinded in equity, may in most jurisdictions simply give notice promptly of his intention to rescind without instituting equitable proceedings, and if sued on the contract, set up the defence as an equitable plea.² Since this is so, most of the questions involved in the case will be left to the jury,³ and however careful the instructions may be, it is probable that the fine distinctions involved in them will be overlooked. Moreover, in a developed system of jurisprudence any distinction in this matter between written and oral contracts seems based on no sound principle and can hardly persist. Either all or none will be subject ultimately to the defence of unilateral mistake. In the former alternative the stability and definiteness secured by the objective theory of mutual assent—which are the best reasons for its adoption—are obviously destroyed, and this is to a large extent true when rescission of any contract is allowed for unilateral error beyond the limits stated in a previous section,⁴ even though equity jurisdiction is not exercised by courts of law.

§ 1580. An executed or partially executed transaction will not be rescinded for unilateral mistake.

The same principle that prohibits recovery of money paid after the defendant has changed his position, makes it clear that whatever equity there may be in favor of one who has made a unilateral mistake in the formation of a bilateral contract, the effect of it is confined to cases where the transaction is still wholly executory. Therefore if the parties proceed with a contract under a bid or offer erroneously calculated, there can be no relief;⁵ and in other cases also unilateral mis-

² See § 1598.

³ An equitable defence "which sets forth some equitable consideration for the sole purpose of resisting the plaintiff's claim without asking any affirmative action of the court whatever, will not affect the mode of trial." *Gill v. Pelkey*, 54 Ohio St. 348, 360, 43 N. E. 991; *Raymond v. Toledo, etc., R. Co.*, 57 Ohio St. 271, 48 N. E. 1093.

⁴ § 1573.

⁵ *Hubbert v. Fagan*, 99 Ark. 480, 138

S. W. 1001; *Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; *Griffin v. O'Neil*, 48 Kan. 117, 29 Pac. 143; *Boeckler Lumber Co. v. Cherokee Realty Co.*, 135 Mo. App. 708, 116 S. W. 452; *Chaplaine Realty, etc., Co. v. Philip Gruner, etc., Co.*, 137 Mo. App. 451, 118 S. W. 665. See also *Young v. Springer*, 113 Minn. 382, 129 N. W. 773; *Harter v. Bomberger*, 47 Pa. 492.

take will not justify rescission of a wholly or partly executed contract.⁶

§ 1581. Mistake of law.

There is no portion of the law of mistake more troublesome than that relating to mistake of law. It is impossible to coördinate the cases so as to produce satisfactory results, because the rule itself distinguishing mistake of law from mistake of fact is founded on no sound principle. Ignorance of law does not excuse one who has violated a prohibition of the law from the penalties that the law imposes. This is a necessary rule not only of the law of crimes and torts, but it is generally true also that a contract forbidden by law, or a contract to do an act forbidden by law, is none the less unenforceable because the parties were ignorant of the law or made a mistake in regard to it, though this principle is not without exception.⁷ Such a rule is necessary to enforce the orders of society; but the only bearing that it has on the reformation or rescission of contracts, or the recovery of payments made under a mistake is when the contract or payment is tainted with illegality. Prior to the nineteenth century no indication of a distinction between mistake of law and mistake of fact is to be found, and indeed not only are there early authorities, both at law⁸ and in equity,⁹ for the allowance of relief in cases of mistake of law, but a decision by Lord Mansfield only a few years before the close of the eighteenth century¹⁰ is to the same effect. Yet at the beginning of the nineteenth century in a case before Lord Ellenborough, who was trained in criminal trials, it was held that mistake of law afforded no ground for quasi-contractual recovery,¹¹ and though within ten years the same judge held a mistake of law sufficient ground for disregarding the cancellation of a deed,¹²

⁶ *Hayes v. Penn. Mut. L. Ins. Co.*, 228 Mass. 122, 117 N. E. 191; *Stettheimer v. Killip*, 75 N. Y. 282; *Susquehanna Ins. Co. v. Swank*, 102 Pa. 17; *Bible v. Centre Hall Borough*, 19 Pa. Super. 136; *Diman v. Providence, etc., R. Co.*, 5 R. I. 130. See also *Star Glass Co. v. Longley*, 64 Ga. 576; *Phillip v. Gallant*, 62 N. Y. 256.

⁷ See *infra*, § 1632.

⁸ *Hewer v. Bartholomew, Cro. Eliz.* 614; *Bonnel v. Foulke*, 2 Sid. 4.

⁹ *Turner v. Turner*, 2 Rep. Ch. 154; *Lansdown v. Lansdown*, 2 Jac. & W. 205, n.

¹⁰ *Bize v. Dickason*, 1 T. R. 285.

¹¹ *Bilbie v. Lumley*, 2 East, 469.

¹² *Perrott v. Perrott*, 14 East, 423.

his earlier statement became generally accepted both at law and in equity. But the injustice of some of the results produced thereby has led to an increasing number of exceptions which have to a considerable extent destroyed the rule, and often make it difficult to determine in what cases it may still be thought applicable. The only way apparent for the law on the subject to obtain uniformity and certainty is by the gradual broadening of these exceptions until they so far coalesce that courts will venture to put mistakes of law and of fact on the same footing.

§ 1582. General statements deny relief for mistake of law.

Subject to qualifications, hereafter considered, the statement is generally made that no relief will be given for a mistake of law unaccompanied with any mistake of fact,¹³ and especially, it is still generally held that money paid under a mistake of law

¹³ *Bilbie v. Lumley*, 2 East, 469; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; *Midland G. W. R. Co. v. Johnson*, 6 H. L. Cas. 798; *Stewart v. Kennedy*, L. R. 15 App. Cas. 108; *Hunt v. Rousmanier's Adm'rs*, 1 Pet. 1, 7 L. Ed. 27; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85, 25 L. Ed. 62; *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, 11 Sup. Ct. 972, 999; *Taylor v. Holmes*, 14 Fed. 498, aff'd in 127 U. S. 489, 32 L. Ed. 179, 8 Sup. Ct. 1192; *Goodno v. Hotchkiss*, 237 Fed. 686; *Clark v. Hart*, 57 Ala. 390; *Stephenson v. Atlas Coal Co.*, 147 Ala. 432, 41 So. 301; *Steinfeld v. Zeckendorf*, 10 Ariz. 221, 86 Pac. 7; *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185; *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994; *Porter v. Wright*, 145 Ga. 787, 89 S. E. 838; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Baker v. Pierce*, 197 Ill. App. 158; *Oiler v. Gard*, 23 Ind. 212; *Allen v. Anderson*, 44 Ind. 395; *Casady v. Woodbury County*, 13 Ia. 113; *Bach v. Interurban Ry. Co. (Ia.)*, 171 N. W. 723;

Stover v. Poole, 67 Me. 217; *Carpenter v. Jones*, 44 Md. 625; *Konig v. Mayor, etc., of Baltimore*, 128 Md. 465, 97 Atl. 837; *Sparks v. Pittman*, 51 Miss. 511; *Price v. Estill*, 87 Mo. 378; *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Morehead Bkg. Co. v. Morehead*, 124 N. C. 622, 32 S. E. 967, affirming on motion for rehearing, 122 N. C. 318, 30 S. E. 331; *Palmer v. Cully (Okl.)*, 153 Pac. 154; *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236; *Clark v. Lehigh & W. B. Coal Co.*, 250 Pa. 304, 95 Atl. 462; *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096; *Farnsworth v. Dinamore*, 2 Swan, 38; *Lott v. Kaiser*, 61 Tex. 665; *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643; *Deeriet Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Rochester v. Alfred Bank*, 13 Wis. 432, 433, 80 Am. Dec. 746.

cannot be recovered.¹⁴ But in Connecticut,¹⁵ and Kentucky,¹⁶ the courts have refused to draw the common distinction between mistakes of fact and of law, and have allowed relief for such mistakes of law as fall within the general principles allowing relief for mistake. The distinction seems also wholly abolished by the Civil Code of California,¹⁷ the provisions of

¹⁴ *Brisbane v. Dacres*, 5 Taunt. 143; *Henderson v. Folkestone Waterworks Co.*, 1 Times L. R. 329; *Elliott v. Swartwout*, 10 Pet. 137, 153, 9 L. Ed. 373; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *Maryland Casualty Co. v. Little Rock, etc., Co.*, 92 Ark. 306, 122 S. W. 994; *Blackburn v. Texarkana &c. Co.*, 102 Ark. 152, 159, 143 S. W. 588; *Drumagins v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Wingerter v. San Francisco*, 134 Cal. 547, 66 Pac. 730, 86 Am. St. Rep. 294; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Town of Edinburg v. Hackney*, 54 Ind. 83; *Coburn v. Neal*, 94 Me. 541, 48 Atl. 178; *Alton v. First Nat. Bank*, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144, 34 Am. St. Rep. 285; *Erkens v. Nicolin*, 39 Minn. 461, 40 N. W. 567; *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251; *Lamar Township v. City of Lamar*, 261 Mo. 171, 186, 169 S. W. 12; *Campbell v. Clark*, 44 Mo. App. 249; *Keasar v. Colebrook Nat. Bank*, 75 N. H. 278, 73 Atl. 170; *Clarke v. Dutcher*, 9 Cow. 674; *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Belloff v. Dime Savings Bank*, 118 N. Y. App. D. 20, 103 N. Y. S. 273, aff. 191 N. Y. 551, 85 N. E. 1106; *Scott v. Ford*, 45 Or. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469; *Ege v. Koontz*, 3 Pa. St. 109; *Millard v. Delaware &c. R.*, 224 Pa. 448, 73 Atl. 904; *Robinson v. Charleston*, 2 Rich. (S. C.) 317, 45 Am. Dec. 739; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643; *Mayor, etc., of Richmond v. Judah*, 5 Leigh (Va.) 305; *Gage v. Allen*, 89

Wis. 98, 61 N. W. 361; *Perry v. New-castle &c. Ins. Co.*, 8 Up. Can. Q. B. 363. See also *Heath, etc., Mfg. Co. v. Nat. Linseed Oil Co.*, 99 Ill. App. 90 (aff'd 197 Ill. 632, 64 N. E. 732); *Bond v. Coates*, 16 Ind. 202. Cf. *Rawson v. Bethesda Baptist Church*, 123 Ill. App. 239; *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375; *Scott v. Board of Trustees*, 132 Ky. 616, 116 S. W. 788, 21 L. R. A. (N. S.) 112; *Lawrence v. Beaubien*, 2 Bailey (S. C.) 623, 23 Am. Dec. 156.

¹⁵ *Northrop's Exr's v. Graves*, 19 Conn. 548, 554, 50 Am. Dec. 264; *Kane v. Morehouse*, 46 Conn. 300; *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; *Park Bros. & Co., Ltd., v. Blodgett & Clapp Co.*, 64 Conn. 28, 29 Atl. 133; *Monroe Nat. Bank v. Catlin*, 82 Conn. 227, 73 Atl. 3; *Bronson v. Liebold*, 87 Conn. 293, 87 Atl. 979.

¹⁶ *McMurtry v. Kentucky Central R. Co.*, 84 Ky. 462, 464, 1 S. W. 815; *Louisville Banking Co. v. Asher*, 112 Ky. 138, 152, 65 S. W. 133, 99 Am. St. Rep. 283; *Tucker v. Denton*, 32 Ky. L. Rep. 521, 106 S. W. 280, 15 L. R. A. (N. S.) 289; *Supreme Council v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Hartsfield v. Wray (Ky.)*, 205 S. W. 965.

¹⁷ Civil Code, §§ 1567, 1576, 1578; *Gregory v. Clabrough's Ex.*, 129 Cal. 475, 62 Pac. 72; *Ellis v. Jeffers*, 130 Cal. 478, 62 Pac. 734; *Wingerter v. San Francisco*, 134 Cal. 547, 66 Pac. 730, 86 Am. St. Rep. 294; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149.

which have been copied in Montana,¹⁸ North Dakota,¹⁹ Oklahoma,²⁰ and South Dakota.²¹ In the Georgia Code,²² it is provided that relief may be given in equity for mistake of law, and recovery of money paid is allowed on the same ground.²³ On the other hand, it may be noted that the courts of Illinois²⁴ and Pennsylvania²⁵ go to an extreme in denying the generally received exceptions to the rule that a mistake purely of law justifies no relief.²⁶

The tendency in courts of equity to depart from a general recognition of a distinction between mistakes of facts and law is stronger than the similar tendency in courts of law.²⁷ In England at least it has been broadly said that a court of equity may relieve from mistake of law "if there is any equitable ground that makes it, under the particular facts of the case, inequitable that the party who received the money should retain it,"²⁸ and though few American courts might express themselves so broadly most would agree with the statement of the Supreme Court of Missouri.²⁹ "It is a legal commonplace that ignorance of the law excuses no man, but this is a hard saying much murmured against, and the rule is relaxed in equity."³⁰

¹⁸ Civil Code, §§ 4973, 4982, 4984.

¹⁹ Rev. Code (1913), §§ 5844, 5853, 5855; *Silander v. Gronna*, 15 N. Dak. 552, 108 N. W. 544, 125 Am. St. Rep. 616; *Hellebust v. Bonde*, (N. Dak. 1919), 172 N. W. 812.

²⁰ Rev. Laws, 1910, §§ 898, 907, 909; *Hamilton v. Havercamp*, 37 Okl. 41, 130 Pac. 259; *Northwest Thresher Co. v. McNinch*, 42 Okl. 155, 140 Pac. 1170. But see *Campbell v. Newman*, 51 Okl. 121, 151 Pac. 602.

²¹ Civ. Code, §§ 1196, 1205, 1207.

²² Secs. 4576, 4577. See *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375; *Jones v. Munroe*, 32 Ga. 181; *Gefken v. Graef*, 77 Ga. 340; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Strange v. Franklin*, 126 Ga. 715, 55 S. E. 943.

²³ See cases in the preceding note.

²⁴ *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591; *Tilton v. Fairmount Lodge*, 244 Ill. 617, 91 N. E.

644; *Baker v. Pierce*, 197 Ill. App. 158. Cf. *Moore v. Shook*, 276 Ill. 47, 114 N. E. 592.

²⁵ *Fink v. Farmers' Bank*, 178 Pa. 154, 167, 35 Atl. 636, 56 Am. St. Rep. 746; *Clark v. Lehigh, etc., Coal Co.*, 250 Pa. 304, 95 Atl. 462; *Shields v. Hitchman*, 251 Pa. 455, 96 Atl. 1039.

²⁶ See also *Euler v. Schroeder*, 112 Md. 155, 76 Atl. 164; *Godwin v. Da Conturbia*, 115 Md. 488, 80 Atl. 1016.

²⁷ See *Stanley Bros., Ltd., v. Corporation of Nuneaton*, 108 L. T. (N. S.) 986, 992.

²⁸ *Rogers v. Ingham*, 3 Ch. Div. 351. 357. See also *In re Hulkes*, 33 Ch. D. 552; *Allcard v. Walker*, [1896] 2 Ch. 369, 381.

²⁹ *Williamson v. Brown*, 195 Mo. 313, 330, 93 S. W. 791.

³⁰ In *Reggio v. Warren*, 207 Mass. 525, 534, 93 N. E. 805, 32 L. R. A. (N. S.) 340, the court indicated its hostility to the doctrine, saying: "Sometimes as

§ 1583. Mistake of law in the Civil law.

The classical Roman law denied relief on account of mistake of law except in the case of minors and women.³¹ But in most

the ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving of relief to one injured by reason of a mistake of law, but that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress. *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052; *Freichnecht v. Meyer*, 39 N. J. Eq. 551; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Hausbrandt v. Hofler*, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289, quoting and following *Stafford v. Fetters*, 55 Iowa, 484, 8 N. W. 322, and *Ring v. Ashworth*, 3 Iowa, 452; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52. To the same effect see *Swedesboro L. & B. Assoc. v. Gans*, 20 Dick. 132, in which the old rule as to ignorance of the law is said to be subject to so many exceptions that it is quite as often inapplicable as applicable; *Williams v. Hamilton*, 104 Iowa, 423, 73 N. W. 1029, in which the court declares it to be well settled that a mistake as to law may under certain circumstances afford ground for relief in equity; and *Allcard v. Walker*, [1896] 2 Ch. 369, 381, in which the proposition that relief never can be given in respect to a mistake of law was called inaccurate. So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself

unjustly at the expense of another by reason of an innocent mistake of law or of fact entertained by both parties. *Park Brothers v. Blodgett*, 64 Conn. 28, 29 Atl. 133; *Blakemore v. Blakemore*, 19 Ky. L. Rep. 1619, 1620, 44 S. W. 96; *Dinwiddie v. Self*, 145 Ill. 290, 305, 33 N. E. 892; *Benson v. Bunting*, 127 Cal. 532, 59 Pac. 991; *Order of United Commercial, etc., of America v. McAdam*, 125 Fed. 358, 368, 61 C. C. A. 22; *Stone v. Godfrey*, 5 DeG. M. & G. 76, 90; *Naylor v. Winch*, 1 Sim. & Stu. 555, 564; *Re Saxon Life, etc., Soc.*, 2 Johns & Hen. 408, 412. This doctrine frequently has been applied to cases of the reformation of contracts; *a fortiori*, it is to be applied to cases in which justice can be obtained only by a complete rescission. *Canedy v. Marcy*, 13 Gray, 373; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 299; *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, 11 Sup. Ct. 972, and cases cited on page 284. *Carrell v. McMurray*, 136 Fed. 661. Cases in which a release has been either avoided or restricted in its operation by a limitation of its general words rest really upon the same principle. *Ramsden v. Hylton*, 2 Ves. Sen. 304; *Lyall v. Edwards*, 6 H. & N. 337; *Turner v. Turner*, 14 Ch. D. 829; *In re Garnett*, 31 Ch. D. 1. So one who has made an election under a will may rescind it upon proof that he acted under a misapprehension of his legal rights or even in ignorance of the fact that he was bound to make an election. *Watson v. Watson*, 128 Mass. 152; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Pusey v. Desbouvrie*, 3 P. Wms. 315, 316; *Salkeld v. Vernon*, 1 Eden, 64."

³¹ Dig. XXII, 6, 9, pr. and § 2,

Civil law countries any distinction between mistake of law and mistake of fact, has now been disregarded. The German Code makes no difference,³² the French³³ and Italian law³⁴ likewise put mistake of law on the same footing as mistake of fact, and such is the general modern tendency.³⁵

§ 1584. Exceptions to the rule denying relief for mistake of law.

The formula that mistake or ignorance of law excuses no one is often used where the lack of relief is due to a more fundamental difficulty which would likewise have precluded relief if the mistake had been one of fact. Thus mistake by one party of the law governing his antecedent rights or his present agreement can afford no ground for relief if the mistake was not known to or induced by the other party,³⁶ unless there is the further element of lack or failure of consideration.

Again the distinction must be observed between (1) a mistake of law in the expression of an intended contract; (2) a mistake of law concerning legal consequences of a contract which were not covered by any antecedent agreement of the parties; and (3), a mistake of law concerning the rights of the parties prior to the transaction in question. A mistake of the first sort is not likely to occur except in connection with writings. A mistake of the second or third kinds may occur in connection with written or oral transactions whether executory or executed.

It must be remembered also that in any event a mistake of law to justify rescission must have related to a question the answer to which was assumed as part of the fundamental basis of the transaction. A mistake of law as to some collateral mat-

translated by Pound, *Readings in Roman Law* (2d ed.), 37.

³² Sec. 119, translated, *supra*, § 1546, n. 37.

³³ Baudry-Lacantinerie, *Traité de Droit Civil* (2d ed.) XI, § 70; translated by Pound, *Readings in Roman Law* (2d ed.), 37.

³⁴ Civ. Code, Art. 1109.

³⁵ See Pound, *Readings in Roman*

Law (2d ed.), 37-43; *Philippine Sugar Estates Development Co. v. Government of Philippine Ids.*, 247 U. S. 385, 38 Sup. Ct. 513, 62 L. Ed. 1177.

³⁶ See Georgia Code, § 4575; *Marshall v. Westrope*, 98 Ia. 324, 67 N. W. 257; *Wheaton, etc., Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Dow v. Ker*, Speers Eq. 413; *Neff v. Rains*, 33 Wis. 689.

ter bearing on the motive for entering into the transaction on no principle can have greater importance than a corresponding mistake of fact. This will explain the decision of many cases where relief has been denied, professedly because the mistake was one of law. When the recognized exceptions to any general principle denying relief for that reason are taken into account, it will be seen that the scope of the rule, even in jurisdictions which fully recognize it, is much restricted. These exceptions may now be considered.²⁷

§ 1585. Mistake of law as to meaning of instrument is ground for reformation.

Where a written instrument fails to express the intention of the parties because of a mutual mistake as to the construction or legal effect of the words of the writing, though there is no misapprehension as to what words have been used, reformation is allowed.²⁸ It is not necessary, moreover, in order to establish

²⁷ See also a criticism of the rule regarding Mistake of Law, and an enumeration of exceptions in 32 Harv. L. Rev. 283.

²⁸ *Coldcot v. Hill*, 1 Ch. Cas. 15; *Wake v. Harrop*, 1 H. & C. 202; *Wilding v. Sanderson*, [1897] 2 Ch. 534; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678; *Philippine Sugar Estates Development Co. v. Government of Philippine Ids.*, 247 U. S. 385, 38 Sup. Ct. 513, 62 L. Ed. 1177; *Oliver v. Mutual, etc., Ins. Co.*, 2 Curt. 277, 299; *Abraham v. North German Ins. Co.*, 40 Fed. 717; *Chicago & A. Ry. Co. v. Green*, 114 Fed. 676 (*cf. Goodno v. Hotchkiss*, 237 Fed. 686); *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Remington v. Higgins*, 54 Cal. 620; *Peers v. McLaughlin*, 88 Cal. 294, 26 Pac. 119; *Blakeman v. Blakeman*, 39 Conn. 320; *Hausman v. Burnham*, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; *Park v. Blodgett, etc., Co.*, 64 Conn. 28, 29 Atl. 133; *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637;

Marshall v. Lane, 27 App. D. C. 276; *Richardson v. Perrin*, 137 Ga. 432, 73 S. E. 649; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925; *Sparta v. Mendell*, 138 Ind. 188, 37 N. E. 604; *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607; *Allen v. Bollenbacher*, 49 Ind. App. 589, 97 N. E. 817; *Stafford v. Fetters*, 55 Ia. 484, 8 N. W. 322; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Hausbrandt v. Hofer*, 117 Ia. 103, 90 N. W. 494; 94 Am. St. Rep. 289; *Bottorff v. Lewis*, 121 Iowa, 27, 95 N. W. 262; *Coleman v. Coleman*, 153 Ia. 543, 133 N. W. 755; *Good Milking Mach. Co. v. Galloway*, 168 Ia. 550, 150 N. W. 710; *Hyde Park Inv. Co. v. Glenwood Coal Co.*, 170 Ia. 593, 153 N. W. 181; *Worley v. Tuggle*, 4 Bush, 168; *Knuckles v. J. D. Hughes Lumber Co. (Ky.)*, 116 S. W. 1193; *Cooke v. Husbands*, 11 Md. 492; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Marine Sav. Bank v. Norton*, 160 Mich. 614, 125 N. W. 754; *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; *Scotfield v. Quinn*, 54

a mistake which may be reformed that it should be shown that particular words were misunderstood. "It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention."³⁹ But in a few jurisdictions if the parties knew the words in the instrument and intended to use those words their misapprehension of the legal effect of the language will not be ground for reformation.⁴⁰

Minn. 9, 55 N. W. 745; *Barnum v. White*, 128 Minn. 58, 61, 150 N. W. 227; *Cassidy v. Metcalf*, 66 Mo. 519; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401; *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791; *Dry Goods Co. v. Grocer Co.*, 68 Mo. App. 290; *McKim v. Metropolitan St. Ry. Co.*, 196 Mo. App. 544, 196 S. W. 433; *Lansing v. Commercial Union Assur. Co.*, 4 Neb. (Unof.) 140, 93 N. W. 756; *Webster v. Webster*, 33 N. H. 18, 22, 66 Am. Dec. 705; *Kennard v. George*, 44 N. H. 440; *Green v. Morris Co.*, 12 N. J. Eq. 165; *McMillan v. Fish*, 29 N. J. Eq. 610; *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109; *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Miller v. Savage*, 60 N. J. Eq. 204, 46 Atl. 632 (rev'd on other grounds, 62 N. J. Eq. 746, 48 Atl. 1004); *Pitcher v. Hennessey*, 48 N. Y. 415; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Bacot v. Fessenden*, 130 N. Y. App. Div. 647, 124 N. Y. S. 370 (cf. *Moran v. Wellington*, 101 N. Y. Misc. 594, 167 N. Y. S. 465); *Springs v. Harven*, 3 Jones Eq. 96; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418; *Clayton v. Freet*, 10 Oh. St. 544; *McNaughten v. Partridge*, 11 Oh. 223; *Ormsby v. Longworth*, 11 Oh. St. 653; *Evants v. Strode*, 11 Oh. 480; *Gross Construction Co. v. Hales*, 37 Okl. 131, 129 Pac. 28; *Talley v. Courtney*, 1 Heisk. 715; *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311; *Mower v. Hutchinson*, 9 Vt. 242; *Beardsley v. Knight*, 10

Vt. 185, 33 Am. Dec. 193; *McKensie v. McKensie*, 52 Vt. 271; *Green Bay Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Dietrich v. Hutchinson*, 73 Vt. 134, 141, 50 Atl. 810, 87 Am. St. Rep. 698; *Alexander v. Newton*, 2 Gratt. 266; *Biggs v. Bailey*, 49 W. Va. 188, 38 S. E. 499; *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346; *Wisconsin, etc., Bank v. Mann*, 100 Wis. 596, 76 N. W. 777; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

³⁹ *Leitensdorfer v. Delphy*, 15 Mo. 160, 167, 55 Am. Dec. 137, and see cases in the preceding note.

⁴⁰ *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; (but see Cal. C. C., §§ 1567, 1576, 1578); *Wood v. Price*, 46 Ill. 439; *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591; *Allen v. Anderson*, 44 Ind. 395; *Nicholson v. Caress*, 59 Ind. 39, 53; *Easter v. Severin*, 78 Ind. 540 (but see later Indiana cases *supra* note 38); *Corning v. Grohe*, 65 Ia. 328, 21 N. W. 662; *Andrus v. Blazsard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354. See also *Renard v. Clink*, 91 Mich. 1, 13, 51 N. W. 692, 30 Am. St. Rep. 458; *Reggio v. Warren*, 207 Mass. 525, 535, 93 N. E. 805, 32 L. R. A. (N. S.) 340.

In *Goodno v. Hotchkiss*, 237 Fed. 686, 696, the court said: "There was clearly no mistake of fact; the mistake, if any, was at the most a mistake as to

§ 1586. Limits of possibility of reformation for mistake of law.

The desirable rule governing reformation is that if the writing actually executed does not contain all that the parties agreed that it should contain, it will be reformed ⁴¹ whether the reason why it fails to express the agreement is due to a mistake of fact or of law. If parties in their preliminary agreements ordinarily determined the exact words which should be inserted in the writing, an unintentional failure to include those words would necessarily involve mistake of fact. But parties frequently agree upon the object to be attained by the writing which they propose to make and not upon the details of the instrument by which the object shall be attained. If, subsequently, when the writing is executed the parties fail to notice that some provision to which they had previously agreed, has been omitted or added, the mistake is one of fact; but if their error consists in erroneously supposing that the words of the instrument with which they have made themselves acquainted are legally effective to secure the desired result, the mistake is one of law.

If the instrument executed by the parties fails to carry out

the legal effect of the family agreement, without the addition of any circumstances of fraud or misrepresentation, for which there is no relief in the federal equity courts. *Rogers v. Ingham*, 3 Ch. Div. 351; *Chandler v. Pomeroy*, 143 U. S. 318, 337, 12 Sup. Ct. 410, 36 L. Ed. 169; *Utermehle v. Norment*, 197 U. S. 40, 56, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520, and cases there cited; *Bank of the United States v. Daniel*, 12 Pet. 32, 57, 9 L. Ed. 989; *Hunt v. Rousmaniere's Adm.*, 1 Pet. 1, 7 L. Ed. 27; *Allen v. Galloway*, 30 Fed. 466; *Hamblin v. Bishop*, 41 Fed. 74.

In *Tilton v. Fairmount Lodge*, 244 Ill. 617, 621, 91 N. E. 644, the court said: "Where a lodge agrees with the owner of a building to erect a second story thereon for a lodge room upon the understanding of both parties that the owner will convey the fee simple

title to the second story to the lodge, but instead of a deed a ninety-nine year lease is entered into in the belief of both parties that their intention could be carried out legally in that way only, a court of equity cannot reform the lease so as to make it a conveyance of the fee simple title."

"The parties cannot be said to have been mutually mistaken as to any question of fact. They each understood fully what language was to be contained in the instrument. It is true, the legal effect of that language is different from what they understood it to be or from what they intended. This cannot be said, in any sense, to be a mistake of fact. It was a mistake of law as to the legal effect of the language used and adopted by the parties and is not such a mistake as equity will relieve against."

⁴¹ See *supra*, §§ 1548, 1549.

an intended object upon which they had previously come to an agreement, whether because they were under a mistake of fact as to the words the writing contained or were under a mistake of law as to the meaning of those words, there are two cases where a court of equity cannot well correct the error by reformation, though if the previous status can be restored and justice requires relief, the transaction may be rescinded.

1st. Where their intended object was so indefinite, or if the object itself was definite the means by which it might be carried out so various, that the court can not fix on any possible writing and hold that it, rather than another, will express the intention of the parties.

2d. Where the parties acting advisedly have chosen one means of carrying out their object and on consideration rejected another, even though the first proves less adequate than the second to effectuate the object.⁴³

⁴³ In neither of these cases is there any reason why rescission should not be allowed, if justice will thereby be attained. An illustration of the latter type is the leading case of *Hunt v. Rousmaniere's Adm.*, 1 Pet. 1, 10, 7 L. Ed. 27. Both the parties declared that they had called upon an attorney to request him to draw writings to secure a loan by means of a vessel, and to obtain his opinion as to the kind of instrument which would give the most perfect security to the lender. The attorney told them that a bill of sale, or mortgage, would be security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security, as either of the others; and would prevent the necessity of changing the vessel's papers, and of taking possession of the vessel, upon her arrival from sea. The parties then requested him to draw such an instrument, as, in his opinion, would most effectually and fully secure Mr. Hunt; and the plaintiff frequently asked him, whilst he was drawing the power, and after he had finished and read it to the

parties, if he was quite certain that the power would be as safe and available to him, as a bill of sale, or mortgage, and that upon his assurance that it was, it was then executed.

The court while saying: "Where an instrument is drawn and executed, which professes, or is intended, to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement;" held the plaintiff entitled to no relief on the following ground: "That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments, to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a Court of Equity, which the representatives of Rousmaniere could not

§ 1587. Mistake as to legal consequences.

It is said that where the parties are under no mistake as to the language of the instrument in question reformation will not be allowed because of a mistake of the parties as to some legal consequences of the instrument.⁴³

The correctness of such a statement may be questioned where there was an understanding either (1) that the expected legal consequences should be provided for in the writing, or (2) that a general purpose or object should be effectuated by the writing, which would be interfered with if not defeated by the legal consequences of the writing. Except in the few jurisdictions where relief is denied in every case where the parties were under no mistake as to the words of the writing, reformation would be allowed on the first supposition. On the second supposition if the intended object will not be defeated, but merely impaired, the question becomes one of degree, not only as to the extent to which the intended purpose is impaired but as to the extent of variation in the instrument necessary to effectuate the purpose. Equity may order a seal attached to a conveyance in

easily have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and, having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured."

"It may therefore admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view. The question then, is, ought the Court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We

hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character." See also *Irnham v. Child*, 1 Brown's Ch. Cas. 92; *Larkins v. Biddle*, 21 Ala. 252, 256; *Lanning v. Carpenter*, 48 N. Y. 406; *Pitcher v. Hennessey*, 48 N. Y. 415, 424.

⁴³ *Re Railway Time Tables Pub. Co.*, L. R. 42 Ch. D. 98; *Hunt v. Roussaniere's Adm.*, 1 Pet. 1, 7 L. Ed. 27; *Orr v. Echols*, 119 Ala. 340, 24 So. 357; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Lott v. Kaiser*, 61 Tex. 665; *Andrus v. Blassard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354. See also *Louisville & N. R. Co. v. Cox*, 133 Ga. 763, 66 S. E. 1088.

order that it may have the intended effect, and yet refuse to order a power of attorney reformed into a chattel mortgage on the same ground.

§ 1588. Mistake of matter of law affecting the situation antecedent to the bargain.

If the only mistake of the parties related to some matter, either of fact or law in the situation of affairs prior to the execution of the writing in question, making it desirable or undesirable to enter into a written contract or conveyance, there can generally be no question of reformation. Occasionally the object of the parties has been so clearly agreed upon between them that equity by reforming a writing can give effect to that object, though because of their erroneous belief as to their antecedent rights, they sought to attain it by inadequate means; but usually the only question can be of rescission, and in determining the propriety of such relief, it must first be asked whether the mistake related to an essential matter assumed by both parties as a basis of their agreement. Only after that question has been answered in the affirmative can it make any difference whether the mistake is of fact or of law. It is undoubtedly generally said in broad terms that if the mistake is of law, no relief is possible. Thus it has been said, distinguishing mistake of law of this sort from mistake of law in the expression of an agreement, where, as already observed,⁴⁴ relief is generally allowed:⁴⁵ "If . . . in a given case the parties actually mistake or misunderstand the principle of law applicable to the subject-matter of the contract and reach an agreement relying upon this mistake of the law, there is no ground upon which a court of equity can reform the contract. . . ."⁴⁶ When, however, the mistake lies not in a misunderstanding of the principles of the law as controlling the subject of the contract or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one

⁴⁴ *Supra*, § 1585.

⁴⁵ *Abraham v. North German Ins. Co.*, 40 Fed. 717.

⁴⁶ It is not clear, however, that there

might not be rescission. But see *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886.

sense a mistake of law, is one that a court of equity will correct."⁴⁷

A bond executed in conformity with a statute thereafter held unconstitutional is executed under a mistake of law, though it has not always been appreciated that in so far as the instrument would be a valid contract at common law, any relief from it must be based on mistake of law. Whether such a bond is void, it is held, depends upon the consideration of the bond and public policy. If there is no infringement of policy and the obligor gave the bond under no sense of compulsion and received consideration, the contract is upheld generally on the ground of a so-called estoppel.⁴⁸

§ 1589. Mistake as to antecedent private rights.

An exception has been made to the rule denying relief for mistake of the law governing a situation prior to the bargain, where the mistake relates to the private rights of the parties as distinguished from a mistake as to the general law. Lord Westbury, in a leading English case,⁴⁹ took this distinction. "It is said, '*Ignorantia juris haud excusat*,' but in that maxim the

⁴⁷ Quoted with approval in the dissenting opinion in *Atherton v. Roche*, 192 Ill. 252, 265, 61 N. E. 357, 55 L. R. A. 591, with the further citation to the same effect of *Coleman v. Coleman*, 153 Ia. 543, 133 N. W. 755; *Wisconsin Marine, etc., Bank v. Mann*, 100 Wis. 596, 76 N. W. 777. In the latter case the court said at p. 619: "Many cases may be cited to support the contention made by appellant's counsel, that a mistake of law is not remediable in equity, but they do not fit this case. They refer to a mistake of law in the making of the verbal contract as distinguished from a mere mistake in reducing the contract to writing through some misapprehension of the legal meaning of the language used. The rule applies where the contract is written so as to express the agreement as understood, though the understanding were wrong through

ignorance of law; it does not apply where the contract is fully understood but is incorrectly expressed in the writing through ignorance as to the legal import of the language selected by the parties for that purpose."

⁴⁸ *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *State ex rel. Cantwell v. Stark*, 75 Mo. 566; *United States Fidelity, etc., Co. v. Ettenheimer*, 70 Neb. 144, 147, 97 N. W. 227, 99 N. W. 652, 113 Am. St. Rep. 783. See also *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760, 2 Sup. Ct. 765. Cf. *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; *Cassel v. Scott*, 17 Ind. 514; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *Poole v. Kermit*, 59 N. Y. 554; *Love v. McCoy*, 81 W. Va. 478, 94 S. E. 954.

⁴⁹ *Cooper v. Phibbs*, L. R. 2 H. L. 149.

word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."⁵⁰

⁵⁰ See also to similar effect, *Beauchamp v. Winn*, L. R. 6 H. L. 223, 234; *In re Oliver's Settlement*, [1905] 1 Ch. 191; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Stoeckle v. Rosenheim*, 10 Del. Ch. 195, 87 Atl. 1006; *Gefken v. Graef*, 77 Ga. 340; *Bonney v. Stoughton*, 122 Ill. 536, 544, 13 N. E. 833; *Baker v. Massey*, 50 Ia. 399; *Lewis v. Mote*, 140 Ia. 698, 119 N. W. 152; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012; *Reggio v. Warren*, 207 Mass. 525, 534, 93 N. E. 805, 32 L. R. A. (N. S.) 340; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; *Alabama, etc., Ry. Co. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488; *Hoy v. Hoy*, 93 Miss. 732, 48 So. 903, 25 L. R. A. (N. S.) 182; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Blair v. Chicago, etc., R. Co.*, 89 Mo. 383, 1 S. W. 350; *McIntyre v. Casey* (Mo.), 182 S. W. 966; *Williams v. Union Bank*, 9 Heisk. 441; *Cook v. Sumner Spinning, etc., Co.*, 1 Sneed, 698; *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Burton v. Haden*, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1038; *Waggoner v. Waggoner*, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644. See also *Tarbox v. Tarbox*, 111 Me. 374, 89 Atl. 194. But see *Thomas v. Chicago*, 55 Ill. 403; *Kirkland v. Edenborn*, 140 La. 669, 73 So. 719; *Clark v. Lehigh, etc., Coal Co.*, 250 Pa. 304, 312, 95 Atl. 462. In the case last cited the court said: "It is

conceded that if the lessee was induced to enter into the lease by a mistake it was one of law and not of fact. The land in question is what was known as a 'Commissioner's Road,' and the alleged mistake was in construing the defendant's title to the adjacent land as extending to the edge of the road and not to its center. As pointed out above, there could not have been a mistake of fact, as the title of each party was of record and hence the parties had all the facts before them when the lease was made. It is not alleged that the lessee was induced to enter into the lease by any fraud, misrepresentation, concealment of facts, or other inequitable conduct on the part of the lessor. There are no special circumstances or facts in the case, disclosed by the record, to induce a chancellor to give relief to the complaining party. As suggested above, the contract may have been advantageous to the lessee company notwithstanding it was the owner of the fourth piece of coal. We are, therefore, dealing here with a mistake of law, pure and simple, unaided by any equitable consideration which should move a chancellor to grant relief. Under these circumstances, it is settled that equity will not relieve against a mistake of law." Citing earlier Pennsylvania cases and *Utermehle v. Norment*, 197 U. S. 40, 49 L. Ed. 655; *Midland Great Western Ry. Co. v. Johnson*, 6 H. L. Cas. 798.

The only merit of this distinction between private right and general law is that it enables a court of equity to give relief in a majority of cases where the parties to a transaction assumed as a basis for it a certain legal situation. Almost always such an assumption is based on a rule of law affecting the relative rights of the parties. Their mistake may be ignorance of a most fundamental principle of general law, but if the effect of that general rule is to vary their private rights, they come within the exception.

In England at least, and perhaps in the United States, this exception of mistake as to private rights, though available in equitable proceedings, is not made to the general denial of the right to recover money paid under a mistake of law.⁵¹ There

⁵¹ In *Stanley Bros., Ltd., v. Corporation of Nuneaton*, 108 Law Times (N. S.) 986, 992, it was said: "I think, however, as *Bailhache, J.*, decided otherwise, and decided upon the ground that in his view it was a mistake of fact and not of law, that I ought to say a word upon that. His attention was directed to *Earl Beauchamp's case* (*Earl Beauchamp v. Winn*, 6 E. & I. App. 234), which is a case in which the claimant was ordered relief from the obligation of an agreement upon the ground that the specific private rights affecting the subject-matter of that agreement had been mistakenly construed by the plaintiff in the action. His attention was not drawn to the proposition laid down in *Rogers v. Ingham*, by Lord Mellish (35 L. T. Rep. 677, 3 Ch. Div. 357), that such a doctrine has never been applied to a claim for the return of money paid under a mistake of fact. The equity in the latter case is the supposed equity that it is unusual for the defendant to keep money which the plaintiff voluntarily gave him, but under a mistake which was not common to the two; the equity, whatever else may be said of it, is at any rate not the same equity as that which is put into force when the relief by way of rescis-

sion by the act of the court of an obligation which is entered into is sought upon the ground that the contract had been entered into or the conveyance executed under a misapprehension as to one of the parties existing private rights. Even so a passage in the case of *Midland Great Western Railway v. Johnson* (6 H. L. Cas. 811), and in this court in *Wilking v. Sanderson* (77 L. T. Rep. 57; (1897) 2 Ch. at p. 550), ought to be borne in mind. The passage by Lord Chelmsford in the former case is: 'It must be a mistake not in matter of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law.' The passage in the other judgment is: 'A written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed.' There must be some case either of error induced by misrepresentation of the opposite party or error as to the subject-matter with which the contract purports to deal. I think, therefore, the mistake in question was not a mistake of fact but of law."

seems no logical reason for distinguishing in this particular between a bill to reform or rescind and an action for money had and received.

§ 1590. Money paid under a mistake of law by a public officer or to an officer of the court.

Payments of public money made by officials made under a mistake of law may be recovered.⁵² Though no such broad principle is applicable conversely where money is paid to a public officer, a court will not permit one of its own officers to retain moneys paid to him under a mistake of law where there is failure of consideration. This principle has been applied to various court officers, receivers, trustees or assignees in bankruptcy, and even attorneys, although it may be doubted whether it is of universal application in the last case.⁵³

⁵² Wisconsin, etc., *R. Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399 (*cf. Badeau v. United States*, 130 U. S. 439, 32 L. Ed. 997, 9 Sup. Ct. 579); *McElrath v. United States*, 12 Ct. Cl. 201; *Barnes v. Dist. of Col.*, 22 Ct. Cl. 366; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71; *Board of Com'rs v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; *Heath v. Albrook*, 123 Ia. 559, 98 N. W. 619; *State v. Young*, 134 Ia. 505, 110 N. W. 292; *Jones County v. Arnold*, 134 Ia. 580, 111 N. W. 973; *Board of Commissioners v. Patrick*, 12 Kan. 605; *Ellis v. Board of Auditors*, 107 Mich. 528, 65 N. W. 577; *Lamar Township v. City of Lamar*, 261 Mo. 171, 169 S. W. 12; *Board of Supervisors v. Ellis*, 59 N. Y. 620; *Allegheny County v. Grier*, 179 Pa. St. 639, 36 Atl. 353; *Commonwealth v. Field*, 84 Va. 26, 3 S. E. 882; *Douglas County v. Sommer*, 120 Wis. 424, 98 N. W. 249. See also *Kerr v. Regester*, 42 Ind. App. 375, 85 N. E. 790. Contrary decisions, however, are *Jefferson County v. Hawkins*, 23 Fla. 223, 2 So. 362, 365; *People v. Foster*, 133 Ill. 496, 23 N. E. 615 (*cf. Moffett v. People*, 134 Ill.

App. 550); *Wayne County v. Randall*, 43 Mich. 137, 5 N. W. 75; *State v. Ewing*, 116 Mo. 129, 22 S. W. 476; *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376; *Territory v. Newhall*, 15 N. M. 141, 103 Pac. 962; *Richland County v. Miller*, 16 S. C. 236. See also *Morgan Park v. Knopf*, 199 Ill. 444, 65 N. E. 322; *Board of Highway Commrs. v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913 A. 471.

⁵³ *Ex parte James*, 9 Ch. App. 609 (trustee in bankruptcy); *Ex parte Simmonds*, 16 Q. B. D. 308 (trustee in bankruptcy); *Gillig v. Grant*, 23 N. Y. App. Div. 596, 49 N. Y. S. 78 (receivers); *Moulton v. Bennett*, 18 Wend. 586 (attorney). In *Ex parte Simmonds*, L. R. 16, Q. B. D. 308, 312, Lord Esher said: "A rule has been adopted by courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby

§ 1591. Mistake of law induced by the other party.

If a mistake of law is induced or encouraged by the misrepresentation of the other party or even if it is perceived by the other party and taken advantage of by him, it is in equity, at least, justification of rescission.⁵⁴ And where one of the parties is in a position of authority which enables him to exert pressure upon the other who in ignorance of his legal rights makes a

thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James, L. J., laid it down in *Ex parte James*, L. R. 9 Ch. 609, that, although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a Court of Common Law, the court would order him to repay it so soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the court will order him to act in an honorable and high-minded way, and so it was laid down by James and Mellish, L. JJ., in *Ex parte James*, L. R. 9 Ch. 609. It is true that in that case the money in question had not been divided among the creditors, but was still in the hands of the trustee, and we are about to carry the principle of this decision somewhat further. But, though the

money has been divided among the creditors, the court sees that other moneys, which would be applicable to the payment of dividends to the creditors, are about to come into the hands of the trustee, and it has not been shown that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error."

"In *Haviland v. Willets*, 141 N. Y. 35, 50, 35 N. E. 958, the court said: "Assuming, as counsel for the appellants contends, that Barclay's mistake was one of law, and that the general rule excludes equitable relief for such a mistake, when it is one of law pure and simple, and no other elements are present, it is still obvious that the doctrine does not cover the entire array of facts here disclosed. It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief." See also *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Montgomery & Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N. E. 71; *Chelsea Nat. Bank v. Smith*, 74 N. J. Eq. 275, 69 Atl. 533; *Hellebust v. Bonde*, (N. Dak. 1919), 172 N. W. 812; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811. Cf. *supra*, § 1495, concerning a misrepresentation of law as the basis for a claim of fraud.

payment, recovery of it has been allowed, though the defendant acted in good faith.⁵⁵

§ 1592. Mistake of foreign law.

Mistake of the law of a country foreign to that where the plaintiff was domiciled and foreign to that where he acted is regarded as a mistake of fact.⁵⁶ This exception, available both at law and in equity, has been based on the familiar rule of evidence that foreign law must be proved as a fact. The law of one of the United States is foreign to that of another under this rule.⁵⁷

§ 1593. Mistake must be injurious.

Not only must the mistake relate to a matter on the basis of which the parties contracted, in order to justify rescission but the mistake must affect the complainant injuriously.⁵⁸ Thus where parties contract on the assumption that property exists, or that it is in a certain condition, a destruction of a considerable portion of the property prior to the formation of the contract and unknown to the parties undoubtedly involves a mistake as to a matter which formed the basis of the contract, but if the buyer was content to perform the contract the seller would certainly not get relief.⁵⁹

§ 1594. Prompt election and restoration of the status quo.

As has been seen, a transaction cannot be rescinded on ac-

⁵⁵ *Marshall v. Snediker*, 25 Tex. 460, 78 Amer. Dec. 534; *Bruner v. Stanton*, 102 Ky. 459, 43 S. W. 411; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436.

⁵⁶ *Taylor v. First Nat. Bank*, 212 Fed. 898, 901, 129 C. C. A. 418; *Schlosser v. Nicholson*, 184 Ind. 283, 111 N. E. 13; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Vinal v. Continental, etc., Const. Co.*, 53 Hun, 247, 6 N. Y. S. 595. See also *Ætna Ins. Co. v. Mayor*, 7 N. Y. App. Div. 145, 40 N. Y. S. 120, 124; *Walker v. Walker*, 138 Tenn. 679, 200 S. W. 825. It is held in the case first cited that a cor-

poration chartered in Kentucky but doing business in Indiana was chargeable with constructive knowledge of the statutes of the latter State.

⁵⁷ The right to relief, however, is based on the law being foreign to the residence of the parties when the transaction in question was entered into—not on the law being foreign to the forum where the question is ultimately litigated. *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914 C, 1262.

⁵⁸ *Conaway v. Gore*, 24 Kan. 389.

⁵⁹ *Scott v. Littledale*, 8 E. & B. 815, stated *supra*, § 1563, *ad fin.*

count of fraud,⁶⁰ or on account of breach of warranty,⁶¹ without prompt election and restoration of the *status quo* by the party seeking rescission. If this is true in cases where the other party is actively in fault, it must, *a fortiori*, be true in cases of innocent mistake. It is, therefore, fundamental that one seeking relief by rescission or reformation shall indicate his election promptly on discovery of the mistake and shall restore the former status.⁶² If the rights of third persons will be injuriously affected relief may be denied for this reason.⁶³

⁶⁰ See *supra*, § 1526.

⁶¹ See *supra*, § 1463.

⁶² In *Grymes v. Sanders*, Adm'r, 93 U. S. 55, 23 L. Ed. 798, the settled doctrine was stated: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas v. Bartow*, 48 N. Y. 193, 200; *Flint v. Woodin*, 9 Hare, 620, 622; *Jennings v. Broughton*, 5 De G. M. & G. 126, 139; *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 88; *Saratoga & S. R. Co. v. Rowe*, 24 Wend. 74; *Minturn v. Main*, 3 Seld. 220, 7 Rob. Prac. c. 6, sect. 2, p. 43; *Campbell v. Fleming*, 1 Ad. & El. 40, 41; *Sugd. Vend.* (14 th ed.), 335; *Diman v. Providence W. & B. R. Co.*, 5 R. I. 130.

"A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity

imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. *Hunt v. Silk*, 5 East, 449, 452; *Minturn v. Main*, 3 Seld. 220; *Okill v. Whittaker*, 2 Phill. 338, 340; *Brisbane v. Dacres*, 5 Taunt. 143; *Andrew v. Hancock*, 1 Brod. & B. 37; *Skyring v. Greenwood*, 4 Barn. & C. 281, 289; *Jennings v. Broughton*, 5 De G. M. & G. 126, 139." See also *Kinney v. Consolidated Virginia Min. Co.*, 4 Saw. 382; *Hewitt v. Powers*, 84 Ind. 295; *Bigelow v. Wilson*, 99 Iowa, 456, 68 N. W. 798; *Conaway v. Gore*, 21 Kans. 725; *Cottrell v. Citizens' Sav. Bank*, 53 Minn. 201, 54 N. W. 1111; *Cassidy v. Metcalf*, 66 Mo. 519; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Crosier v. Acer*, 7 Paige, 137; *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 449; *State v. Fronizer*, 15 Ohio Dec. 613, 626; *Fink v. Farmers' Bank*, 178 Pa. 154, 35 Atl. 636, 56 Am. St. Rep. 746; *Persinger's Adm v. Chapman*, 93 Va. 349, 25 S. E. 5, and *infra*, § 1596, *ad fin.*

⁶³ In *Matter of an Arranging Debtor*,

§ 1595. Change of position bars recovery of money paid under a mistake.

If one to whom money has been paid under a mistake has so changed his position in reasonable reliance on his right to the payment as to be unable to restore it without a detriment greater than he would have incurred had the payment never been made, recovery is not allowed,⁶⁴ unless, the plaintiff's mistake was due to the defendant's fault. Then he has but himself to blame if injured by a change of position, and recovery should be allowed.⁶⁵ A common illustration of change of position barring relief is where payment has been made to an agent who before discovery of the mistake has made settlement with his principal.⁶⁶ And in England, with a strange disregard

43 Ir. L. T. Rep. 21, an agreement was made in consideration of the assignment of the debtor's estate that the assignee should pay a certain composition on the debts. Part of the property assigned was an insurance policy the premium of which was stated in a schedule to be 61£ a year. In fact this amount was payable semi-annually. The court refused relief in view of the interest of the creditors to whom the composition was payable.

⁶⁴ *German Security Bank v. Columbia, etc., Trust Co.*, 27 Ky. L. Rep. 581, 85 S. W. 761; *Pelletier v. State Nat. Bank*, 117 La. 335, 41 So. 640; *Wilson v. Barker*, 50 Me. 447; *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786, 69 Mich. 321, 37 N. W. 292, 13 Am. St. Rep. 391; *Pickslay v. Starr*, 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. 740; *Continental Nat. Bank v. Tradesmen's Bank*, 173 N. Y. 272, 65 N. E. 1108; *Ball v. Shepard*, 202 N. Y. 247, 95 N. E. 719; *Fegan v. Great Northern Ry. Co.*, 9 N. Dak. 30, 81 N. W. 39; *Boas v. Updegrove*, 5 Pa. 516, 47 Am. Dec. 425; *Atlantic Coast Line R. Co. v. Schirmer*, 87 S. C. 309, 69 S. E. 439; *Richy v. Clark*, 11 Utah, 467, 40 Pac. 717. And see *Deutsche Bank v. Beriro & Co.*, 73 L. T. R. 669; *Maher v. Millers*, 61 Ga. 556, 34 Am.

Rep. 104; *Citizens' Bank v. Rudisill*, 4 Ga. App. 37, 60 S. E. 818; *Guild v. Baldrige*, 2 Swan (Tenn.), 295. The contrary decisions in *Durrant v. Ecclesiastical Commrs.*, 6 Q. B. D. 234, and *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516, have been criticised. Keener, *Quasi Contracts*, p. 66; Woodward, *Quasi Contracts*, § 25; Costigan, 20 Harv. L. Rev. 205, 216. Cf. with one of these criticised cases (*Kingston Bank v. Eltinge*), *Continental Nat. Bank v. Tradesmen's Bank*, 173 N. Y. 272, 65 N. E. 1108; *Hathaway v. Delaware County*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909; *Ball v. Shepard*, 202 N. Y. 247, 95 N. E. 719.

⁶⁵ *Union Bank v. United States Bank*, 3 Mass. 74; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Phetteplace v. Bucklin*, 18 R. I. 297, 27 Atl. 211; *Metcalf v. Denson*, 4 Baxt. 565. See also *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Clark v. Eckroyd*, 12 Ont. App. 425. The cases relating to the effect of a change of position on the right to recover money paid under a mistake of fact are collected in L. R. A. 1917 E. 349n.

⁶⁶ *Holland v. Russell*, 1 B. & S. 424, aff. 4 B. & S. 14; *Shand v. Grant*, 15

of the principle which should underlie the matter, it has been held that no other case of change of position will exonerate a defendant.⁶⁷ In order that change of position should operate as an excuse, it should be irrevocable or revocable only with loss.⁶⁸ The mere fact that the defendant has parted with what he received is not sufficient to excuse him if he obtained pecuniary benefit thereby, as if he discharged a debt or expended money in a way which in any event he would have had to do.⁶⁹ That a defendant is a purchaser for value in good faith of a legal right is not of itself an answer to a proceeding to reform or rescind the transfer of that legal right, because of an essential mutual mistake between the parties to the transaction. In many, if not in most, of the suits in equity for reformation or rescission, that is the position of the defendant.

§ 1596. Negligence and laches.

It is frequently said that equity will not reform or rescind a contract if the petitioner has been guilty of negligence, or at

C. B. (N. S.) 324; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Yarborough v. Wise*, 5 Ala. 292; *Maher v. Millers*, 61 Ga. 556, 34 Am. Rep. 104; *Granger v. Hathaway*, 17 Mich. 500; *Martin v. Allen*, 125 Mo. App. 636, 103 S. W. 138. (Cf. *Mason v. Commerce Trust Co.*, 192 Mo. App. 528, 183 S. W. 707.) If the agent purported to be a principal when the payment was made to him, it is said that he cannot invoke settlement with his principal as an excuse. *Newall v. Tomlinson*, L. R. 6 C. P. 405; *United States v. Pinover*, 3 Fed. 305; *Smith v. Kelly*, 43 Mich. 390, 5 N. W. 437; *Canal Bank v. Bank of Albany*, 1 Hill, 287. If the settlement is irrevocable, it is hard to see why such an exception should be made. The non-disclosure has not caused the mistake, and is not necessarily improper.

⁶⁷ In *Baylis v. Bishop of London*, [1913] 1 Ch. 127, the defendant had received in his official capacity money paid under a mistake, and before notice of the mistake had applied the money, in accordance with his duty, in

no way for his own benefit. He was, nevertheless, held liable to repay the money and it was said (page 133): "No case can be found in the books in which a defendant has been exempted except that of an agent who has paid over to his principal." See also *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. (N. S.) 263.

⁶⁸ *Lawrence v. American Nat. Bank*, 54 N. Y. 432, 436; *Phetteplace v. Bucklin*, 18 R. I. 297, 27 Atl. 211.

⁶⁹ See *Standish v. Ross*, 3 Exch. 527; *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Continental, etc., Co. v. Kleinwort*, 90 L. T. Rep. 474; *Moors v. Bird*, 190 Mass. 400, 410, 77 N. E. 643; *Houston, etc., Ry. v. Hughes* (Tex. Civ. App.), 133 S. W. 731. In the case first cited the court said: "It could not be any bar to the recovery of it, that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed in *statu quo*." Cf. *Brisbane v. Dacres*, 5 Taunt. 143; *Skyring v. Greenwood*, 4 B. & C. 281.

any rate of gross negligence.⁷⁰ That no such principle can be laid down as a universal rule is obvious. In many if not most cases of mistake in the expression of a contract where reformation is granted, there is some element of lack of care, but at least if the mistake is mutual and each party has been careless in failing to make a contract expressing the real intention of both, there seems no reason why relief should not be granted,⁷¹ unless this is made inequitable by some change of position other than merely entering into the contract in question.⁷² But if unilateral mistake, where there is no fraud or inequitable conduct, is ever to be regarded as sufficient ground for the rescission of a bilateral contract,⁷³ there is more reason why a court of equity should confine its jurisdiction to cases where the party

⁷⁰ *Duke of Beaufort v. Neeld*, 12 Clark & F. 248, 286; *Bealey v. Bealey*, L. R. 9 Ch. Div. 103; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Pope v. Hoopes*, 84 Fed. 927, 90 Fed. 451, 61 U. S. App. 446, 33 C. C. A. 595; *Great Western Mfg. Co. v. Adams*, 176 Fed. 325, 99 C. C. A. 615; *Greil v. Tillis*, 170 Ala. 391, 54 So. 524; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Kent v. Bailey*, 181 Ia. 489, 164 N. W. 852; *Beebe v. Birkett*, 109 Mich. 663, 67 N. W. 966; *Brown v. Fagan*, 71 Mo. 563; *Serrell v. Rothstein*, 49 N. J. Eq. 385, 24 Atl. 369; *Crowder v. Langdon*, 3 Ired. Eq. 476; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Path Valley R. Co. v. Brinley*, 15 Pa. C. C. 339; *Diman v. Providence, etc., R. Co.*, 5 R. I. 130; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490; *Persinger's Adm. v. Chapman*, 93 Va. 349, 25 S. E. 5; *Ledyard v. Hartford F. Ins. Co.*, 24 Wis. 496; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264. But see *Schauts v. Keener*, 87 Ind. 258; *Boulden v. Wood*, 96 Md. 332, 53 Atl. 911; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982, and cases in the following note.

⁷¹ *Albany City Savings Institution v. Burdick*, 87 N. Y. 40, 46. "In most of the cases to be found in the books, where relief has been sought against written instruments on the ground of fraud and mistake, the complaining parties were chargeable with the same kind of negligence which exists in this case, to wit, the omission to read or understand the contents of instruments executed or accepted. It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud." See also *Cox v. Hall*, 54 Mont. 154, 168 Pac. 519.

⁷² *Pomeroy* (2 Eq. Jur., § 856), expresses the opinion that the general rule must be qualified and that each case must depend on its own circumstances. His words are quoted or similar statements made in *Kinney v. Enaminger*, 87 Ala. 340, 6 So. 72; *Seeley v. Bacon* (N. J. Eq.), 34 Atl. 139; *Southern F. & W. Co. v. Ozment*, 132 N. C. 839, 44 S. E. 681; *Powell v. Heisler*, 16 Or. 412, 19 Pac. 109; *San Antonio Nat. Bank v. McLane*, 96 Tex. 48, 70 S. W. 201.

⁷³ See *supra*, § 1578.

seeking relief has been free from negligence, since the blame of the situation lies wholly on the party seeking relief. In contrast with the decisions in equity, it should be observed that in many cases in an action at law to recover money paid under a mistake of fact, negligence of the plaintiff is held no bar to recovery unless there has been such a change of position as to make recovery inequitable.⁷⁴ But in these cases there had been a failure of consideration for the money paid, which often does not find perfect analogy where an attempt is made in equity to rescind an executory contract or a conveyance.

Unreasonable delay in seeking relief after the discovery of a mistake justifying it will bar relief; but what delay is unreasonable depends on the special circumstances of each case indicating negligent sleeping on his rights by the party seeking relief and injury caused to the other party by the delay.⁷⁵

⁷⁴ *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; *Continental Caoutchouc &c. Co. v. Kleinwort*, 90 L. T. (N. S.) 474; *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. (N. S.) 263; *Brown v. Tillinghast*, 84 Fed. 71; *Merrill v. Brantly*, 133 Ala. 537, 31 So. 847; *Devine v. Edwards*, 101 Ill. 138; *Brown v. College Corner, etc., Co.*, 56 Ind. 110; *Fraker v. Little*, 24 Kans. 598, 36 Am. Rep. 262; *First Nat. Bank v. Behan*, 91 Ky. 560, 16 S. W. 368, 13 Ky. Law Rep. 148, 16 S. W. 368; *Baltimore, etc., R. Co. v. Faunce*, 6 Gill (Md.), 68, 46 Am. Dec. 655; *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *Koonts v. Central Nat. Bank*, 51 Mo. 275; *Bone v. Friday*, 180 Mo. App. 577, 167 S. W. 99; *Douglas County v. Keller*, 435 Neb. 635, 62 N. W. 60; *Waite v. Leggett*, 8 Cow. 195, 18 Am. Dec. 441; *National Bank of Commerce v. National &c. Assoc.*, 55 N. Y. 211, 14 Am. Rep. 232; *Hathaway v. Delaware County*, 185 N. Y. 368, 370, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909; *Payne v. Witherbee, etc.*,

Co., 132 N. Y. App. Div. 579, 117 N. Y. S. 15; *Simms v. Vick*, 151 N. C. 78, 65 S. E. 621, 24 L. R. A. (N. S.) 517; *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952; *McKibben v. Doyle*, 173 Pa. 579, 34 Atl. 455, 51 Am. St. Rep. 785; *City Bank v. First Nat. Bank*, 45 Tex. 203; *Houston, etc., R. Co. v. Hughes* (Tex. Civ. App.), 133 S. W. 731; *City Nat. Bank v. Peed* (Va.), 32 S. E. 34. But see *Grymes v. Sanders, Adm'r*, 93 U. S. 55, 23 L. Ed. 798; *Stanley Rule & Level Co. v. Bailey*, 45 Conn. 464, 466; *Norton v. Marden*, 15 Me. 45, 47, 32 Am. Dec. 132; *Ash v. McLellan*, 101 Me. 17, 62 Atl. 598; *Wheeler v. Hatheway*, 58 Mich. 77, 24 N. W. 780; *Brummitt v. McGuire*, 107 N. C. 351, 12 S. E. 191, 193; *First Nat. Bank v. Taylor*, 122 N. C. 569, 29 S. E. 831; *Simmons v. Looney*, 41 W. Va. 738, 24 S. E. 677, 678-9.

⁷⁵ *Newman v. Milner*, 2 Ves. Jr. 483; *Grymes v. Sanders, Adm'r*, 93 U. S. 55, 23 L. Ed. 798; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85, 25 L. Ed. 52; *Kinney v. Consolidated Virginia Min. Co.*, 4 Sawy. 382, 392, Fed. Cas. No. 7,827; *Salinas v. Stillman*, 66 Fed.

§ 1597. Burden of clear proof is on complainant.

Though equity will not permit the parol evidence rule to prevent it from granting relief for mistake, "the purpose of a written contract is to furnish a record of the terms of the agreement of the parties not easily impeached, and thereby to avoid subsequent disputes and conflicting testimony and claims regarding its terms and their meaning. To accomplish this purpose, and to prevent such disputes from annulling written agreements, two rules have been firmly established in equity: First, that the burden is on the complainant to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or inequitable conduct of the other, upon which he relies for a modification or avoidance of the contract; and, second, that in view of the written record of the terms of the agreement made at the time a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement."⁷⁶

Though it is settled that there must be more than a mere preponderance of evidence in order to justify relief in equity from mistake in a written instrument, the language of different courts varies in regard to the *quantum* of evidence necessary to sustain the burden of proof thrown upon one who seeks relief. In many cases it is said that proof must be beyond a reasonable doubt,⁷⁷ but this mode of expression has been criti-

677, 30 U. S. App. 40, 14 C. C. A. 50; *Hurto v. Grant*, 90 Iowa, 414, 57 N. W. 899; *Yocum v. Foreman*, 14 Bush, 494; *Ætna Indemnity Co. v. Baltimore, etc., R. Co.*, 112 Md. 389, 76 Atl. 251, 136 Am. St. Rep. 389; *Paulison v. Van Iderstine*, 28 N. J. Eq. 306; *White v. Campbell*, 80 Va. 180; *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479; *Van Brunt v. Ferguson*, 163 Wis. 540, 158 N. W. 295. See also *supra*, § 1594.

⁷⁶ *Bailey v. Lisle Mfg. Co.*, 238 Fed. 257, 266, 152 C. C. A. 3.

⁷⁷ *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836, 134 Am. St. Rep. 60; *Franklin v. Jones*, 22 Fla. 526; *Houser v.*

Austin, 2 Idaho, 204, 10 Pac. 37; *Sutherland v. Sutherland*, 69 Ill. 481; *Wachendorf v. Lancaster*, 61 Iowa, 509, 16 N. W. 533, 14 N. W. 316; *Dare v. Foy*, 180 Ia. 1156, 164 N. W. 179; *Schaefer v. Mills*, 69 Kans. 25, 76 Pac. 436; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 107 Mass. 290; *Steinberg v. Phoenix Insurance Co.*, 49 Mo. App. 255; *Henderson v. Stokes*, 42 N. J. Eq. 586, 8 Atl. 718; *Boyertown Nat. Bank v. Hartman*, 147 Pa. 558, 23 Atl. 842, 30 Am. St. Rep. 759; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pa. 215; *Bailey v. Woodbury*, 50 Vt. 166;

cized,⁷⁸ and the better and commoner way of appraising the *quantum* of proof is to state that the evidence must be clear and satisfactory or words of similar effect.⁷⁹

§ 1598. Law and equity; rescission at law.

Rescission and reformation are generally thought of as remedies appropriate to courts of equity. There are, however, obvious limitations to the power of equity to grant relief. Equity will entertain a bill for reformation only where a writing is involved; and the right to maintain a suit for cancellation or rescission and restitution is dependent either on the contract or conveyance being written or relating to such a subject-matter that the remedy at law is deemed inadequate. The right to maintain an action at law for money paid under substantially the same kinds of mistake as courts of equity have regarded as giving jurisdiction for the rescission of a written contract to sell

Fudge v. Payne, 86 Va. 303, 10 S. E. 7; *Jarrell v. Jarrell*, 27 W. Va. 743; *Meiswinkel v. St. Paul F. & M. Ins. Co.*, 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200.

⁷⁸ *Stille v. McDowell*, 2 Kans. 374, 85 Am. Dec. 590; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642; *Archer v. California Lumber Co.*, 24 Or. 341, 33 Pac. 526.

⁷⁹ *Campbell v. Northwest Eckington Imp. Co.*, 229 U. S. 561, 57 L. Ed. 1330, 33 S. Ct. 796; *Philippine Sugar Est. & Co. v. Philippine Islands*, 247 U. S. 385, 62 L. Ed. 1177, 38 S. Ct. 513; *Upton Nat. Co. v. American Shipbuilding Co.*, 251 Fed. 707, 709; *Ezell v. Humphrey*, 90 Ark. 24, 117 S. W. 758; *Connecticut F. Ins. Co. v. Wigginton*, 134 Ark. 152, 203 S. W. 844; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Loukowski v. Pryor*, 46 Col. 584, 106 Pac. 7; *Robertson v. Rigsby*, (Ga. 1918), 95 S. E. 973; *Rexroat v. Vaughn*, 181 Ill. 167, 54 N. E. 917; *Anderson v. Stewart*, 281

Ill. 69, 117 N. E. 743; *Murphy v. First Nat. Bank*, 95 Iowa, 325, 63 N. W. 702; *Dare v. Foy*, 180 Ia. 1156, 164 N. W. 179; *Mahoning Coal Co. v. Dowling (Ky.)*, 124 S. W. 370; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Ætna Indemnity Co. v. Baltimore, etc., R. Co.*, 112 Md. 389, 76 Atl. 251, 136 Am. St. Rep. 389; *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207, Ann. Cas. 1918 D. 145; *German-American Ins. Co. v. Davis*, 131 Mass. 316; *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; *Clayton v. Freet*, 10 Ohio St. 544; *Manley v. Smith*, 88 Ore. 176, 171 Pac. 897; *Furuset v. Aaby*, 88 Ore. 278, 170 Pac. 1180, 171 Pac. 1054; *School District v. Hartong*, 89 Ore. 155, 173 Pac. 570; *Cranston Print Works v. Dyer*, 19 R. I. 208, 32 Atl. 922; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381.

land is well settled⁸⁰ and similar redress may be sought in an appropriate case for goods delivered or services rendered under a mistake.⁸¹ Payments in counterfeit money or forged securities may likewise be rescinded.⁸²

The same fundamental reason not only for rescission but for reformation may arise in regard to oral contracts or sales concerning ordinary personal property as in regard to written contracts or deeds concerning land. Here, as in not a few other cases, courts of law have had presented to them the alternative of attempting to adapt equitable relief to legal procedure, or of leaving the parties without relief. And, here as usually, courts of law are more and more disposed to take the former alternative. There is also a tendency for courts of law to assume the functions of courts of equity even in cases where unquestionably relief might be obtained by an equitable proceeding. Instances of this may be found even in the Federal Courts.⁸³

There seems no reason to doubt that wherever equitable pleas are allowed at law, either under a code procedure or otherwise, even in cases where a bill to rescind for mistake of fact might be entertained as a direct equitable proceeding, such a mistake of fact as equity would regard ground for unconditional rescission may be set up as a defence to an action at law. Judgment for the defendant by a court of law has the same practical effect as a decree of rescission by a court of equity.⁸⁴

⁸⁰ See *supra*, § 1574.

⁸¹ See *supra*, § 1575.

⁸² See *supra*, § 1572.

⁸³ In *United States v. Charles*, 74 Fed. 142, 20 C. C. A. 346, 36 U. S. App. 766, a mail contractor was sued on a written contract to carry from T the mail for V. Shortly before the contract was made the Post-Office at V had been discontinued, and this fact had been unknown or not present to the minds of the contracting parties. To fulfil the contract it would be necessary to carry the mail for V to Q some distance further and across a river. Though the observance between law and equity in the Federal Courts has been sharper than in any other courts, it was held that the

mutual mistake of fact was a good defence at law to the Government's action.

⁸⁴ *Zuspann v. Roy*, 102 Kan. 188, 170 Pac. 387; *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 217, 84 N. E. 449; *Barlow v. Elliott*, 56 Mo. App. 374; *Gill v. Pelkey*, 54 Ohio St. 348, 360, 43 N. E. 991; *Raymond v. Toledo*, etc., R. Co., 57 Ohio St. 271, 48 N. E. 1093. See also *Scott v. Littledale*, 8 E. & B. 815, where the equitable plea at law was held bad only because in that case equity would not have rescinded the contract. See also *Pierson v. McCahill*, 21 Cal. 123.

In *Alabama*, etc., *Railway Co. v. Jones*, 73 Miss. 110, 127, 19 So. 105; 55 Am. St. Rep. 488, the court said,

§ 1599. Reformation at law.

Even the power of equity to reform contracts has been to some extent borrowed by courts of law, in fact, though not in name; for the result attained by a court of equity may frequently be reached by a court of law by simply admitting evidence of the actual intention of the parties and enforcing the bargain which the parties intended to make.⁸⁵ The same principle, may be applied by a court of law to an oral contract as to a writing. For instance, in case of a sale by sample, if the sample is subject to a secret defect unknown to the parties, the obligation of the seller is to furnish, not goods like the sample, but goods of the kind to which the sample seems to belong.⁸⁶ In terms, such a contract obviously binds the seller to furnish defective goods only. But the mutual mistake as to a material fact can be rectified and the parties "put in the same position as if their erroneous assumption had been correct, and, therefore, their contract, instead of being avoided, is upheld, according to their true intention."⁸⁷

So recovery by a corporation has been allowed on a promise in terms made to a corporation of another name, the plaintiff corporation being in fact intended as the promisee;^{87a} and re-

"The right which one has to nullify an alleged ratification by him of a voidable release executed by him, by showing that when he was alleged to have so ratified, he was not aware of his private legal right arising out of the facts, to repudiate such release, is a substantive right, and not the mere rule by which a court of chancery administers his right; and, as such substantive right, it is available in avoidance of such alleged release, as well at law as in equity. If such person filed his bill to cancel an alleged written ratification, on such ground, all that the court does is to cancel and annul the alleged written ratification, so that it shall not form the basis for the assertion of any right resulting therefrom to the party holding it against the person filing the bill. When such person is allowed to show

at law want of knowledge of such private legal right to repudiate the release, the same end is accomplished, the proof cancels and annuls the alleged written ratification. It is the same substantive right, inhering in the very truth and justice of the case administered in both instances—administered in one form in one forum and in another form in another."

⁸⁵ See an illustration of this, *supra*, § 302. But see *Aradalou v. New York &c. R. Co.*, 225 Mass. 235, 114 N. E. 297.

⁸⁶ *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Drummond v. Van Ingen*, 12 A. C. 284; *Coates v. Cook*, 101 Ga. 586, 28 S. E. 982. Compare *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656.

⁸⁷ Sir F. Pollock, *Wald's Pollock, Contracts* (3d ed.), p. 620.

^{87a} *Blenkiron Bros. v. Rogers*, 87

covery has been allowed of money paid under a written contract which because of a mistake reformable in equity provided for too large a payment.⁸⁸ It seems probable that such a short cut to the relief to which the plaintiff is undoubtedly entitled will find favor with the courts, though the difference between the *quantum* of proof required by a court of equity for relief on the ground of mistake and that required by a court of law may well be urged in opposition.⁸⁹ The situation just considered, where a promise in the contract was erroneously written for too large a sum must not be confused with one where an excessive payment is made for a conveyance of real estate and the deed recites the consideration which the plaintiff in fact paid. Here the only difficulty which the plaintiff meets is that he is endeavoring to contradict a recital of fact in a deed, not to deny a promise in the teeth of the parol evidence rule. Such a contradiction of recitals though formerly not permitted is now generally allowed at law for any purpose except that of invalidating the conveyance.⁹⁰

Modern decisions, therefore, have generally permitted recovery of an overpayment for land though it is stated in recitals as the consideration for the conveyance.⁹¹ The question

Neb. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127, Ann. Cas. 1912 A. 1043.

⁸⁸ *Ragsdale v. Turner*, 141 Iowa, 604, 120 N. W. 109. But see *contra*, *Boyce v. Wilson*, 32 Md. 122; *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654; *Borough Paper Co. v. Scher*, 170 N. Y. S. 395. See, also, *Keener*, *Quasi Contracts*, 123; *Woodward*, *Quasi Contracts*, § 180.

⁸⁹ See 32 Harv. L. Rev. 179; also, *supra*, § 750.

⁹⁰ See *supra*, § 115a.

⁹¹ *Solinger v. Jewett*, 25 Ind. 479, 87 Am. Dec. 372 (quoted with approval in *Wolcott v. Frick*, 40 Ind. App. 236, 81 N. E. 731); *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492; *Wilson v. Randall*, 67 N. Y. 338; *White v. Miller*, 22

Vt. 380; *Butt v. Smith*, 121 Wis. 566, 99 N. W. 328, 105 Am. St. Rep. 1039 (*cf.* *Ohlert v. Alderson*, 86 Wis. 433, 57 N. W. 88). The decisions which seem opposed are either of early date or follow early cases without sufficient appreciation of the change in the law regarding the contradiction of recitals in sealed instruments, or they present facts where under no procedure was the plaintiff entitled to recover. *Carter v. Beck*, 40 Ala. 599; *Williams v. Hathaway*, 19 Pick. 387 (but see *contra*, *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492); *Howes v. Barker*, 3 Johns. 506, 3 Am. Dec. 526 (but see *contra*, *Wilson v. Randall*, 67 N. Y. 338); *Farmers', etc., Bank v. Galbraith*, 10 Pa. St. 490, 51 Am. Dec. 498; *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750; *Baker v. Barley*, 34 Pa. Super. 169.

whether the original contract is merged in the deed is not involved. If there was a prior contract undoubtedly it is merged, but the plaintiff's recovery does not depend on the continued existence of a prior contract but on the fact that a larger payment has been made than was agreed.

Under the name of construction also courts to some degree exercise a power of reforming instruments, refusing to give language its natural meaning where that is opposed to the probable intention of the parties.⁹²

§ 1600. Accidental loss or destruction of writings.

Since *profert* of a sealed instrument is not now usually required as a condition of the plaintiff's recovery, the loss or destruction of the instrument generally has merely the effect of a loss of primary evidence which may be remedied in an action at law by the use of secondary evidence.⁹³ But the early jurisdiction of courts of equity to repair the loss persists.⁹⁴ The case of negotiable instruments presented a greater difficulty than that of a bond or conveyance because one who pays a negotiable instrument is entitled to the redelivery of it not simply for use as a voucher but as proof that the instrument has not been transferred to another holder before maturity. A difficulty was felt in giving relief at law in such a case because the defendant should be indemnified against the possibility of being subsequently held liable on the instrument and a judgment at law conditional on the giving of a proper indemnity seemed anomalous. Accordingly the remedy was formerly confined to equity,⁹⁵ since it can properly make conditional decrees. But

⁹² See *supra*, §§ 90, n. 38; 302; 322; 619; 750; 1551. As to the limits of the power of a court of law to give this kind of relief, see *Kimble v. Mayor*, 91 N. J. L. 249, 102 Atl. 637.

⁹³ See *infra*, §§ 1882, 1883, 1916.

⁹⁴ *Toulmin v. Price*, 5 Ves. 235, 238; *Bromley v. Holland*, 7 Ves. 3, 19; *Security Sav. & Loan Ass'n v. Buchanan*, 66 Fed. 799, 802, 14 C. C. A. 97, 31 U. S. App. 244; *Bohart v. Chamberlain*, 99 Mo. 622, 13 S. W. 85; *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl.

1040. In the former case the court refused to exercise its jurisdiction merely to establish written evidence which had been lost.

⁹⁵ *Hansard v. Robinson*, 7 B. & C. 90; *Price v. Price*, 16 M. & W. 232; *Crowe v. Clay*, 9 Exch. 604; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 18 Am. Dec. 603; *Adams v. Edmunds*, 55 Vt. 352; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609; *Campbell v. Myers*, 72 W. Va. 428, 78 S. E. 648, 48 L. R. A. (N. S.) 648. See also

this rule is nearly everywhere obsolete. Generally by statute and in some States without the aid of statutes, an action at law may be maintained on tender of proper indemnity even though the negotiable instrument was lost before maturity.⁹⁶

In some cases the risk to a party to a negotiable instrument in paying it, in spite of its loss, is negligible, and in these cases as no indemnity is practically necessary, an action at law is almost universally allowed without regard to the question whether except for these circumstances the remedy should be in equity. This is true where it is clearly proved that the instrument has been destroyed,⁹⁷ or has come into the defendant's possession after its loss;⁹⁸ or where the instrument, at the

Posey v. Decatur Bank, 12 Ala. 802 (quoting statute permitting action at law if necessary affidavit is first made. See also *Bank of Mobile v. Meagher*, 33 Ala. 622); *Commack v. Conrad*, 30 La. Ann. 503; *Wofford v. Board Police*, 44 Miss. 579, 589; *Warder, etc., Co. v. Libby*, 104 Mo. App. 140, 145, 78 S. W. 338; *Hart-Parr Co. v. Keeth*, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912 D. 243.

⁹⁶ *First Nat. Bank v. Wilder*, 104 Fed. 187, 43 C. C. A. 461; *Stone v. Gray*, 10 Cal. App. 609, 103 Pac. 155; *Bridgeford v. Masonville Mfg. Co.*, 34 Conn. 546, 91 Am. Dec. 744; *Robinson v. Bank of Darien*, 18 Ga. 110; *Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S. E. 1052; *Bean v. Keen*, 7 Black, 152; *Commercial Bank v. Benedict*, 18 B. Mon. 307; *Hill v. Grizzard*, 133 Ky. 816, 119 S. W. 168; *Foster's Adm'r v. Metcalfe*, 144 Ky. 385, 138 S. W. 314; *Willis v. Cressey*, 17 Me. 9; *Page v. Page*, 15 Pick. 368; *Fales v. Russell*, 16 Pick. 315; *Hinckley v. Union Pacific R. Co.*, 129 Mass. 52, 37 Am. Rep. 297; *Munroe v. Weir*, 177 Mass. 301, 58 N. E. 1013 (but in *Savannah Nat. Bank v. Haskins*, 101 Mass. 370, 3 Am. Rep. 373, it was held that the remedy against the indorser of lost negotiable paper must be in equity); *First Nat. Bank v. McConnell*, 103 Minn. 340,

114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336; *Warder, etc., Co. v. Libby*, 104 Mo. App. 140, 78 S. W. 338; *Leighty v. Murr*, 194 Mo. App. 156, 186 S. W. 734; *Moore v. Durnan*, 69 N. J. Eq. 828, 65 Atl. 463, 115 Am. St. Rep. 635; *Mills v. Albany Exch. Nat. Bank*, 28 N. Y. Misc. 251, 253, 59 N. Y. S. 149; *Fisher v. Webb*, 84 N. C. 44; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571; *Synder v. Wolfley*, 8 S. & R. 328; *Smith v. Nelson*, 83 S. C. 294, 65 S. E. 261, 24 L. R. A. (N. S.) 644, 137 Am. St. Rep. 808.

⁹⁷ *Wright v. Maidstone*, 1 Kay & J. 701; *Blackie v. Pidding*, 6 C. B. 196; *Pierson v. Hutchinson*, 2 Campb. 211; *Branch Bank v. Tillman*, 12 Ala. 214; *Filby v. Turner*, 9 Colo. App. 202, 47 Pac. 1037; *Moore v. Fall*, 42 Me. 450, 66 Am. Dec. 297; *Wofford v. Board of Police*, 44 Miss. 579, 589; *Hinsdale v. Bank of Orange*, 6 Wend. 378; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Des Arts v. Leggett*, 16 N. Y. 582; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571; *Aborn v. Bosworth*, 1 R. I. 401; *Hough v. Barton*, 20 Vt. 455; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609.

⁹⁸ *Smith v. McClure*, 5 East, 476; *De la Chaumette v. Bank of England*, 9 B. & C. 208; *Decker v. Mathews*, 12

time of its loss, was not negotiable merely by delivery;⁹⁹ or where at the time of the trial the Statute of Limitations would be a bar if a new action were brought upon the instrument.¹ Sometimes the fact that an instrument was overdue when lost and would, therefore, if negotiated, pass subject to defences, has been held to justify the same procedure.²

N. Y. 313; *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576.

⁹⁹ *Branch Bank v. Tillman*, 12 Ala. 214; *O'Neil v. O'Neil*, 123 Ill. 361, 14 N. E. 844; *Petrue v. Wakem*, 99 Ill. App. 463; *Dean v. Speakman*, 7 Blackf. 317; *Cleveland v. Worrell*, 13 Ind. 545; *Moore v. Fall*, 42 Me. 450, 66 Am. Dec. 297; *Hill v. Barney*, 18 N. H. 607; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 352; *Hough v. Barton*, 20 Vt. 455; *Clark v. Snow*, 60 Vt. 205, 14 Atl. 87, 6 Am. St. Rep. 108. But see *Rolt v. Watson*, 4 Bing. 273; *Butler v. Joyce*, 20 D. C. 191.

¹ *Moore v. Fall*, 42 Me. 450, 66 Am. Dec. 297; *Fales v. Russell*, 16 Pick.

315; *Adams v. Baker*, 16 R. I. 1, 11 Atl. 168, 27 Am. St. Rep. 721; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609. And the court may order a case continued until the note becomes barred by the Statute of Limitations in order to give protection to the defendant and justify recovery by the plaintiff. *Matthews v. Matthews*, 97 Me. 40, 53 Atl. 831, 94 Am. St. Rep. 464.

² *Sloo v. Roberts*, 7 Ind. 128; *Elliott v. Woodward*, 18 Ind. 183; *Palmer v. Carpenter*, 53 Neb. 394, 73 N. W. 690; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571. But see *Butler v. Joyce*, 9 Mackey, 161, 16 L. R. A. 205; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609.

CHAPTER XLIII

DURESS

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§ 1601. Early development of law of duress.

Under the name of duress, there have long been included what early lawyers classified under the two headings: (1) duress—that is, imprisonment—and (2) menaces, that is, threats of imprisonment or bodily harm. Unlike the defence of fraud, duress was early recognized by the common-law courts as a ground for avoiding a sealed instrument, then the only form of

contract.¹ Bracton states that a deed made under such fear as may happen to a resolute man because of danger of death or torture of the body invalidates the conveyance.² Coke,³ says that a man shall avoid his own act for menaces in four cases: "1. for fear of losse of life, 2. of losse of member, 3. of mayhem, and 4, imprisonment; otherwise it is for fear of battery, which may be very light, or for burning of his house, or taking away, or destroying of his goods, or the like, for there he may have satisfaction by recovery of damages;" and these are the limits stated in subsequent early authorities,⁴ (though with some doubt as to the sufficiency of a mere threat of imprisonment),⁵ and they are still not without influence in the law. It will be observed that threat of an ordinary battery is not included in Coke's list, and Blackstone says: "A fear of battery or of being beaten, though never so well grounded, is no duress."⁶

§ 1602. Undue influence in equity.

Equity established no rule defining the exact amount of compulsion which should justify the avoidance of a contract or conveyance; but

"Any influence brought to bear upon a person, entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment."⁷

¹ "We should have no difficulty in finding cases which illustrate a growing doctrine of 'duress.'" 2 Pollock & Maitland, Hist. 535, 536, citing Bracton, 16b. (Twiss's translation, Vol. I, pp. 131, 133); and Bracton's Note Book, pl. 182, 200, 229, 243, 750, 1126, 1643, 1913. See also Ames, Lect. Legal Hist. 113.

² 16b, Twiss's translation, 133.

³ 2 Inst. 483. See also Co. Litt. 253b.

⁴ See Shepp. Touch. 61; 1 Bl. Comm. 131.

⁵ This is not included by Blackstone, and its sufficiency is doubted by Preston in his edition of Shepp. Touch., p. 61.

⁶ 1 Bl. Comm. 131.

⁷ Pollock, Contracts (8th Eng. ed.), 640; Wald's Pollock (3d ed.), 732. See Attorney General v. Sothorn, 2 Vern. 497; Woodman v. Skute, Prec. in Ch. 266; Woodhouse v. Shepley, 2 Atkins. 535; Williams v. Bayley, L. R. 1 H. L. 200; Smith v. Kay, 7 H. L. 750, 779; Allcard v. Skinner, 36 Ch. Div. 145;

§ 1603. Gradual enlargement of duress.

Under the influence of increasing liberality of legal thought aided by the example offered by courts of equity, the definition of duress in courts of law has been much enlarged. It has been said "duress is but the extreme of undue influence."⁸ And while this statement is not strictly accurate since duress implies that fear is the motive which coerces the will, and no such implication is necessarily involved in the words "undue influence," there is no doubt that the modern tendency of courts of law is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction. The earlier requirements of common-law duress may be regarded as merged in this broader definition.⁹ Statements, in the subsequent discussion, of what has been held in the past insufficient to constitute duress must, therefore, be taken with much qualification. In some jurisdictions, indeed, the tendency to preserve hard and fast lines persists in actions

Harding v. Handy, 11 Wheat. 103, 125, 6 L. Ed. 429; *Gillespie v. Smith*, 229 Fed. 760; *Crabb v. Watts*, 249 Fed. 357; *Lord v. Reed*, 254 Ill. 350, 98 N. E. 553, Ann. Cas. 1913 C. 139; *Zimmerman v. Bitner*, 79 Md. 115, 28 Atl. 820; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657; *Munson v. Carter*, 19 Neb. 293, 27 N. W. 208; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; *Long v. Mulford*, 17 Oh. St. 484, 504, 505, 93 Am. Dec. 633; *Zeigler v. Shuler*, 87 S. C. 1, 68 S. E. 817; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361.

⁸ *Commercial Nat. Bank v. Wheelock*, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738.

⁹ See *Barnett Oil & Gas Co. v. New Martinsville Oil Co.*, 254 Fed. 481; *Missouri Pacific R. Co. v. Fields*, 134 Ark. 273, 203 S. W. 1036; *Dorsey v. Bryans*, 143 Ga. 186, 84 S. E. 467, Ann. Cas. 1917 A. 172; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; *Cox v. Edwards*, 120 Minn.

512, 517, 139 N. W. 1070; *First Nat. Bank of David City v. Sargeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; *Pickenbrock v. Smith*, 43 Okl. 585, 143 Pac. 675; *Anderson v. Kelley*, 57 Okl. 109, 156 Pac. 1167; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016.

In *Koewing v. West Orange*, 89 N. J. 539, 99 Atl. 203, 204, the court said: "A very good definition of duress is that adopted in the opinion of the court in *Re Meyer* (D. C.), 106 Fed. 831, as follows: 'The duress for which a person may avoid any contract or conveyance made, or recover back any money paid under its influence, exists where one by the unlawful act of the beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will to agree or to perform the act sought to be avoided.'"

at law, and in such jurisdictions the precedents cited might be regarded as establishing narrower and more definite rules than that just suggested; but the modern tendency is to consider each case upon its own special circumstances. "The real and ultimate fact to be determined in every case is whether or not the party really had a choice—whether 'he had his freedom of exercising his will.'"¹⁰ In considering the authorities, however, it must be remembered that some jurisdictions are less ready than others to treat the defence of duress at law as having been enlarged to this extent by borrowing from equity.¹¹ The word duress, itself, also is ambiguously used. It is often used now as covering every case where a party to a contract or transfer was deprived of freedom of will, and this seems a desirable extension of meaning. Other courts give duress an older and narrower meaning, and while not confining the limits of a possible defence within the limits of that meaning, speak of undue influence when the case goes beyond those limits.

§ 1604. Consent must be coerced.

Whatever definition be adopted, it is clear that in order that a transaction may be avoided on account of duress or undue influence, it must appear that the consent of the party seeking to avoid the transaction was coerced. That is, that he was actually induced by the duress or undue influence to give his consent, and would not have done so otherwise.¹²

¹⁰ *Joamin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581.

¹¹ In *Sooy ads State*, 38 N. J. L. 324, and *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, the court held stiffly to the distinction between legal and equitable rules, and in the latter case held that there was no defence at law to notes signed by a married woman under threats of her husband that otherwise he would kill himself, though the notes had not come into the hands of a holder in due course. It is not likely that the decision would be generally followed. Cf. the definition of duress quoted

supra, n. 9, in a later New Jersey decision.

¹² *Towson v. Moore*, 173 U. S. 17, 43 L. Ed. 597, 19 Sup. Ct. 332; *Love v. State*, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Van Alstine v. Mo-Aldon*, 141 Ill. App. 27; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *Williamson, Halsell, Frasier Co. v. Ackerman*, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; *Knight v. Brown*, 137 Mich. 396, 100 N. W. 602; *Dallavo v.*

§ 1605. Threats need not be such as to affect a brave man.

The statements in the early books assert that in order to constitute duress by threats, the threats in question must be such as to put a brave man in fear.¹³ Later, the standard of courage was somewhat reduced, but it was said that duress must consist of something sufficient to overcome the will of a person of ordinary firmness, and the rule in this latter form with more or less qualification is frequently repeated in modern cases,¹⁴ though in many of the cases which repeat the formula, the question was not really involved. The tendency of the modern cases, and undoubtedly the correct rule is that any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done, and which he was not bound to do, constitute duress. The age, sex, capacity, relation of the parties and all the attendant circumstances must be considered.¹⁵ This fol-

Dallavo, 189 Mich. 350, 155 N. W. 538; Earle v. Norfolk, etc., Hosiery Co., 36 N. J. Eq. 188; Smithwick v. Whitley, 152 N. C. 369, 67 S. E. 913; Edmondston v. Porter (Okl.), 162 Pac. 692; Wilkerson v. Bishop, 47 Tenn. 24; Kansas City &c. R. v. Graham (Tex. Civ. App.), 145 S. W. 632; Walla Walla Fire Ins. Co. v. Spencer, 52 Wash. 369, 100 Pac. 741; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

¹³ See the passage from Bracton stated *supra*, § 1601, the influence of which has continued because of its quotation in 1 Blackstone Comm. 131. See also Co. Lit. 253b.

¹⁴ Brown v. Pierce, 7 Wall. 205, 19 L. Ed. 134; United States v. Huckabee, 16 Wall. 414, 21 L. Ed. 457; Andrews v. Connolly, 145 Fed. 43; Bosley v. Shanner, 26 Ark. 280; Hines v. Board of Commissioners of Hamilton County, 93 Ind. 266; Williamson-Halsell, etc., Co. v. Ackerman, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; United States Banking Co. v. Neale, 84 Kans. 385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; Bryant v. Levy, 52 La.

Ann. 1649, 28 So. 191; Higgins v. Brown, 78 Me. 473, 5 Atl. 269; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120; Flanigan v. Minneapolis, 36 Minn. 406, 31 N. W. 359; Wood v. Kansas City Home Tel. Co., 223 Mo. 537, 123 S. W. 6; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Sulzner v. Cappeau-Lemley &c. Co., 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421; Ortt v. Schwartz, 62 Pa. Super. 70; Ford v. Engleman, 118 Va. 89, 86 S. E. 852; Walla Walla Fire Ins. Co. v. Spencer, 52 Wash. 369, 100 Pac. 741; Simmons v. Trumbo, 9 W. Va. 358; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Barrett v. Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953.

¹⁵ Scott v. Sebright, 12 P. D. 21, 24; United States v. Huckabee, 16 Wall. 414, 432, 21 L. Ed. 457; International Harvester Co. v. Voboril, 187 Fed. 973, 110 C. C. A. 311; Hartford, etc., Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651; McCarthy v. Tanska, 84 Conn. 377, 80 Atl. 84; Turner v. State, 10

lows the analogy of the modern doctrine of fraud which tends to disregard the question whether misrepresentations were such as would have deceived a reasonable person, and confines the question to whether the misrepresentations were intended to deceive and did so.¹⁶

§ 1606. Pressure must be wrongful; threatened suit.

One element of the early law of duress continues to exist, however the boundaries of the defence may be extended. The pressure must be wrongful, and not all pressure is wrongful.¹⁷ The law provides certain means for the enforcement of their claims by creditors. It is not duress to threaten to take these means. Therefore a threat to bring action is not such duress as to justify rescission of a transaction induced thereby,¹⁸

Ga. App. 18, 72 S. E. 604; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711; *Denney v. Reber*, 63 Ind. App. 192, 114 N. E. 424; *Callendar Sav. Bank v. Loos*, 142 Iowa, 1, 120 N. W. 317; *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555; *Anthony & Cowell Co. v. Brown*, 214 Mass. 439, 101 N. E. 1056; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6; *Gate City Nat. Bank v. Elliott (Mo.)*, 181 S. W. 25; *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383, 97 N. W. 476; *Earle v. Norfolk, etc., Hosiery Co.*, 36 N. J. Eq. 188; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Parmentier v. Pater*, 13 Oreg. 121, 130, 9 Pac. 59; *Sulzner v. Cappeau-Lemley, etc., Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421; *Galusha v. Sherman*, 106 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

¹⁶ See *supra*, § 1516.

¹⁷ *Connolly v. Bouck*, 174 Fed. 312, 98 C. C. A. 184; *Miller v. Davis' Est.*, 52 Colo. 485, 122 Pac. 793; *United States Banking Co. v. Veale*, 84 Kans.

385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; *Dispeau v. First Nat. Bank*, 24 R. I. 508, 53 Atl. 568; and see cases in the following notes.

¹⁸ *Hamlet v. Richardson*, 9 Bing. 644; *Moore v. Vestry*, [1895] 1 Q. B. 399; *Vick v. Shinn*, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26; *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629; *VanAlstine v. McAlodon*, 141 Ill. App. 27; *Buck v. Axt*, 85 Ind. 512; *Paulson v. Barger*, 132 Iowa, 547, 109 N. W. 1081; *United States Banking Co. v. Veale*, 84 Kans. 385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; *Kingsbury v. Sargent*, 83 Me. 230, 22 Atl. 105; *Parker v. Lancaster*, 84 Me. 512, 24 Atl. 952; *Vereycken v. Vanden Brooks*, 102 Mich. 119, 60 N. W. 687; *Minneapolis Land Co. v. McMillan*, 79 Minn. 287, 82 N. W. 591; *Wolfe v. Marshall*, 52 Mo. 167; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35; *Jones v. Houghton*, 61 N. H. 51; *Turner v. Barber*, 66 N. J. L. 496, 49 Atl. 676; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Lilienthal v. George Bechtel Brewing Co.*, 118 N. Y. App. D. 205,

even though there is no legal right to enforce the claim,¹⁹ provided the threat is made in good faith; that is, in the belief that a possible cause of action exists. But if the threat is made with the consciousness that there is no real right of action and the purpose is coercion, a payment or contract induced thereby is voidable.²⁰ In the former case it may be said that the threatened action was rightful; in the latter case it was not.²¹ As foreclosure is a lawful means for securing a mortgagee's claim, threats of foreclosure do not amount to duress;²² nor do threats that one entitled to establish a mechanic's lien,²³ or to enjoin either the presentation of a play,²⁴ or the use of premises in violation of a covenant,²⁵ will adopt this course unless his claim is settled. A threat by a creditor to apply for a receiver made under circumstances which would justify the application will not render voidable a transaction induced thereby;²⁶ and "The collection of taxes through threats, by the authorities of a municipality to which they are owing, that unless the sum due is

102 N. Y. S. 1051; *Peebles v. Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714; *C. & J. Michel Brewing Co. v. State*, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911; *Flack v. National Bank*, 8 Utah, 193, 30 Pac. 746, 17 L. R. A. 583; *Burnham v. Strafford*, 53 Vt. 610; *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73.

¹⁹ *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Peckham v. Hendren*, 76 Ind. 47; *Lester v. Mayor*, 29 Md. 415, 96 Am. Dec. 542; *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848.

²⁰ *Foote v. DePoy*, 126 Iowa, 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365. See also *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129; *Callendar Savings Bank v. Loos*, 142 Iowa, 1, 120 N. W. 317; *Behl v. Schuett*, 104 Wis. 76, 80 N. W. 73.

²¹ See *supra*, § 135.

²² *Vick v. Shinn*, 49 Ark. 70, 45 S. W. 60, 4 Am. St. Rep. 26; *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Savannah Sav. Bank v. Logan*, 99 Ga. 291, 25 S. E. 692; *Hart v. Strong*, 188 Ill. 349,

55 N. E. 629; *Buck v. Art*, 85 Ind. 512; *Stout v. Judd*, 10 Kans. App. 579, 63 Pac. 662; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; *Vereycken v. Vanden Brooks*, 102 Mich. 119, 60 N. W. 687; *Nutting v. McCutcheon*, 5 Minn. 382; *Koewing v. West Orange*, 89 N. J. L. 539, 99 Atl. 203; *Martin v. New Rochelle Water Co.*, 11 N. Y. App. Div. 177, 42 N. Y. S. 893, *affd.* 162 N. Y. 599, 57 N. E. 1117; *Wessel v. Johnston Land & Mtge. Co.*, 3 N. Dak. 160, 54 N. W. 922, 44 Am. St. Rep. 529; *F. B. Collins Investment Co. v. Easley*, 44 Okl. 429, 144 Pac. 1072; *Pease v. Francis*, 25 R. I. 226, 55 Atl. 686; *Shuck v. Interstate Building, etc., Association*, 63 S. C. 134, 41 S. E. 28.

²³ *Abelman v. Indelli, etc., Co.*, 170 N. Y. App. Div. 740, 156 N. Y. S. 401.

²⁴ *Hart v. Walsh*, 84 N. Y. Misc. 421, 146 N. Y. S. 235.

²⁵ *Ripy Bros. Distilling Co. v. Lillard*, 149 Ky. 726, 149 S. W. 1009.

²⁶ *Minneapolis Land Co. v. McMillan*, 79 Minn. 287, 82 N. W. 591.

paid, the owner's right to redeem will be barred or foreclosed, does not amount to unlawful coercion and is not duress;" ²⁷ nor does the threatened resignation of an administrator, ²⁸ or the threat of a widow as to the place of burial of her deceased husband. ²⁹

§ 1607. Abuse of lawful means.

Means in themselves lawful must not be so oppressively used as to amount to an abuse of legal remedies. Though attachment is in itself lawful, if an attachment is excessive, or of perishable property, ³⁰ or is made under circumstances which make it difficult for the defendant to avoid yielding to any demands ³¹ the use of the attachment for the purpose of enforcing extortionate or collateral demands is abusive, and transactions coerced by such means are voidable. Under similar circumstances a threat to apply for a receiver of a corporation has been held duress of one who was interested financially therein and whose reputation would be injuriously affected by the application. ³² Even a threat of ordinary litigation may be made under such circumstances as to render the threat wrongful as a means of coercion, and the transaction induced thereby voidable. Thus, where one of the parties is in such a position as to be easily dominated by the other, ³³ or is old and weak-minded, ³⁴ a transaction induced by such a threat may be avoided. Where,

²⁷ *Koewing v. West Orange*, 89 N. J. L. 539, 99 Atl. 203.

²⁸ *Sackman v. Campbell*, 15 Wash. 57, 45 Pac. 895.

²⁹ *Jewelers' League v. DeForest*, 80 Hun, 376, 30 N. Y. S. 88, affd. 151 N. Y. 654, 46 N. E. 1148.

³⁰ *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367.

³¹ *Collins v. Westbury*, 2 Bay (S. Car.), 211, 1 Am. Dec. 643.

³² *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129. Cf. *Minneapolis Land Co. v. McMillan*, 79 Minn. 287, 82 N. W. 591; *McCammon v. Shantz*, 26 N. Y. Misc. 476, 57 N. Y. S. 515.

³³ See *Heinlein v. Imperial, etc., Ins.*

Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409 (unfounded claim that a policy was void with threats to bring suit to cancel it). See also *Foot v. DePoy*, 126 Ia. 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365.

³⁴ See *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (threats of criminal prosecution were also made.) In *Hogan v. Leeper*, 37 Okl. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475, the threat of guardianship proceedings by which the will of an old man was coerced, whereby he was induced to sign a deed of trust, was held to render the deed voidable.

however, ordinary legal procedure is used or threatened by one who believes he has a claim of the kind for which such procedure was provided, there must doubtless be some actual or threatened abuse of process. What amounts to such an abuse is not susceptible of exact definition.

§ 1608. Neither persuasion nor pressure of circumstances is duress.

Since there is no impropriety in the use of such means, it follows that suggestion, argument, entreaties, advice, and persuasion, unless there is some special relation between the parties giving one ascendancy over the other, or unless carried to such an extreme as to coerce the will of the person addressed, will not render a transaction voidable.³⁵

Nor is it duress or undue influence when a party is constrained to enter into a transaction by force of circumstances for which the other party is not responsible.³⁶ But it seems

³⁵ *Bowdoin College v. Mergitt*, 75 Fed. 480, 169 U. S. 551, 18 Sup. Ct. 415, 42 L. Ed. 850; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Adair v. Craig*, 135 Ala. 332, 33 So. 902; *Rogers v. Higgins*, 57 Ill. 244; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Beith v. Beith*, 76 Iowa, 601, 41 N. W. 371; *Seward v. Seward*, 59 Kans. 387, 53 Pac. 63; *United Shoe Mach. Co. v. La Chapelle*, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913 D. 715; *Hammond v. Welton*, 106 Mich. 244, 64 N. W. 25; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657; *Fjone v. Fjone*, 16 N. D. 100, 112 N. W. 70; *Coleman v. Coleman*, 85 Oreg. 99, 166 Pac. 47; *Longnecker v. Zion, etc., Church*, 200 Pa. 567, 50 Atl. 244; *DuBose v. Kell*, 90 S. C. 196, 71 S. E. 371; *Seat v. McWhirter*, 93 Tenn. 542, 29 S. W. 220; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788. Even persuasion, however, by one who is in a dominant position may invalidate a transaction, see *infra*, § 1627.

³⁶ *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987; *Jenkins S. S. Co. v. Preston*, 186 Fed. 609, 108 C. C. A. 473; *Hackley v. Headley*, 45 Mich. 469, 8 N. W. 511; *Lalienthal v. George Bechtel Brewing Co.*, 118 N. Y. App. Div. 205, 102 N. Y. S. 1051; *J. J. Little & Ives Co. v. Madison Paper Stock Co.*, 169 N. Y. S. 104; *Custin v. Viroqua*, 67 Wis. 314, 30 N. W. 515. In *Horn v. Davis*, 70 Or. 498, 142 Pac. 544, the plaintiff received a telegram that his wife was dangerously ill and stated that rather than stay and complete a pending negotiation he would surrender the defendant's note and call it settled. The surrender was held not voidable.

So also, neither "will want of money, nor distressing circumstances, avoid a contract of settlement. *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852; *United States v. Huckabee*, 16 Wall. 431, 21 L. Ed. 457; *Mason v. United States*, 17 Wall. 74, 21 L. Ed. 564." *Burnes v. Burnes*, 132 Fed. 485, 493. Cf. English equity decisions,

clear that if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate a transaction.

§ 1609. Duress by imprisonment and by threats of imprisonment.

Though the common law distinguished duress and menace, or as it was later phrased duress by imprisonment and duress by threats, there is no logical distinction worth preserving. Imprisonment operates as a means of coercion only because of its threatened continuance, and there seems no material difference between a threat whether express or implied to continue an existing imprisonment, and a threat to arrest and imprison one who is then at large, provided the threat is accompanied with apparent ability to execute it. Whether threatened imprisonment is immediately imminent or not, involves a distinction of degree rather than of kind.

§ 1610. Duress by imprisonment for debt.

Confusion has been caused in regard to duress by imprisonment by a double meaning of the word "lawful." Lawful imprisonment, it is said, cannot amount to duress, and it is true that if imprisonment is a lawful means of collecting a debt, it will not under any ordinary circumstances amount to duress to collect a debt by the compulsion of imprisonment for it. Formerly, such imprisonment was a generally permitted means of enforcing an execution which could not be satisfied from the debtor's property, and therefore imprisonment for a valid debt by regular process (and *a fortiori* the threat of such imprisonment) did not amount to duress unless accompanied with circumstances of unnecessary oppression or hardship.³⁷ Even at the present day, in many jurisdictions, arrest and imprison-

O'Rorke v. Bolingbroke, 2 App. Cas. 814 (sale of inheritance by an expectant heir); Fry v. Lane, 40 Ch. D. 312 (sale by a poor and ignorant person of a reversionary interest).¹

³⁷ Nelson v. Suddarth, 1 H. & M. (Va.) 350; Crowell v. Gleason, 1 Fair-

field (10 Me.), 325; Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Richardson v. Duncan, 3 N. H. 508; Shephard v. Watrous, 3 Caines, 166; Stouffer v. Latahaw, 2 Watts, 165, 27 Am. Dec. 297; Meek v. Atkinson, 1 Bailey, 84, 19 Am. Dec. 653.

ment are permissible as a means of enforcing certain civil claims, and as to such claims the old rule still prevails.³⁸ And if the process upon which the arrest is made is legal, and the claim against the defendant made in good faith, it is not important whether it was well founded in fact.³⁹ But even in cases where imprisonment is a permitted means of enforcing a claim, if the imprisonment is unlawful or though lawful is made improperly oppressive, and assent to a conveyance or contract is induced thereby, or to obtain release therefrom, this will amount to duress.⁴⁰

§ 1611. Duress by imprisonment for crime.

Where a person is imprisoned for crime his situation must be distinguished from that where he is imprisoned for the debt or liability to which the settlement which he is induced to make relates. If the prisoner is not guilty of the crime with which he is charged,⁴¹ or if his imprisonment is for any reason illegal,⁴² it would universally be admitted that a transaction induced by the imprisonment would be voidable for duress; but if the

³⁸ *Mascola v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417; *Bunker v. Steward* (Me.), 4 Atl. 558; *Prichard v. Sharp*, 51 Mich. 432, 16 N. W. 798; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Meacham v. Newport*, 70 Vt. 67, 39 Atl. 631; *Lyons v. Davy-Pocahontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744.

³⁹ *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157; *Pflaum v. McClintock*, 130 Pa. 369, 18 Atl. 734. *Heaps v. Dunham*, 95 Ill. 583, goes beyond the text for if the charge was unfounded in that case it was presumably known to be so by the person making it. The court seemed to think it enough that the process was legal. Though early authorities may sustain this position (see *Watkins v. Baird*, 6 Mass. 506, 510, 4 Am. Dec. 170, and authorities cited) it is submitted that it cannot now be accepted.

⁴⁰ This was laid down by Lord Coke, Co. Litt. 253, 2 Inst. 481, and is still law. 1 Bl. Comm. 137; *Whitefield v. Longfellow*, 13 Me. 140; *Morse v. Woodworth*, 155 Mass. 233, 250, 27 N. E. 1010, 29 N. E. 535; *Reinhard v. City*, 49 Ohio St. 257, 31 N. E. 35, and see cases in the preceding note. *Lyons v. Davy-Pocahontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744. In *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406, a creditor by false representations enticed a non-resident debtor into Massachusetts and then by arresting him for debt (as allowed by Massachusetts when the debtor is about to leave the State), induced him to make a settlement. The settlement was held voidable.

⁴¹ *Hatter v. Greenlee*, 1 Porter, 222, 26 Am. Dec. 370.

⁴² *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153. See also *infra*, § 1613, n. 47.

prisoner is guilty, and the process valid, the imprisonment is "lawful." The argument based on this circumstance has been answered in a leading Massachusetts case⁴³ as follows:

"It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose,"⁴⁴ and where there is actual imprisonment or a threat of immediate arrest, the weight of authority supports this view.⁴⁵

§ 1612. Threat of criminal prosecution.

A threat of criminal prosecution is not in terms a threat of imprisonment but in effect it is ordinarily a threat of imprisonment, and, also irrespective of whether the prosecution is likely to be followed by imprisonment, it is a threat of disgrace. It needs no argument to show that as matter of fact threats of prosecution may be and frequently are of such compelling force that acts done under their influence are coerced and not voluntary; and the better foundation there is for the prosecution, the greater is the coercion. Nevertheless, there are a number of decisions holding that a threat of well-founded criminal prosecution is not such duress as to make voidable a transaction

⁴³ *Morse v. Woodworth*, 155 Mass. 233, 251, 27 N. E. 1010, 29 N. E. 525.

⁴⁴ (Quoted with approval in *Kwentsky v. Sirovy*, 142 Iowa, 385, 400, 121 N. W. 27.)

⁴⁵ *Walbridge v. Arnold*, 21 Conn. 424; *Mayer v. Oldham*, 32 Ill. App. 233;

Richardson v. Duncan, 3 N. H. 508; *Clark v. Tilton*, 74 N. H. 330, 333, 68 Atl. 335; *Edmondston v. Porter* (Okla.), 162 Pac. 692; *Fillman v. Ryon*, 168 Pa. St. 484, 32 Atl. 89; *Phelps v. Zuschlag*, 34 Tex. 371; *Heckman v. Swarts*, 64 Wis. 48, 24 N. W. 473.

induced thereby. The arguments advanced in the opinions in these cases in support of this conclusion are by no means uniform. In the main they are based on two dissociated ideas which may be thus stated:

(1) That whether the person threatened was guilty or not, a threat of prosecution is not necessarily a threat of immediate arrest and imprisonment, and therefore is insufficient as a means of terrorizing another; (2) that if the person threatened was guilty, the threat was one which a person criminally defrauded or injured by another had a right to make.⁴⁶

⁴⁶ In *Ingebrigt v. Seattle, etc., Co.*, 78 Wash. 433, 139 Pac. 188, 189, the cases supporting this side of the question are thus summarized: "It is not duress for one, who in good faith believes that he has been wronged, to threaten the wrongdoer with a civil suit; and, if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 818. A mere threat to imprison, without an actual arrest, does not constitute duress. *Bodine v. Morgan*, 37 N. J. Eq. 426; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335. Threats of imprisonment, not accompanied with the statement that the prosecution has been commenced, do not constitute duress. *Buchanan v. Sahlein*, 9 Mo. App. 552; *Sulzner v. Cappeau-Lemley &c. Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421. In the case last cited the court said: 'Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract; the threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment.' [Citing *Russell v. McCarty*, 45 Ga. 197; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Wilkerson v. Hood*, 65 Mo. App. 491;

Sieber v. Weiden, 17 Neb. 582, 24 N. W. 215; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Moyer v. Dodson*, 212 Pa. 344, 61 Atl. 937.] The threat, in order to be coercive, must be of an unlawful use of process. *Loan & Protective Ass'n v. Holland*, 63 Ill. App. 58. There is no duress where neither a warrant has been issued nor proceedings commenced. *Elaston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361. 'Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress.' *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589. See to the same effect, *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256. [*Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223.] '... It is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, that can be avoided for duress.' *McCormick Harvesting Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061. See to the same effect *Alexander v. Pierce*, 10 N. H. 494; *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169." See also *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290; *Harrison Township v. Addison*, 176 Ind. 389, 96 N. E. 146; *Giddings v. Iowa Sav. Bank*, 104 Ia. 676, 679, 74 N. W. 21; *Guinn v. Sumpster Valley Ry. Co.*, 63 Oreg. 368, 127 Pac. 987.

§ 1613. Arguments that threats of criminal prosecution may not be duress are unsound.

Neither of the ideas stated in the preceding section will bear examination. The first—that imprisonment is not sufficiently imminent is based on early common-law definitions of duress which are generally obsolete. It may be classed with the idea that a battery cannot amount to duress unless it is so severe as to threaten life or mayhem. Everyone knows that threat of a well-founded prosecution, which is likely to end in imprisonment, is often quite sufficient to put even a brave man in fear. Moreover, the argument goes too far, for if sound, threats of prosecution without cause could likewise not be duress; and certainly most courts would agree that threats of an ill-founded prosecution may be duress.⁴⁷ The second argument that a well-founded prosecution is “lawful” has already been examined.⁴⁸ If the argument is unsound where there is actual imprisonment it is equally unsound where it is only threatened.

§ 1614. Illustrations showing that threats of criminal prosecution may be duress.

The unsoundness of the arguments denying that threats of well-founded prosecution can be duress—at least unless a warrant has issued and immediate arrest is probable, will be evident from considering some cases not dissimilar in principle but differing slightly in fact from those which usually arise. In the ordinary case one who has been criminally defrauded forces by threats a settlement with his debtor by which a payment or transfer of property is made not exceeding in value the amount which the creditor could recover in a civil action. But let it be supposed that the creditor forced a conveyance from his debtor of property worth several times the claim. If the threats do not amount to an unlawful coercion, the terms of the contract and the adequacy of consideration are for the parties to consider. They are of no concern to the court.⁴⁹ Again, suppose

⁴⁷ *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182; *Rollins v. Lashus*, 74 Me. 218; *Flanigan v. Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Ball v. Ball*, 79 N. J. Eq. 170, 81 Atl. 724, 37 L. R. A. (N. S.) 539;

Coon v. Metaler, 161 Wis. 328, 154 N. W. 377, L. R. A. 1916 B. 667. See also cases *supra*, § 1612, n. 46.

⁴⁸ *Supra*, § 1611.

⁴⁹ But such a conveyance was set aside in *Clement v. Buckley Mercan-*

the threat of prosecution is made by some one who was not injured by the crime and who makes use of his discovery of it to force an agreement or conveyance from the criminal. Any member of the public has a right to prosecute for crime one whom he knows to be guilty. The prosecution is therefore lawful. Yet to threaten to use this right for the purpose of coercing the criminal to make a payment or to enter into a contract may be in itself a criminal offence, and certainly must be regarded as duress.⁵⁰ Finally, there are many cases where it is held that threats of a well-founded prosecution of a husband, son, or other relative of the person threatened, may amount to duress.⁵¹ It can hardly be duress to threaten the prosecution

tile Co., 172 Mich. 243, 137 N. W. 657, though Michigan has been one of the States denying that mere threats of a well-founded prosecution could amount to duress. See *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589, and cases therein cited.

⁵⁰ *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803. In *Coveney v. Pattullo*, 130 Mich. 275, 89 N. W. 968, an attorney whose client was imprisoned at a distance from home, exacted a mortgage to secure an unreasonable fee. The transaction was set aside.

⁵¹ *Williams v. Bayley*, L. R. 1 H. L. 200; *McClatchie v. Haslam*, 63 L. T. 376; *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Merchant v. Cook*, 21 D. C. 145; *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182; *Denney v. Reber*, 63 Ind. App. 192, 114 N. E. 424; *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. 165; *Giddings v. Iowa Sav. Bank*, 104 Ia. 676, 74 N. W. 21; *Williamson-Halsell, etc., Co. v. Ackerman*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; *Fears v. United Loan & Deposit Bank*, 172 Ky. 255, 189 S. W. 226; *Bryant v. Peek, etc., Co.*, 154 Mass. 460, 28 N. E. 678; *Webb v. Lothrop*,

224 Mass. 103, 112 N. E. 934; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193; *Lewis v. Doyle*, 182 Mich. 141, 148 N. W. 407; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Hargreaves v. Menken*, 45 Neb. 668, 63 N. W. 951; *Nebraska Mut. Bond Assoc. v. Klee*, 70 Neb. 383, 97 N. W. 476; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410; *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 32; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741; *Adams v. Irving Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; *Kohler v. Savage*, 86 Oreg. 639, 167 Pac. 789; *Keckley v. Union Bank*, 79 Va. 458; *McCormick, etc., Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727; *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848. But see *Sulzner v. Cappeau-Lemley, etc., Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421. In some of the decisions in this note the transaction in question was held under the facts of the case not to have been made under duress, but they all, except the Pennsylvania decision cited at the end, indicate that if the will of the person threatened was in fact coerced, the threats would amount to duress.

of a third person and not be duress to threaten the prosecution of the person himself who is threatened.

§ 1615. Reason why many courts have refused to avoid transactions made under threats of prosecution.

The truth seems to be that in the cases where a settlement coerced by means of threatened prosecution has been held not to amount to duress, no more than a fair settlement was obtained. One who had misappropriated money or property, and who was therefore under a civil as well as criminal liability, made restitution. Under such circumstances even though there was unquestionable duress, the debtor if compelled to pay the exact amount of a liquidated debt, cannot be allowed to recover the payment because in making the payment he has done no more than he was legally bound to do. The situation is legally different where the debtor is compelled to transfer property in satisfaction of his civil liability, or to pay a fixed sum to satisfy a claim of uncertain amount, from what it is where the payment exacted is the exact amount of a liquidated debt, since in the former case the parties are attempting an accord and satisfaction, not exactly fulfilling an existing obligation. But where the settlement is fair, this distinction is easily lost sight of. Moreover, the line of division between threats of prosecution by the creditor and the compelling force of circumstances, the effect of which the debtor knows, though no threats are made, is often hard to draw. Not only may the debtor properly make and the creditor receive satisfaction of the civil liability, but the debtor, if acting under no other compulsion than that exercised by the force of circumstances, may make such satisfaction as he can in the hope that his criminal default will be dealt with leniently.⁵² It is probably under the influence of such considerations that so many courts⁵³ have refused to avoid settlements made under threat of prosecution.

⁵² *Rolosen v. DeHart*, 134 Mo. App. 633, 114 S. W. 1122; *Roth v. Holmes* (Tenn.), 52 S. W. 699. In *Felton v. Gregory*, 130 Mass. 176, 178, the court said of such a situation: "If this can be held to be duress, then every thief who makes restitution of the stolen prop-

erty, for the purpose of mitigating his sentence, would be entitled to recover it back on the ground of duress." But see also *Goodrum v. Merchants', etc., Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914 A. 511.

⁵³ See *supra*, § 1612.

Whether these decisions are right or wrong, the first step towards a satisfactory understanding of the subject is to recognize that if they are right, it is because it is inequitable to deprive a creditor of the benefit of a fair settlement of a genuine claim even if it was made under coercion.⁵⁴

§ 1616. Even a reasonable settlement obtained by threats of prosecution should be voidable.

In spite of the arguments advanced in the preceding section, it seems better to hold that where anything other than a satisfaction of the precise civil obligation under which a criminal rested is obtained by coercion through threats of prosecution by the creditor the transaction should be avoided without reference to its reasonableness, and excellent authority supports this view.⁵⁵ There can be no question that there is duress

⁵⁴ This has been recognized in some recent cases. In *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 939, 45 L. R. A. (N. S.) 1182, the court said: "Duress is not available as a defence against a note or other instrument executed by one who is, in fact, guilty of misappropriating the money of another, although the execution of the instrument is obtained by threatened prosecution, if the instrument is executed in payment of a debt honestly due. In such case the law regards the existence of a debt, and not the threatened prosecution, as the consideration. The authorities support the proposition that, where a deed or mortgage is executed to secure an amount of money actually due as the result of transactions having a criminal aspect, equity will not set aside such conveyances even though their execution was procured by threats of criminal prosecution."

In *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069, 1073, it was said: "Now it would seem entirely just—and, if just, it ought to be the law—that, if Wilbur had stolen property from Blanchard and afterward paid Blanchard the reasonable value of the

goods taken, he ought not to be able to recover that sum back, even though the payment were made under threats of arrest or duress as defined by the foregoing authorities. On the other hand, although Wilbur had converted and appropriated Blanchard's property and was guilty of a crime and legally liable to pay for the property taken, Blanchard had no right to use that as a means of extorting from Wilbur a sum in excess of the value of the goods taken."

In *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589, . . . a party had been charged with embezzlement and had given his notes for \$2,700 in settlement thereof. He subsequently defended against the collection of the notes, on the ground that they were given under duress. The court held that "he was liable upon them to the extent of moneys appropriated by him, if any were so appropriated; and it was the province of the jury to determine the amount. If he had appropriated none of the plaintiff's money, of course the note was without consideration, and void."

⁵⁵ *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207;

within the modern meaning of the word, and the opportunities for abuse are too considerable if the creditor is allowed to use such means to enforce a settlement, to make it wise to graft an exception on the general rule that transactions made under duress are voidable.

§ 1617. Duress of property.

Under the early common-law rule fear of pecuniary or property loss could not amount to duress,⁵⁶ but under the enlarged doctrine to which modern courts have tended, it is held that duress of property will justify a rescission of a transaction since it may and frequently does operate as a coercion of the will.⁵⁷ In this respect an artificial distinction was for some time enforced at least by the English courts. It was held that an executory contract induced by wrongful seizure of property or threats regarding it could not be avoided,⁵⁸ but that if money was actually paid to prevent seizure of property or to release it when it had been seized, or detained in an improper manner or under an unfounded claim, the payment might be recovered. Such a right of recovery undoubtedly exists in both England and America, whatever may be the present status of the rule

Wilbur v. Blanchard, 22 Idaho, 517, 126 Pac. 1069; *Kiventsky v. Sirovy*, 142 Ia. 385, 121 N. W. 27; *Callendar Sav. Bank v. Loos*, 142 Ia. 1, 120 N. W. 317; *Thompson v. Niggley*, 53 Kans. 664, 35 Pac. 290, 26 L. R. A. 803; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525, 27 N. E. 1010; *Bryant v. Peck, etc., Co.*, 154 Mass. 460, 28 N. E. 678; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Springfield Fire, etc., Co. v. Hull*, 51 Oh. St. 270, 37 N. E. 116, 25 L. R. A. 37, 46 Am. St. Rep. 571; *Pieckenbrock v. Smith*, 43 Okl. 585, 143 Pac. 675; *Morrison v. Faulkner*, 80 Tex. 128, 15 S. W. 797; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. Even though a threatened criminal proceeding may be thought to involve only a fine, it may, nevertheless, amount to duress. *Enid, etc., Gas*

Co. v. Decker, 36 Okl. 367, 128 Pac. 708.

⁵⁶ *Sumner v. Ferryman*, 11 Mod. 201.

⁵⁷ *United States v. Huckabee*, 16 Wall. 414, 432, 21 L. Ed. 457; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581; *Nelson v. Nelson*, 99 Neb. 456, 156 N. W. 1036; *Foshay v. Ferguson*, 5 Hill, 154; *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722; *Collins v. Westbury*, 2 Bay (S. C.), 211, 1 Am. Dec. 643; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913 A. 1350; and see cases *passim* in this and the following section.

⁵⁸ *Skeate v. Beale*, 11 Ad. & El. 983; *Atlee v. Backhouse*, 3 M. & W. 633.

as to executory contracts.⁵⁹ There is obviously no merit in a distinction between executory and executed transactions, and at the present day it is probable that an executory contract would be voidable which was secured by such threats regarding property as would render an actual payment recoverable.⁶⁰

§ 1618. Illustrations of duress of property.

Analogous to cases of the detention of goods are cases where the assertion of a lien upon real property has been used as a means of coercion, though no lien existed or if it existed should have been discharged.⁶¹ So where a void tax has been paid to prevent seizure or levy on property,⁶² or a payment made in

⁵⁹ *Astley v. Reynolds*, 2 Strange, 915; *Irving v. Wilson*, 4 Term Rep. 485; *Shaw v. Woodcock*, 7 B. & C. 73; *Ashmole v. Wainwright*, 2 Q. B. 837; *Oates v. Hudson*, 6 Exch. 346; *Green v. Duckett*, 11 Q. B. D. 275; *Maskell v. Horner*, [1914] 3 K. B. 106; *Loneragan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *Du Vall v. Norris*, 119 Ga. 947, 47 S. E. 212; *Fenwick Shipping Co. v. Clarke Bros.*, 133 Ga. 43, 65 S. E. 140; *Pemberton v. Williams*, 87 Ill. 15; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312; *Chase v. Dwinal*, 7 Greenl. (Me.) 134, 20 Am. Dec. 352; *Whitlock Machine Co. v. Holway*, 92 Me. 414, 42 Atl. 799; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *McCabe v. Shaver*, 69 Mich. 25, 36 N. W. 800; *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940; *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376; *Quinnett v. Washington*, 10 Mo. 53; *Weber v. Kirkendall*, 39 Neb. 193, 57 N. W. 1026; *Baldwin v. Liverpool, etc., S. Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Doyle v. Rector, etc., Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Cowley v. Fabien*, 204 N. Y. 566, 97 N. E. 458; *Clancy v. Dutton*, 129 N. Y. App. Div. 23, 113 N. Y. S. 124; *Motz*

v. Mitchell, 91 Pa. St. 114; *Lowenstein v. Bache*, 41 Pa. Super. 552; *Alston v. Durant*, 2 Strob. L. (S. C.) 257, 49 Am. Dec. 596; *Buford v. Loneragan*, 6 Utah, 301, 22 Pac. 164; *Marsh v. Port Hope Harbour Co.*, 6 U. C. Q. B. (O. S.) 100.

⁶⁰ See *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; and also cases cited *supra*, note 57; *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457; *Wilkerson v. Hood*, 65 Mo. App. 491; *Van Dyke v. Wood*, 60 N. Y. App. Div. 208, 70 N. Y. S. 328; *Sasportas v. Jennings*, 1 Bay (S. Car.), 470.

⁶¹ *Fraser v. Pendlebury*, 31 L. J. C. P. 1; *Rowland v. Watson*, 4 Cal. App. 476, 88 Pac. 495; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581; *Fout v. Giraldin*, 64 Mo. App. 165; *Wells v. Adams*, 88 Mo. App. 215; *First Nat. Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722. But see *Savannah Savings Bank v. Logan*, 99 Ga. 291, 25 S. E. 692.

⁶² *Maskell v. Horner*, [1914] 3 K. B. 106; *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150; *Bailey v. Goshen*, 32 Conn. 546, 87 Am. Dec. 191; *Hennel v.*

order to compel a public officer to perform his duty,⁶³ the payment may be recovered. Illegal charges paid to public service companies in order to induce them to perform their duty

Vanderburgh County, 132 Ind. 32, 31 N. E. 462; *Greenabaum v. King*, 4 Kans. 332, 96 Am. Dec. 172; *Whitney v. Port Huron*, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; *Minor Lumber Co. v. Alpena*, 97 Mich. 499, 56 N. W. 926; *American Baptist Missionary Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078, 72 Minn. 484, 75 N. W. 713, 77 N. W. 36; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593; *Dale v. New York*, 71 N. Y. App. Div. 227, 611, 75 N. Y. S. 576, 1123; *People v. Purdy*, 143 N. Y. App. Div. 277, 128 N. Y. S. 119; *Stephan v. Daniels*, 27 Ohio St. 527; *Whittaker v. Deadwood*, 12 S. Dak. 608, 82 N. W. 202; *Stowe v. Stowe*, 70 Vt. 609, 41 Atl. 1024; *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904. This matter is covered by statute in many States. Though not paid strictly under duress, a tax may be recoverable in case of mistake of some extrinsic fact rendering the tax void.

In *Betz v. New York*, 119 N. Y. App. Div. 91, 92, 103 N. Y. S. 886, the court said: "The rule stated in numerous decisions, that payment without coercion of a tax or assessment (1) which is void on its face, but not known by the payor to be void, or (2) of a tax or assessment which is void, but not void on its face, with knowledge by the payor of facts *dehors* which make it void, is not recoverable back, has no application to the present case. Such payments are technically called voluntary payments. The payment in this case does not come under that head at all. It was voluntary in the large sense, but is not within the legal definition of what are termed voluntary payments. In the case of payment without coercion of a tax or assessment void on its face as matter of law, the

conclusive legal presumption that every one knows the law, regardless of whether that be the truth as matter of fact or not in the particular case, makes the payment a voluntary one, i. e., a payment made with knowledge that the tax or assessment is void. In the case of like payment of a tax or assessment not void on its face, knowledge at the time by the payor of facts *dehors* which make it void, also makes the payment a voluntary one, i. e., a payment made with knowledge that the tax or assessment is void. In each case the knowledge that the tax or assessment is void is the basis on which the payment is declared to be a voluntary one. But where the facts *dehors* which made it void are not known to the payor, such basis does not exist. There the payment is not voluntary, for it can be such only when made with knowledge, either presumed or actual, that the levy is void. Instead of being made in the present case with knowledge of the fact that the tax was void, it was made and received under a mutual mistake of a fact on which the validity of the tax depended, and money so paid is always recoverable back. *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436; *Thompson v. Otis*, 42 Barb. 461; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 25 N. E. 408; *Davis v. Kling*, 77 Hun, 598, 28 N. Y. S. 1026."

⁶³ *Lovell v. Simpson*, 3 Esp. 153; *Dew v. Parsons*, 2 Barn. & Ald. 562; *Morgan v. Palmer*, 2 B. & C. 729; *Hills v. Street*, 5 Bing. 37; *Steele v. Williams*, 8 Exch. 625; *Ogden v. Maxwell*, 3 Blatch. (U. S.) 319; *Cook County v. Fairbank*, 222 Ill. 578, 78

as such, are also regarded as made under such compulsion as to justify recovery;⁶⁴ and an executory contract induced by the same means is likewise voidable.⁶⁵

N. E. 895; *Ford v. Holden*, 39 N. H. 143; *Clinton v. Strong*, 9 Johns. 370; *Robinson v. Ezzell*, 72 N. C. 231; *American Steamship Co. v. Young*, 89 Pa. St. 186, 33 Am. St. Rep. 748, aff'd 105 U. S. 41, 26 L. Ed. 966; *Alston v. Durant*, 2 Strob. L. (S. C.) 257, 49 Am. Dec. 596; *Hays v. Stewart*, 8 Tex. 358; *Hooker v. Gurnett*, 16 Up. Can. Q. B. 180. And see *Laterrade v. Kaiser*, 15 La. Ann. 296 (fees for stalls in a market); *Marcotte v. Allen*, 91 Me. 74, 39 Atl. 346, 40 L. R. A. 185 (fraud rather than duress); *Niedermeyer v. Curators Univ. of Missouri*, 61 Mo. App. 654 (excessive fees obtained by University from student); *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, 55 Am. St. Rep. 878 (recovery from county of excessive fees obtained by sheriff). Cf. *Sheibley v. Cooper*, 79 Neb. 232, 112 N. W. 363; *Taylor v. Hall*, 71 Tex. 213, 9 S. W. 141; *Camden v. Green*, 54 N. J. L. 591, 593, 25 Atl. 357, 33 Am. St. Rep. 686.

In the decision last cited the court said: "The case, then, could have been only this: the city board, claiming the legal fee to be \$500 although the county board had ordered that the fee be reduced to \$300 and being willing to issue a license to the plaintiff on payment of what it considered the legal fee, the plaintiff, with full knowledge of the facts, paid \$500, and received the license. In such a transaction there is nothing to take the case out of the general principle, that where a party,

without mistake of fact, or fraud, duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back. *Flower v. Lance*, 59 N. Y. 603; *Schwarzenbach v. Odorless Excavating Co.*, 65 Md. 34, 3 Atl. 676, 57 Am. Rep. 301; *Sowles v. Soule*, 59 Vt. 131. A refusal to issue the license without payment of more than the legal fee would not constitute duress. *Sooy ads. State*, 9 Vroom, 324; *Wright v. Remington*, 12 Vroom, 48, 32 Am. Rep. 180, S. C. 14 Id. 451. Nor would it constitute extortion; for a license was not demandable by the plaintiff as a right, and the city board, under its authority, conferred by the Act of 1884, to license, regulate or prohibit, could lawfully have refused to issue a license upon any terms. Although the language of the Act of 1891 would empower the county board under certain circumstances, to reduce the license fee fixed by the city board, yet it did not attempt to impose upon the latter board the duty of issuing a license at the reduced rate, but merely entitled the applicant, on refusal of a license from the city board, to apply therefor to the county board. Consequently, by refusing to license the plaintiff unless he paid the city \$500, which the city board deemed the lawful fee or tax, that board was not withholding from him anything which it was its duty to concede."

⁶⁴ *Ashmole v. Wainwright*, 2 Q. B. 837; *Parker v. Great Western R.*, 7

⁶⁵ *St. Louis, etc., Ry. Co. v. Gorham*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637. Cf. *Kansas City &c. Ry. Co. v. Graham* (Tex. Civ. App.), 145 S. W. 632, where a release extending the carrier's time for unloading, in-

duced by the carrier's threats, was held valid, though the court admitted that threats of a more serious breach of duty by the carrier might have amounted to duress.

An unlawful refusal by a mortgagee to release the mortgage unless he is paid a bonus ⁶⁶ or a demand of an excessive payment in order to prevent foreclosure,⁶⁷ may also amount to duress. On similar principles a threatened injury to business or to means of livelihood which goes beyond the means legally allowed a creditor for the enforcement of his claim, may constitute such duress as to give a right of rescission.⁶⁸

§ 1619. Coercion by judgment.

Where a plaintiff has recovered judgment and execution has been issued, or may be immediately issued, a payment or settlement made by the defendant in satisfaction of the judgment is obviously coerced, but as the coercion is legal and the judgment establishes conclusively the plaintiff's right, the payment or settlement cannot be avoided, though it afterwards appears

M. & G. 253; *Great Western R. v. Sutton*, L. R. 4 H. L. 226; *Lancashire &c. R. v. Gidlow*, L. R. 7 H. L. 517, 527; *Mobile, etc., Ry. Co. v. Steiner*, 61 Ala. 559; *Chicago, etc., R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312; *Indiana, etc., Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868; *Chamberlain v. Reed*, 13 Me. 357, 29 Am. Dec. 506; *Fargusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Panton v. Duluth Gas, etc., Co.*, 50 Minn. 175, 52 N. W. 527, 36 Am. St. Rep. 635; *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. St. Rep. 4; *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; *Baldwin v. Liverpool & G. W. S. Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Monongahela Nav. Co. v. Wood*, 194 Pa. 47, 45 Atl. 73; *Beckwith v. Frisbie*, 32 Vt. 559; *Guetskow v. Breeze*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83. The Interstate Commerce Act has not barred the shipper's right to recover from a carrier an illegal charge on an interstate shipment; *Pine Tree Lumber Co. v. Chicago, etc., R. Co.*, 123 La. 583, 49 So. 202, unless the decision

that the charge is illegal involves a determination of matters within the exclusive control of the Interstate Commerce Commission. *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 124, 61 L. Ed. 188, 37 Sup. Ct. Rep. 46.

⁶⁶ *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722.

⁶⁷ *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581. See also *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. 138; *First Nat. Bank v. Sergeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296.

⁶⁸ See *Snyder v. Rosenbaum*, 215 U. S. 261, 30 S. Ct. 73, 54 L. Ed. 186, 30 Sup. Ct. 73; *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205; *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; *Fuerst v. Musical, etc., Union*, 95 N. Y. S. 155; *Guetskow Bros. Co. v. Breeze*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83. Cf. *Matthews v. William Frank Brewing Co.*, 26 N. Y. Misc. 46, 55 N. Y. S. 241.

that the plaintiff's claim was unfounded.⁶⁹ What has been said does not, however, apply to a judgment which is totally void, and a transaction coerced by such a judgment is voidable;⁷⁰ but money voluntarily paid even on a void judgment cannot be recovered.⁷¹ Where a valid judgment is reversed by an appellate court after payment has been made, it seems that if the appellate proceedings had not operated as a supersedeas, so that the creditor unless paid could levy on the debtor's property, a payment or settlement might be so far coerced as to be recoverable after the reversal of the judgment.⁷²

§ 1620. Effect of adequate legal remedy.

Analogous to the idea that threats must be such as to terrify a man of ordinary firmness is the principle not infrequently stated that if the law provides adequate redress or compensation for the injury threatened, the threat will not amount to duress. Indeed the only reason which could be given for the

⁶⁹ *Marriot v. Hampton*, 7 T. R. 269; *De Medina v. Grove*, 10 Q. B. 152; *Turlington v. Slaughter*, 54 Ala. 195; *Hagar v. Springer*, 60 Me. 436; *Fuller v. Shattuck*, 13 Gray, 70, 74 Am. Dec. 622; *People's Savings Bank v. Heath*, 175 Mass. 131, 55 N. E. 807, 78 Am. St. Rep. 481; *Greenbaum v. Elliott*, 60 Mo. 25; *Deseret National Bank v. Nuckolls*, 30 Neb. 754, 47 N. W. 202; *Finklestone v. Lankske*, 63 N. Y. Misc. 330, 117 N. Y. S. 183; *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357; *Ogle v. Baker*, 137 Pa. St. 378, 20 Atl. 998, 21 Am. St. Rep. 886. Cf. *Moses v. Macferlan*, 2 Burr. 1005; *Walker v. Ames*, 2 Cow. 428.

⁷⁰ *Farrow v. Mayes*, 18 Q. B. 516; *Hollingsworth v. Stone*, 90 Ind. 244; *Trimmer v. Rochester*, 130 N. Y. 401, 405, 29 N. E. 746.

⁷¹ *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Hollingsworth v. Stone*, 90 Ind. 244.

⁷² *Florence, etc., Co. v. Louisville Banking Co.*, 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50; *Reynolds v.*

Hosmer, 45 Cal. 616; *Chicago, etc., R. Co. v. Adams*, 26 Ind. App. 443, 59 N. E. 1087; *Hipp v. Crenshaw*, 64 Iowa, 404, 20 N. W. 492; *Stevens v. Fitch*, 11 Metc. (Mass.) 248; *Carson's Adm. v. Suggett's Adm.*, 34 Mo. 364, 86 Am. Dec. 112; *Campbell v. Kauffman Milling Co.*, 127 Mo. App. 287, 105 N. W. 286; *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320, 83 N. W. 77; *Clark v. Pinney*, 6 Cow. 298; *Scholey v. Halsey*, 72 N. Y. 578; *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588; *Bickett v. Garner*, 31 Oh. St. 28; *Metschan v. Grant County*, 36 Or. 117, 58 Pac. 80; *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683. In the following cases payment of a judgment, afterwards reversed, was held under the particular facts, to have been voluntary. *Winston v. Nunez*, 25 La. Ann. 476; *Ritchie v. Carter*, 89 Mo. App. 290; *Gould v. McFall*, 118 Pa. 455, 12 Atl. 336, 4 Am. St. Rep. 606.

latter rule is that such a threat should not terrify a person of resolution.⁷³ But though such statements are still repeated, the rule is artificial and, so far as it would require a person threatened with injury necessarily to endure the injury because the law provides a remedy for it, cannot be accepted. The inquiry must always be pertinent whether under all the circumstances of each case the remedy is adequate, and the mere fact that it cannot be made effective immediately will often make it inadequate.⁷⁴ It is true, refusal to pay a debt or to perform

⁷³ In *Joannin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581, the court said: "The fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand will not render its payment compulsory, at least in the absence of fraud on part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Cush. 125; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. 297. Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the State. To this class belong the following cases cited by plaintiffs: *Cook v. Boston*, 9 Allen, 393;

Emery v. Lowell, 127 Mass. 138; *Mays v. Cincinnati*, 1 Ohio St. 268; *Custin v. City of Viroqua*, 67 Wis. 314, 30 N. W. 515."

⁷⁴ *United States v. Huckabee*, 16 Wall. 414, 432, 21 L. Ed. 457. "Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats it is said are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance. *Foshay v. Ferguson*, 5 Hill, 154, 158; *Central Bank v. Copeland*, 18 Md. 305, 317, 81 Am. Dec. 597; *Eadie v. Slimmon*, 26 N. Y. 9, 12, 82 Am. Dec. 395, 1 Story, *Equity Jurisprudence* (9th ed.), 239. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances, is as utterly without the voluntary consent of the party menaced, as if he were induced to sign it by actual violence; nor is the reason

a contract has been held not to amount to duress,⁷⁵ and the reason given is often that the law provides adequate redress for the injury; but it is evident that such a threat will seldom effect so complete a coercion of the will as to justify a finding of duress. The refusal to perform a mere contract obligation is not likely to be as effective in this respect as a refusal to recognize the rights of another in specific property. But it is inconsistent with the modern theory of duress to assert as an infallible rule that threatened repudiation of contractual obligation cannot amount to duress; and the refusal of a bank to allow a depositor to draw on his account until he had executed a contract, has been held to make the contract voidable.⁷⁶ The case may be distinguished where the law will not simply give compensation for a threatened injury, but will prevent it. Thus where a buyer in possession of land under a contract of purchase pays more than he was bound to in order to get a conveyance, which the grantor refused otherwise to give him, he was denied recovery of the excessive payment.⁷⁷ But sometimes even in such cases "although there be a legal remedy a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice."⁷⁸ Generally the inadequacy will be due to the delay involved in invoking the law.⁷⁹ A refusal by a lessor to join at

assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury."

⁷⁵ *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987; *Domenico v. Alaska Packers' Assoc.*, 112 Fed. 554 (rev'd on another point 117 Fed. 99, 54 C. C. A. 485); *Burnes v. Burnes*, 132 Fed. 485, 493; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Rosenfeld v. Boston Mutual L. Ins. Co.*, 222 Mass. 284, 110 N. E. 304; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *Cable v. Foley*, 45 Minn. 421, 47 N. W. 1135; *Joannin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W.

217, 16 L. R. A. 376, 32 Am. St. Rep. 581; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6; *Boas v. Hutchinson*, 182 N. Y. App. D. 88, 169 N. Y. S. 513; *Miller v. Miller*, 68 Pa. 486.

⁷⁶ *Adams v. Schiffer*, 11 Col. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

⁷⁷ *Smithwick v. Whitley*, 152 N. C. 366, 67 S. E. 913, 28 L. R. A. (N. S.) 113.

⁷⁸ *DeGraff v. Ramsey Co.*, 46 Minn. 319, 48 N. W. 1135; quoted in *Joannin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581.

⁷⁹ "Plaintiff might have such an immediate want of his goods that an action of trover would not do his business." *Astley v. Reynolds*, 2 Strange, 915.

the request of the lessee in proving a fire loss to enable insurance to be recovered, unless money was paid to which the lessor was not entitled, when a delay would have involved the lessor's ruin, was held such coercion as to justify recovery of what the lessor wrongly exacted.⁸⁰ So where a vessel was refused clearance until a contract was signed by the master;⁸¹ and in other cases where pecuniary loss was threatened by wrongful acts for which the law provided no means of prevention,⁸² the coerced transaction has been held voidable.

§ 1621. Duress by threats to injure a third person.

The early common law did not regard as duress the mental pressure exerted by imprisonment or threats to injure another. It was said that a servant could not avoid a deed made because his master was subjected to duress nor could the master avoid his deed because of imprisonment or threats directed against the servant;⁸³ but an exception was made where duress was exercised against the husband or wife or child of the person whose action was coerced.⁸⁴ This exception has readily been extended in modern times to include all near relatives.⁸⁵ It is

⁸⁰ *Guetzkow Bros. Co. v. Breese*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83.

⁸¹ *McPherson v. Cox*, 86 N. Y. 472.

⁸² *United States v. Ellsworth*, 101 U. S. 170, 25 L. Ed. 862 (*cf.* *United States v. Edmondston*, 181 U. S. 500, 45 L. Ed. 971, 21 Sup. Ct. 718); *Swift v. United States*, 111 U. S. 22, 28 L. Ed. 341, 4 Sup. Ct. 244; *Snyder v. Rosenbaum*, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186; *Chicago v. Waukesha, etc., Brewing Co.*, 97 Ill. App. 583; *News Publishing Co. v. Associated Press*, 114 Ill. App. 241; *Foote v. De Poy*, 126 Iowa, 366, 102 N. W. 112, 114, 68 L. R. A. 302, 106 Am. St. Rep. 365; *Searle v. Gregg*, 67 Kans. 1, 72 Pac. 544; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *McMurtrie v. Keenan*, 109 Mass. 185; *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548; *Tandy v. Elmore-Cooper, etc., Co.*,

113 Mo. App. 409, 87 S. W. 614; *Van Dyke v. Wood*, 60 N. Y. App. D. 208, 212, 70 N. Y. S. 324; *Ratterman v. American Exp. Co.*, 49 Ohio St. 608, 32 N. E. 754; *Lehigh, etc., Co. v. Brown*, 100 Pa. St. 338. *Cf.* cases cited *supra*, n. 74.

⁸³ *Rolle Abr.* 687.

⁸⁴ *Ibid.*

⁸⁵ *Williams v. Bayley*, L. R. 1 H. L. 200; *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Holt v. Agnew*, 67 Ala. 360; *Sharon v. Gager*, 46 Conn. 189; *O'Toole v. Lamson*, 41 App. D. C. 276; *Burton v. McMillan*, 52 Fla. 469, 42 So. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. Rep. 220; *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; *Green v. Moss*, 65 Ill. App. 594; *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182; *Denney v. Reber*, 63 Ind. App. 192, 114 N. E. 424; *Henry v. Laurens State Bank*, 131

obvious that under the modern definition of duress,⁵⁶ there can be no question of the nearness of relationship; the question becomes merely one of whether the party induced to act was coerced by wrongful pressure, and the threat to kill or seriously assault a companion who is in no way related to the actor may evidently operate as such coercion.

§ 1622. When duress makes a contract void.

Duress, like fraud and mistake, may completely prevent the mutual assent necessary for the formation of a contract or sale, or it may be merely a ground for setting aside a bargain because the expression of mutual assent thereto was improperly obtained. If a man by force compels another to go through certain indications of assent, as by taking his hand and forcibly guiding it, there is no real expression of mutual assent for the act is not that of him whose hand was guided. He is a mere automaton. But in the ordinary case where duress is exercised, as generally when fraud is exercised, there is an actual expression of assent, though in view of the way in which the assent was obtained it is inequitable to permit the enforcement of the bargain.⁵⁷

§ 1623. Generally duress makes a contract voidable.

Save in exceptional cases referred to in the previous section, duress renders the transaction voidable. It is not necessarily

Iowa, 97, 107 N. W. 1034; *Williamson-Halsell, etc., Co. v. Ackerman*, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; *Fears v. United Loan, etc., Bank*, 172 Ky. 255, 189 S. W. 226; *Bryant v. Peck, etc., Co.*, 154 Mass. 460, 28 N. E. 678; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Davis v. Luster*, 64 Mo. 43; *Nebraska Mut. Bond. Assoc. v. Klee*, 70 Neb. 383, 97 N. W. 476; *Davis v. Smith*, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Ball v. Ball*, 79 N. J. Eq. 170, 81 Atl. 724, 37 L. R. A. (N. S.) 539; *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 320,

Ann. Cas. 1917 C. 1031; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; *Anderson v. Kelley*, 57 Okl. 109, 156 Pac. 1167; *Guinn v. Sumpter Valley R. Co.*, 63 Or. 368, 127 Pac. 987; *Horn v. Davis*, 70 Or. 498, 142 Pac. 544; *Oxford Nat. Bank v. Kirk*, 90 Pa. 49; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623.

⁵⁶ See *supra*, § 1603.

⁵⁷ See *Royal v. Goss*, 154 Ala. 117, 121, 45 So. 231; *Fairbanks v. Snow*, 145 Mass. 153, 154, 13 N. E. 596, 1 Am. St. Rep. 446; and *infra*, § 1624.

a tort in itself, as is fraudulent misrepresentation,^{87a} but operates only as authorizing the rescission by the party coerced of a transaction whether executory or executed.⁸⁸

The right of the injured party thus to rescind is a defeasible one which may be lost not only by affirmative acts in ratification of the transaction, but, at least where any advantage has been obtained from the transaction by the injured party, by his failure promptly to surrender the advantage and manifest an election to avoid the transaction. This is true not only in cases of what may be called common-law duress,⁸⁹ but is also the rule in regard to contracts voidable for undue influence.⁹⁰ No acts can constitute a ratification, however, which were done while the fear or undue influence which operated to induce the original transaction is still effective.⁹¹

^{87a} See Woodward, Quasi Contracts, § 211.

⁸⁸ It is not voidable by the other party. *Peirce v. McIntire*, 2 Dane's Abr. 224; *Lewis v. Bannister*, 16 Gray, 500; *Mallard v. Day* (Tex. Civ. App.), 204 S. W. 245.

⁸⁹ This is stated in Bracton, 17, Twiss's translation, 135, where it is said that when a person detained by an enemy has recovered his liberty, he may ratify or invalidate things done by him while in prison: "So that, if afterwards he has approved things so done by him, either by not immediately revoking the gift, or by receiving homage or service, it is valid," and such is the modern law. *Carver v. United States* 111 U. S. 609, 4 Sup. Ct. 561, 28 L. Ed. 450; *Wheeler v. McNeil*, 101 Fed. 685, 41 C. C. A. 604; *Andrews v. Connolly*, 145 Fed. 43; *Royal v. Goss*, 154 Ala. 117, 45 So. 231; *Gillespie v. Simpson* (Ark.), 18 S. W. 1050; *Miller v. Davis Est.*, 52 Colo. 485, 122 Pac. 793; *Craig v. Ginn*, 3 Pennw. 117, 48 Atl. 192, 53 L. R. A. 715, 94 Am. St. Rep. 77; *Ferrari v. Board of Health*, 24 Fla. 390, 50 So. 1; *Eberstein v. Willetts*, 134 Ill. 101, 24 N. E. 967; *Knowlton v. Ross*, 114 Me. 18, 95

Atl. 281; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; *Horn v. Beatty*, 85 Miss. 504, 37 So. 833; *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Myers v. Gray*, 122 N. Y. S. 1079 (N. Y. Misc.); *Guinn v. Sumpter Valley Ry. Co.*, 63 Oreg. 368, 127 Pac. 987; *Dispeau v. First Nat. Bank*, 24 R. I. 508, 53 Atl. 868.

⁹⁰ *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Sanderson v. Adams*, 133 Mich. 359, 94 N. W. 1063; *Keller v. Lamb*, 202 Pa. St. 412, 51 Atl. 982; *Talbott v. Manard*, 106 Tenn. 60, 59 S. W. 340.

⁹¹ *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *St. Louis, etc., R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637; *Quealy v. Waldron*, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803; *Rau v. Von Zedlitz*, 132 Mass. 164; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521.

§ 1624. Duress does not exclude capacity to contract.

It is not infrequently stated as the reason why an instrument obtained under duress may be avoided, that the duress has deprived the person subjected to it of the capacity to consent, and that any writing which he may have signed is not in fact his contract,⁹² though courts making such statements would not be likely to carry them to their logical conclusion. If they did they would hold void every instrument obtained under duress. It could not be ratified and could only have effect in favor of innocent third persons where an estoppel could be proved. It could make no difference whether the means of coercion were rightful or wrongful. The only inquiry would relate to contractual capacity. The truth of the situation, however, is expressed by Holmes, J.:⁹³ "Duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable."⁹⁴

"This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui*." ⁹⁵ It follows that only the party suffering from duress can set it up. Neither the party exercising coercion,⁹⁶ nor third persons⁹⁷ can do so. Fur-

⁹² In *Wilson v. Calhoun*, 170 Iowa, 111, 120, 151 N. W. 1087, it was said: "It is of no consequence that the parties guilty of the duress or undue influence received no benefit therefrom. A trust deed which is obtained by duress or undue influence is void although neither the trustee nor the beneficiaries participated therein. The reason for this is that the instrument is not the deed of the party making it and is avoidable at his election. *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241; *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. 165; *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880,

91 Wis. 166, 64 N. W. 843." See also *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262.

⁹³ *Fairbanks v. Snow*, 145 Mass. 153, 154, 13 N. E. 596, 1 Am. St. Rep. 446. See also *Royal v. Goss*, 154 Ala. 117, 45 So. 231.

⁹⁴ Citing *Foss v. Hildreth*, 10 Allen, 76, 80; *Vinton v. King*, 4 Allen, 562, 565; *Lewis v. Bannister*, 16 Gray, 500; *Fisher v. Shattuck*, 17 Pick. 252; *Worcester v. Eaton*, 13 Mass. 371, 375, 7 Am. Dec. 155; *Whelpdale's Case*, 5 Rep. 119a, 1 Bl. Com. 130.

⁹⁵ Citing Dig. 4, 2, 21, § 5; 1 Windscheid, Pandekten, § 80.

⁹⁶ *Supra*, § 1623, n. 88.

⁹⁷ *Schmidt v. Gaukler*, 156 Mich. 243,

ther if a formal instrument is made under duress in violation of a previous agreement or understanding, the grantor cannot set up rights varying from those set out in the instrument without first having it reformed in an equitable proceeding.⁹⁸

§ 1625. By whom duress must be exercised.

Originally it seems that the common law regarded simply the situation of the party coerced, and held a transaction made under duress voidable, though the duress was not exercised by the grantee or covenantee and he was not cognizant of it.⁹⁹ But at the present time duress is treated like other equitable defences and cannot be made the basis of attack or defence against one who has acquired legal title to money or tangible property or to a chose in action, for value and in good faith, whether he is the original grantee or promisee or is a purchaser from him.¹ The principle is sometimes inadequately expressed by some such statement as "Duress to avoid a contract must be the act of the adverse party himself or his agent, or must be imposed with his knowledge, and taken advantage of by him for the purpose of obtaining the agreement."² If the adverse party has

120 N. W. 746; *Colon v. East One Hundred & Eighty-Ninth St. Bldg., etc., Co.*, 141 N. Y. App. Div. 441, 126 N. Y. S. 226. See also *supra*, § 1218.

⁹⁸ *Commercial Nat. Bank v. Wheelock*, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738.

⁹⁹ "For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself." Sheppard's Touchstone, p. 61.

¹ *Mutual, etc., Life Ass'n v. Cleveland, etc., Mills*, 82 Fed. 508, 27 C. C. A. 212; *Rogers v. Adams*, 66 Ala. 600; *Moog v. Strang*, 69 Ala. 98; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Line v. Blizzard*, 70 Ind. 23; *Green v. Scranage*, 19 Iowa, 461, 87 Am. Dec. 447; *Ely v. Hartford Life Ins. Co.*, 33 Ky. L. 272, 110 S. W. 265; *Frasure v. McGuire*, 23 Ky. 1990, 66 S. W. 1015; *Fears v. United L. & D.*

Bank, 172 Ky. 255, 189 S. W. 226; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; *Springfield, etc., Co. v. Donovan*, 147 Mo. 622, 49 S. W. 500; *Mullin v. Leamy*, 80 N. J. L. 484, 79 Atl. 257; *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 320, Ann. Cas. 1917 C. 1031; *Lefebvre v. Dutruit*, 51 Wis. 326, 8 N. W. 149, 37 Am. Rep. 833. But see *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191; *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112.

² *Guinn v. Sumpter Valley Ry. Co.*, 63 Oreg. 368, 127 Pac. 987. See also *Green v. Scranage*, 19 Ia. 461, 87 Am. Dec. 447; *Fears v. United Loan &c. Co.*, 172 Ky. 255, 189 S. W. 226; *Koewing v. West Orange*, 89 N. J. L. 539, 99 Atl. 203; *Travis v. Unkart*, 89

given value, this is doubtless true, and even an executory promise should be sufficient value, but if he is a donee or transferee with notice of the duress, the transaction will be voidable against him, though the duress was not his act.³ Threats communicated through another have the same effect as if made directly to the person coerced.⁴

§ 1626. Protest.

Frequently payments are made under protest as a means of indicating that coercion has been used, and it is always desirable to make protest when it is intended to assert later a claim to recover the payment. But if a payment is otherwise clearly voluntary, protest will not make it involuntary.⁵ Nor if a pay-

N. J. L. 571, 99 Atl. 320, Ann. Cas. 1917 C. 1031.

³ *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21; *Wilson v. Calhoun*, 170 Ia. 111, 151 N. W. 1087; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. 446.

⁴ *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946; *Price v. Poynette Bank*, 144 Wis. 190, 128 N. W. 895.

⁵ *Railroad Co. v. Commrs.*, 98 U. S. 541, 25 L. Ed. 196; *Chesebrough v. United States*, 192 U. S. 253, 259, 24 Sup. Ct. 262, 264, 48 L. Ed. 432; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76; *Conkling v. Springfield*, 132 Ill. 420, 24 N. E. 67; *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Rosenfeld v. Boston Mut. L. Ins. Co.*, 222 Mass. 284, 110 N. E. 304; *Richards v. Security Mut. L. Ins. Co.*, 230 Mass. 320, 119 N. E. 744; *Oakland Cemetery Assoc. v. Ramsey County*, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237, 116 Am. St. Rep. 377; *Robins v. Latham*, 134 Mo. 466, 36 S. W. 33; *Boss v. Hutchinson*, 182 N. Y. App. D. 88, 169 N. Y. S. 513; *Peebles v. Pittsburg*, 101 Pa. St. 304, 47 Am. St. 714.

In *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 320, Ann. Cas. 1917 C. 1031, the court said: "In *Mee v. Montclair*,

84 N. J. L. 400, 86 Atl. 261, a policeman was fined for delinquency and was told by the chief of police to indorse his salary check to the town in payment of the fine. This he did, but, as it did not appear that the fine was an illegal one, or that the chief used any coercion to compel the indorsement, or that the policeman had made a protest, it was held that the payment was voluntary and could not be recovered. It is not to be understood that if the policeman had protested that that would have compelled a different decision in his case. The fact that he did not protest appeared in the evidence and must be considered as having been adverted to in the opinion of the court, as tending, among other facts, to show that there was no compulsion. In 30 Cyc., p. 1310, it is stated that a payment is not rendered involuntary merely because the payer at the time makes a protest against the payment, and that if money is paid under compulsion no protest is necessary to lay the foundation of an action to recover it; but if there be doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question. This is clearly the law."

ment is obviously coerced will recovery be denied because no protest was made.⁶ But protest is valuable as evidence, and in a doubtful case may establish the coercive character of a payment;⁷ and especially where taxes are demanded by one clothed with official authority and having behind him the powers of the law for their collection, a payment made under protest will generally afford a sufficient foundation for a suit to recover a payment improperly demanded;⁸ and this is sometimes so provided by statute.⁹ A protest need not be made in formal terms. It is enough if it is made clear that the payment is involuntary.¹⁰

§ 1627. Relationship giving dominance to one party.

A relationship between parties to a transaction which tends to give one dominance over the other may be an important element in determining whether duress was exercised. And courts of equity have established the principle that when such a relation exists, the burden is thrown upon the dominant party to

⁶ *Meek v. McClure*, 49 Cal. 623; *Jenks v. Lima Township*, 17 Ind. 326; *Howard v. Augusta*, 74 Me. 79; *Boston & Sandwich Glass Co. v. Boston*, 4 Metc. (Mass.) 181; *Cox v. Welcher*, 68 Mich. 263, 36 N. W. 69, 13 Am. St. Rep. 339; *DeGraff v. Ramsey County*, 46 Minn. 319, 48 N. W. 1135.

⁷ See *Yates v. Royal Ins. Co.*, 200 Ill. 202, 65 N. E. 726.

⁸ *Herold v. Kahn*, 159 Fed. 608, 612, 86 C. C. A. 598; *Cambria Steel Co. v. McCoach*, 225 Fed. 278.

⁹ See *Wheatland v. Boston*, 202 Mass. 258, 88 N. E. 769.

¹⁰ In *Maskell v. Horner*, [1915] 3 K. B. 106, the defendant demanded and received from 1900 to 1912 certain market tolls to which, it was held in the latter year, he had no right. In a suit to recover the payments, it was said by the court in answer to the contention that they were voluntary: "It is clear, and was indeed admitted at the Bar, that no express words are necessary and that the circumstances

attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions. I do not think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter. . . ."

"During the long period of years whenever the plaintiff challenged the defendant's right, there was a seizure or a threat of seizure of the plaintiff's goods. A threat intended to be followed by seizure is equivalent for this purpose to a seizure. (See per Cresswell, J., in *Valpy v. Manley*, 1 C. B. 594, 606.) . . ."

"I cannot think that the protests lost their effectiveness by reason of the length of period during which they were persistently made, or because they

establish the fairness of the transaction and that it was a free act of the other party. This principle has been generally applied to cases of settlements of property especially gifts, rather than to contracts, but does not seem confined to such cases. It is applied where a parent obtains a conveyance from a child;¹¹ and also where a child has obtained a conveyance from an aged parent by means of an agreement to support.¹² So an advantage obtained by a husband from a wife;¹³ or by one who stands in the position of a guardian from a ward, whether legal guardianship exists or not,¹⁴ or by an attorney from a client,¹⁵ a

were at times accompanied by a laugh or jest. The persistence during so long a period serves rather to show that the plaintiff would not acquiesce in the defendant's demands."

¹¹ *Savery v. King*, 5 H. L. Cas. 627; *Powell v. Powell*, [1900] 1 Ch. 243; *Hassell v. Hassell*, (Ala. 1918), 77 So. 716; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Ferns v. Chapman*, 211 Ill. 597, 71 N. E. 1106; *Couchman's Admr. v. Couchman*, 98 Ky. 109, 32 S. W. 283; *Wiley v. Wiley*, 178 Ky. 501, 199 S. W. 47; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Davis v. Strange's Exr.*, 86 Va. 793, 11 S. E. 406, 8 L. R. A. 261.

¹² *Williams v. Langwill*, 241 Ill. 441, 89 N. E. 642, 25 L. R. A. (N. S.) 932n; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997. Cf. *Stanfill v. Johnson*, 159 Ala. 546, 49 So. 223.

¹³ *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Stenger Assn. v. Stenger*, 54 Neb. 427, 74 N. W. 846; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907.

¹⁴ *Smith v. Kay*, 7 H. L. Cas. 750; *Noble's Adm. v. Moses*, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175; *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616.

¹⁵ *Gibson v. Jeyes*, 6 Ves. 266; *Savery v. King*, 5 H. L. Cas. 627; *White v. Tolliver*, 110 Ala. 300, 20 So. 97; *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Wistar's Appeal*, 54

Pa. St. 60; *Unruh v. Lukens*, 166 Pa. St. 324, 31 Atl. 110.

In *Ridge v. Healy*, 251 Fed. 798, 805, 164 C. C. A. 32, the court said: "1. A contract between attorney and client relative to compensation for services, made after the relationship has been entered into, is not per se void, but is presumptively invalid, and will be scrutinized very carefully by the courts whenever the transaction is called in question. Such a contract stands on the same basis as a contract between guardian and ward, or trustee and cestui que trust.

"2. The burden of proof is upon the attorney to show fairness and openness in the making of the contract, and that full information and explanation was given to the client, both of the facts, so far as known to the attorney, and also of her legal rights.

"3. Such a contract, in case of dispute as to the meaning of its terms, will be construed most strongly against the attorney.

"4. If the attorney comes into a court of equity, seeking the enforcement of such a contract, he must be prepared to show that such enforcement will not be unfair or inequitable to the client; in other words, that his claim, independent of the express terms of the contract, is so fair and equitable, that a court of equity would not hesitate to enforce it. *Perry on Trusts* (6th ed.), §§ 202, 203; 1 Story,

physician from a patient,¹⁶ a pastor from a parishioner,¹⁷ is subject to the same rule; which is indeed applicable to any relationship where one party is in a position to influence unduly the will of another.

Eq. Jur. (13th ed.), §§ 310, 311; 3 Am. & Eng. Ency. of Law (2d ed.), pp. 332, 333; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *United States v. Coffin*, 83 Fed. 337; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Nesbit v. Lockman*, 34 N. Y. 167; *Hitchings v. VanBrunt*, 38 N. Y. 335; *In re Holland*, 110 N. Y. App. Div. 799, 97 N. Y. S. 202."

¹⁶ *Dent v. Bennett*, 4 Mylne & Cr. 269; *Woodbury v. Woodbury*, 141

Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Unruh v. Lukens*, 166 Pa. St. 324, 31 Atl. 110.

¹⁷ *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Allcard v. Skinner*, 36 Ch. Div. 145; *Morley v. Loughnan*, [1893] 1 Ch. 736; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Good v. Zook*, 116 Iowa, 582, 88 N. W. 376; *Caspari v. First German Church*, 82 Mo. 649; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355; *Marx v. McGlynn*, 88 N. Y. 357; *McClellan v. Grant*, 83 N. Y. App. Div. 599, 82 N. Y. S. 208.

CHAPTER XLIV

ILLEGAL AGREEMENTS—CONTRACTS IN RESTRAINT OF TRADE

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§ 1628. Classification of illegal agreements.

As the law forbids the actual performance of certain acts

because opposed to social welfare, so it regards as obnoxious various executory agreements. The common law has developed on this subject as on others, a body of doctrine aside from statutory prohibition. Illegal agreements are sometimes classified as for instance, into those which are contrary to positive law, those which are contrary to morality, and those which are contrary to public policy;¹ but there seems no importance to these distinctions. Except where agreements are in terms forbidden by statute, the common law, whenever it refuses to enforce them, though they comply with the ordinary requirements for the formation of contracts, so decides on the basis of public policy. The precise particulars in which an agreement may be opposed to public policy are so various that any classification intermediate between the general heading of illegal agreements and the specific headings appropriate to each species of them, seems of little value. It may be said broadly that whenever the performance of an act would be either a crime or a tort, an agreement to do that act, will also be illegal. The converse, however, is not true. Many acts which are neither criminal or tortious may not be made the subject of a contract. An agreement beforehand to do them is illegal. This is true for instance of many agreements in restraint of trade and of champertous agreements. It should be said here that when an agreement is spoken of as illegal, it is not meant thereby to assert that it is criminal or that the law will visit with any punishment the making of such an agreement other than refusing to enforce it. Though the making of some agreements may be criminal and punished as such, any treatment of such a question is out of place here. In this treatise the only inquiry which is appropriate is in what cases and to what extent the law denies, for reasons of public policy, the usual characteristics of contractual obligations to agreements which fulfil the technical requirements for the formation of contracts. On the other hand, when an agreement is spoken of as illegal or unlawful, something more is meant than that it is unenforceable because a required form has not been complied with, or because

¹ This is a division adopted by Sir Frederick Pollock, *Wald's Pollock on Contracts* (3d ed.), p. 370, though he recognises that it has slight value.

it is *ultra vires*.^{1a} Though the power of courts to invalidate agreements of parties on grounds of public policy is unquestioned, and is obviously necessary, the impropriety of a transaction should be clear in order to justify the exercise of the power.

"If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice."²

§ 1629. Variation of public policy.

In a recent English decision³ the fundamental principles guiding the court were thus stated: "The question of public policy may well give rise to a difference of judicial opinion. Public policy, it was said by Burroughs, J., in *Richardson v. Mellish*,⁴ 'is a very unruly horse, and when once you get astride it you never know where it will carry you.' But the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In *Janson v. Driefontein Consolidated Mines, Ltd.*,⁵ Lord Halsbury, L. C., said: 'I deny that any court can invent a new head of public policy.' I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In *Wilson v. Carnley*,⁶ the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promisee was at the time of making the promise married is void as being against public policy. This decision marked a new application or head of public policy. In *Neville v. Dominion of Canada News Co., Ltd.*,⁷ the Court of Appeal held affirming *Atkin, J.*, that an

^{1a} For performance of an *ultra vires* agreement, quasi-contractual recovery may be had. See *supra*, § 271, but not for performance of an illegal agreement.

² Sir George Jessel, in *Printing Co. v. Sampson*, 19 Eq. Cas. L. R. 462, quoted in *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 482, 13 N. E. 419, 60 Am. Rep. 464, and in other decisions. See also *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed.

588, 142 C. C. A. 220, L. R. A. 1916 C. 620; *Styles v. Lyon*, 87 Conn. 23, 86 Atl. 564; *Harbison-Walker Refractories Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988.

³ *Naylor Benson & Co. v. Krainische Industrie Gessellschaft*, [1918] 1 K. B. 331, 342.

⁴ 2 Bing. 229, 252.

⁵ [1902] A. C. 484, 491.

⁶ [1908] 1 K. B. 729.

⁷ [1915] 3 K. B. 556.

agreement by a journalist not to comment upon the plaintiff's company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In *Horwood v. Millar's Timber and Trading Co.*⁸ the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. This view is exemplified by the decisions which were discussed by the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*⁹ The general economic considerations to which the courts will have regard were indicated by Lord Parker in delivering the judgment of the Privy Council in *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co.*¹⁰ The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal, C. J., in *Horner v. Graves*,¹¹ 'Whatever is injurious to the interests of the public is void, on the grounds of public policy.'"

§ 1630. Effect of illegal agreements.

It is commonly said that illegal contracts and agreements are void. This statement, however, is clearly not generally accurate. It is true that a court could only under very exceptional circumstances enforce specifically an illegal agreement,¹² but the rule of public policy that forbids an action for damages

⁸ [1917] 1 K. B. 305.

⁹ [1894] A. C. 535.

¹⁰ [1913] A. C. 781, 809, 810. See also the judgment of Lord Haldane in *North-Western Salt Co. v. Electrolytic Alkali Co.* [1914] A. C. 461, 469, 471.

¹¹ 7 Bing. 735, 743.

¹² In *Seattle Electric Co. v. Snoqualmie Falls Power Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032, the court for a brief period specifically

enforced a contract which was held illegal as designed to create a monopoly. A refusal to enforce the contract would have involved the sudden cutting off of the supply of electricity upon which the transportation and lighting systems of the city of Seattle were dependent. The court held that the public interest required that the contract be performed until such time as an adequate supply of electricity could be otherwise procured.

for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages; in itself that would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. In a statement of Lord Mansfield frequently quoted in this connection, the matter is correctly put: "The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." ¹³ It will be observed that Lord Mansfield rests the denial of recovery on an illegal agreement upon the illegality of the plaintiff's conduct, not the nature of the transaction.¹⁴

To deny such persons damages, though an equally guilty defendant thereby escapes punishment will tend to diminish the number of illegal agreements. To go farther and assert that all unlawful agreements are *ipso facto* no contracts and void is opposed to many decisions and unfortunate in its consequences, for it may protect a guilty defendant from paying damages to an innocent plaintiff. Doubtless a statute may and sometimes does make an agreement absolutely void, but even though a statute so states in terms, void has sometimes been held to

¹³ *Holman v. Johnson*, Cowp. 341, 343. So in *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U. S. 597, 601, 4 Sup. Ct. 572, 28 L. Ed. 534, the Supreme Court of the United States refers to "the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded

upon or growing out of the illegal transaction."

¹⁴ See also, e. g., *Levinson v. Boas*, 150 Cal. 185; s. c., *sub nom.*, *Levinson v. Boas*, 88 Pac. 825, 12 L. R. A. (N. S.) 575; *Leightman v. Kadetska*, 58 Ia. 676, 12 N. W. 736, 43 Am. Rep. 129; *Gooch v. Gooch*, 173 Ia. 902, 160 N. W. 333; *Third Nat. Exch. Bank v. Smith*, 17 N. Mex. 166, 125 Pac. 632.

mean voidable,¹⁵ and unless no other conclusion is possible from the words of a statute it should not be held to make agreements contravening it totally void.¹⁶

§ 1630a. When illegality must be pleaded.

A desirable flexibility of the law frequently demands the construction here contended for in ways not always easily foreseen. Thus it is generally true that illegality if of a serious nature need not be pleaded. A court will of its own motion take notice of it if it appears in evidence, and deny relief to the plaintiff,¹⁷ and indeed will not allow a defendant to waive the

¹⁵ See, e. g., under the Statute of Frauds, *supra*, § 531. Consider also decisions cited *infra*, § 1683, allowing recovery on a contract illegal for usury when entered into, after repeal of the usury statute.

¹⁶ In *Ferguson v. Sutphen*, 8 Ill. 547, 573, the court said: "It does not follow because a statute declares a certain contract to be void, that either of the contracting parties can take advantage of it. A statute may declare a contract to be void, and still but one of the parties be guilty of its violation. Enactments of this character are often made for the purpose of protecting one class of men from the oppression and impositions of another class of men; and in such cases, the really guilty party is never allowed any relief under the statute, or permitted to set up the statute as a defence to relief sought by the other party. Such is the case with all laws, which declare usurious contracts to be null and void. The lender is never allowed to take advantage of the statute, because he is the guilty party; the borrower may do so, because he is not a *particeps criminis*. He is regarded as the victim of the usurer, and not in *pari delicto*. This principle applies to every contract declared to be void by the statute, in the making of which but one of the parties is in *pari delicto*. *Browning v. Morris*,

Cowper, 790; *Williams v. Headley*, 8 East, 378." See further as recognizing that contracts are not necessarily void in any true sense of the word because of illegality: *Fennell v. Ridler*, 5 B. & C. 406, 408; *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 70 Fed. 201, 36 U. S. App. 152, 30 L. R. A. 193, 17 C. C. A. 62, aff'g 62 Fed. 904, aff'd in 175 U. S. 91, 44 L. Ed. 84, 20 Sup. Ct. 33; *Doney v. Laughlin*, 50 Ind. App. 38, 94 N. E. 1027; *John v. Bailey*, 45 Iowa, 241; *Chesapeake & O. R. Co. v. Maysville Brick Co.*, 132 Ky. 643, 116 S. W. 1183; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Smith v. Bean*, 15 N. H. 577; *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

¹⁷ *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Carter-Crumo Co. v. Peurrung*, 86 Fed. 439, 440, 58 U. S. App. 338, 30 C. C. A. 174, aff'd 99 Fed. 888, 40 C. C. A. 150; *Alabama & C. Ins. Co. v. Mobile & C. Ins. Co.*, 81 Ala. 329, 334, 1 So. 561; *Sheldon v. Pruessner*, 52 Kans. 579, 589, 35 Pac. 201, 22 L. R. A. 709; *Chaffin v. United States Credit System Co.*, 165 Mass. 501, 52 Am. St. 528; *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Drake v. Lauer*, 93 N. Y. App. Div. 86, 86 N. Y. S. 986; *Barry v. Mulhall*, 162 N. Y. App. Div. 749, 147 N. Y. S. 996; *Cansler v.*

defense, if he wishes to do so.¹⁸ Yet if the illegality was not serious or if public policy does not clearly require denial of relief the court may refuse thus to take notice of illegality which is not pleaded, but appears from the evidence given or offered.¹⁹ Such diversity of treatment would be inexplicable if all unlawful agreements were of necessity void.²⁰

§ 1631. Illustrations of recovery by innocent plaintiffs.

That the principle stated in the preceding section is that upon which relief is denied is proved by the fact that if the plaintiff is wholly innocent recovery is allowed though the contract is illegal.²¹ Such a case arises where the illegality is due to a circumstance of which the plaintiff is justifiably ignorant.

The commonest illustration is that of a contract to marry made by one already married. It is well settled that an action for breach of promise will lie in favor of a plaintiff who was ignorant of the defendant's previous marriage.²²

Penland, 125 N. C. 578, 580, 34 S. E. 683, 48 L. R. A. 441; McGuffin v. Coyle, 16 Okl. 648, 652, 85 Pac. 954, 86 Pac. 962; Hunt v. W. T. Rawleigh Medical Co. (Okl.), 176 Pac. 410; Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489. But see 4 Encyc. Pl. & Pract. 952; Milbank v. Jones, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454.

¹⁸ In Metz Co. v. Boston & M. R., 227 Mass. 307, 116 N. E. 475, 476, the court said: "The doctrine of waiver is not applicable to any subject where the public policy has been authoritatively declared to be contrary to waiver of rights. Laws founded upon considerations of public policy cannot be evaded by the device of waiver. The absolute defence is allowed in such instances, not for the sake of the defendant, but because it is the established principle of the law. It stands on the same footing in law as things forbidden to be done on grounds of public policy. There can be no waiver of an express prohibition embodied in the law for the general welfare. There are numerous

examples of this character as to which the law says there can be no waiver, as, for example, contracts with a public enemy, Coppel v. Hall, 7 Wall. 542, 558, 19 L. Ed. 244, contracts made on the Lord's day, Day v. McAllister, 15 Grey, 433, and others of like nature."

¹⁹ Day v. Hemmings, 4 L. T. (N. S.) 443; O'Brien v. Shea, 208 Mass. 528, 95 N. E. 99, Ann. Cas. 1912 A. 1030; Silver v. Graves, 210 Mass. 26, 31, 95 N. E. 948; Raymond v. Phipps, 215 Mass. 559, 102 N. E. 905; Wilde v. Sawtelle (Mass.), 122 N. E. 167; Cox v. Cameron Lumber Co., 39 Wash. 562, 82 Pac. 116.

²⁰ Clark v. Spencer, 14 Kan. 398, 404, 19 Am. Rep. 96; Boutelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152; Kneetle v. Newcomb, 22 N. Y. 249, 78 Am. Dec. 186. See also Decker v. Becker, 143 Wis. 542, 128 N. W. 67.

²¹ Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S. 597, 601, 4 Sup. Ct. 572, 28 L. Ed. 534.

²² Millwood v. Littlewood, 5 Ex. 775; Wild v. Harris, 7 C. B. 999; Daniel

Similarly, though a promise to indemnify one from the consequences of doing an act which is necessarily illegal is unenforceable,²³ where the legality of the act depends on extrinsic facts unknown to the promisee, the promise will be enforced.²⁴ The same principle may be involved in the case of any contract where the illegality of the transaction is due to unknown facts.²⁵

v. Bowles, 2 C. & P. 553; *Paddock v. Robinson*, 63 Ill. 99, 100, 14 Am. Rep. 112; *Davis v. Pryor*, 3 Ind. Terr. 396; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Waddell v. Wallace*, 32 Okl. 140, 121 Pac. 245, Ann. Cas. 1914 A. 692; *Stevenson v. Pettis*, 12 Phila. 468; *Coover v. Davenport*, 1 Heisk. 368, 2 Am. Rep. 706. In *Blattmacher v. Saal*, 29 Barb. 22, and *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702, it was held that an action of tort for deceit would lie, but not an action for breach of contract. But the decisions allowing such an action seem correctly decided.

²³ See *infra*, § 1751.

²⁴ *Arundel v. Gardiner*, Cro. Jac. 652; *Fletcher v. Harcot*, Winch, 48; *Merryweather v. Nixan*, 8 T. R. 186; *Betts v. Gibbins*, 2 A. & E. 57; *Elliston v. Berryman*, 15 Q. B. 205; *Moore v. Appleton*, 26 Ala. 633; *Stark v. Raney*, 18 Cal. 622; *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322; *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Higgins v. Russo*, 72 Conn. 238, 43 Atl. 1050, 77 Am. St. Rep. 307; *Wolfe v. McClure*, 79 Ill. 564; *Marsh v. Gold*, 2 Pick. 284; *Train v. Gold*, 5 Pick. 379; *Avery v. Halsey*, 14 Pick. 174; *C. F. Jewett Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087, 22 L. R. A. 253; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Forniquet v. Tegarden*, 24 Miss. 96; *Moore v. Allen*, 25 Miss. 363; *McCartney v. Shepard*, 21 Mo. 573, 64 Am. Dec. 250; *Harrington's Adm. v. Crawford*, 136 Mo. 467, 472, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653; *Allaire v. Ouland*, 2 Johns. Cas. 54; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376; *Trustees v.*

Galatian, 4 Cow. 340; *Chamberlain v. Beller*, 18 N. Y. 115; *Ives v. Jones*, 3 Ired. 538, 40 Am. Dec. 421; *Miller v. Rhoades*, 20 Ohio St. 494; *Mays v. Joseph*, 34 Ohio St. 22; *Commonwealth v. Vandyke*, 57 Pa. 34; *Jameison v. Calhoun*, 2 Speers, 19; *Davis v. Arledge*, 3 Hill L. (S. Car.) 170 30 Am. Dec. 360; *Hunter v. Agee*, 5 Humph. 57; *Ballard v. Pope*, 3 U. C. Q. B. 317; *Robertson v. Broadfoot*, 11 U. C. Q. B. 407. This is by implication enacted by Calif. Civ. Code, § 2773, which provides that the contract of indemnity shall be void if the act was known to be unlawful. The provision is copied in N. Dak. Comp. L. (1913), § 6642; Okla. Rev. L. (1910), § 1075; S. Dak. Civ. Code, § 1960. See also *Vandiver v. Pollak*, 97 Ala. 467, 12 So. 473, 19 L. R. A. 628, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118; *Union Stave Co. v. Smith*, 116 Ala. 416, 22 So. 275, 67 Am. St. Rep. 140; *Griffiths v. Hardenbergh*, 41 N. Y. 464. See also *supra*, § 1026.

²⁵ *Waugh v. Morris*, L. R. 8 Q. B. 202. In this case there was a contract to ship a cargo of hay, and a term of the bargain was that "all cargoes should be brought and taken from the ship alongside." By an order in council this was illegal at the time. The contract was made in France under the assumption that it could be legally performed. It was held that the illegality did not prevent the enforcement of the contract; and generally where the illegality of a contract results from facts of which the plaintiff is excusably ignorant, he is allowed relief. *Hotchkiss v. Dick-*

The right of a holder in due course to recover on a negotiable instrument originally given as part of an illegal transaction ²⁶ should be explained in the same way.

§ 1632. Illustrations of recovery where plaintiff not innocent.

In some cases where a refusal to enforce an agreement would produce the very effect which the law seeks to guard against, a corporation is allowed to enforce it, although it was particularly prohibited and made illegal. Thus, for the security of depositors and others, banks are prohibited from entering into certain kinds of loans or purchases. When a contract of this sort has been entered into, however, should the corporation be refused a right of recovery the result would be the impairment of the assets of the bank—the very result which the law seeks to prevent, and, therefore, the bank is allowed to recover.²⁷ It

son, 2 Bligh, 305, 348; Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Pullman Palace Car Co. v. Central Transportation Co., 65 Fed. 158; *In re Monongahela Distillery Co.*, 186 Fed. 220; Compagnonette v. McArmick, 91 Ark. 69, 120 S. W. 400; Michener v. Watts, 176 Ind. 376, 96 N. E. 127, 36 L. R. A. (N. S.) 142; Musson v. Fales, 16 Mass. 332; Emery v. Kempton, 2 Gray, 257; Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C. 697; Beram v. Kruscal, 18 N. Y. Misc. Rep. 479; Burkholder v. Beetem's Adm., 65 Pa. St. 496. See also Harse v. Pearl Life Assur. Co., [1903] 2 K. B. 92; Mobile, etc., R. R. Co. v. Dismukes, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113 (but see Gulf, etc., Ry. Co. v. Hefley, 158 U. S. 98, 39 L. Ed. 910; Southern Ry. Co. v. Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; Gerber v. Wabash R. R. Co., 63 Mo. App. 145; Wyrick v. Missouri, etc., Ry. Co., 74 Mo. App. 406); O'Gannon v. Goss, 107 Mass. 439, 9 Am. Rep. 45; Small v. Lowrey, 166 Mo. App. 108, 148 S. W. 132; Miller v. Hirschberg, 27 Or. 522, 40 Pac. 506. Compare Webster v. Sanborn, 47 Me. 471.

²⁶ See *infra*, § 1676.

²⁷ Such contracts were enforced under various bank laws in Gold-Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Reynolds v. Crawfordsville Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. Ed. 733; Hanover Bank v. First Nat. Bank of Burlingame, 109 Fed. 421, 48 C. C. A. 482, 487; England v. Commercial Bank, 242 Fed. 813, 155 C. C. A. 401; Holden v. Upton, 134 Mass. 177. And see Savings Bank v. Burns, 104 Cal. 473, 38 Pac. 102; Union Mining Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; Volts v. National Bank, 158 Ill. 532, 42 N. E. 69; Benton County Bank v. Boddicker, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Allen v. First Nat. Bank, 23 Ohio St. 97; First Nat. Bank v. Smith, 8 S. Dak. 7, 65 N. W. 437; Wroten's Assignee v. Armat, 31 Gratt. 228. A similar decision under Insurance Laws is Bowditch v. New England Mutual Ins. Co., 141 Mass. 292, 4 N. E. 798,

may be observed here also that even a guilty party if not thought to be in *pari delicto*,²⁸ and if public policy demands it even an equal participant in the illegality,²⁹ is often allowed relief by way of restitution, though not on the contract. It should also be noticed that an executed illegal transaction though based on agreement is effectual.³⁰ If illegality made contracts void in a literal sense it is hard to see how a transfer based on an illegal agreement could stand. Doubtless a statute may make an attempted contract or sale absolutely void, and instances of such statutes may be found,³¹ but such a construction will not be adopted unless plainly required by express language or public necessity. Generally the same result is reached when it is said that a guilty party to an illegal bargain cannot enforce it as when it is said that the illegal agreement itself is void, but it is believed that the true reason for the decisions is that which has just been suggested, and that this reason cannot safely be disregarded. Various kinds of illegal contracts may now be considered in detail.

§ 1633. Contracts in restraint of trade.

The topic of contracts in restraint of trade includes a large variety of agreements. Any contract which purports to limit in any way the right of either party to work or to do business,

55 Am. Rep. 474. See also *supra*, § 1217, *infra*, §§ 1771-1774.

In *Mars Nat. Bank v. Hughes*, 256 Pa. 75, 100 Atl. 542, the plaintiff bank sued upon a note made by the defendant who testified that the note was given merely to deceive the bank examiner, and that the parties agreed that it should not be enforced against the defendant. The court held that the note was enforceable according to its terms, and that the defendant could not be heard to say that a note which he had voluntarily given, according to his own account, for the purpose of enabling the bank to deceive the bank examiners of the United States was not what it purported to be. Any general inference from this language that a defendant cannot set up his own

illegality, shared in by the plaintiff, either to a promissory note or any other contract would be incorrect.

²⁸ See *infra*, § 1789.

²⁹ In *Cleveland & C. R. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145, a railroad company, although *particeps criminis*, was held entitled to maintain a suit for cancellation of a contract of lease for illegality, on the ground that the lease was executory and its enforcement contrary to public policy.

³⁰ See, *e. g.*, *Kuahner v. Abbott*, 156 Ia. 598, 137 N. W. 913, and *infra*, § 1702.

³¹ *E. g.*, in *Tennessee a Bulk Sale* law was held to make sales in violation of it "absolutely void." *Cantrell v. Ring*, 125 Tenn. 472, 145 S. W. 166.

whether as to the character of the work or business, its place, the manner in which it shall be done, or the price which shall be demanded for it, may be called a contract in restraint of trade.³² It is immaterial that the amount of business which may be done under the restraint exceeds the amount which was done or would be done had there been no restraining promise. The term does not indicate that less work or trade will be done but merely that one who does it, or who might do it, has agreed to some restriction. Though strictly speaking any contract imposing any restriction whatever of the class alluded to is in restraint of trade, the term is often used as including only contracts where the restraint is obnoxious to the law. Prolonged litigation was necessary to determine whether the words "restraint of trade" as used in the Sherman Act were used in the strict literal sense including any restriction whatever, or in the sense, also common in legal speech, of restraints unreasonable, and therefore obnoxious to the common law.³³ Restraint of trade may be sought by other means than by contract. By what is called unfair competition or by mere aggregation of capital competitors may be put at a disadvantage and a monopoly or something approaching it obtained.³⁴ Here, however, only the validity of contracts can be considered.

§ 1634. Early law.

The early law contains abundant recognition of the evils of monopoly. In general the monopolies which excited attention were not sought or obtained by contract but directly or indirectly by grant or charter from the crown or Parliament; but early criminal statutes against engrossing, regrating and forestalling, indicate that without any such authorization attempts to enhance prices artificially by dealings in the market must have been common.³⁵ The early decisions on contracts in restraint of trade relate to covenants or conditions in bonds by which the obligor undertook to forego the exercise of his trade either generally or within a certain locality. In an early and

³² See "Trust Laws and Competition" (U. S. Dept. Commerce 1915).

³³ See *infra*, § 1658.

³⁴ See Kales, "Good and Bad Trusts," 30 Harv. L. Rev. 830.

³⁵ See *Standard Oil Co. v. United States*, 221 U. S. 1, 51, 55 L. Ed. 619, 31 S. Ct. 502.

often cited case of this sort,³⁶ the court expressed itself emphatically that such a condition of the bond in suit was void and added "per Dieu," if the plaintiff were here, he should go to prison until he paid a fine to the king.³⁷ But it was soon held that if a covenant or the condition of a bond imposed a restraint only during a certain time or within a limited place, it was not unlawful.³⁸ This was so held in the leading case of *Mitchel v. Reynolds*,³⁹ where the court elaborately examined the whole question of contracts restraining a party from exercising his trade.

§ 1635. Reasons for holding restraint invalid.

The reasons given in this examination in the case just referred to for the prohibition against general restraints are thus stated after a consideration of the early decisions:

"The true reasons of the distinction upon which the judgments in these case of voluntary restraints are founded, are, first, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2d to the publick, by depriving it of an useful member.

"Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

"3dly, because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? and surely it would

³⁶ Y. B. 2 Hen. V, Pl. 26, the action was on a bond conditioned to be void if the obligor refrained for six months from carrying on the trade of dyer in the town where he had previously exercised it.

³⁷ See to similar effect *Colgate v. Bachelier*, 2 Cro. Eliz. 872.

³⁸ *Rogers v. Parry*, 2 Bulstr. 136; *Jelliet v. Broad*, Noy. 98; *Broad v. Jollyfe*, Cro. Jac. 596. See also *Prugnell v. Gosse*, Aleyn, 67; *Clerk v. Governor & Taylors of Exeter*, 3 Lev. 641.

³⁹ 1 Peere Wms. 181.

be unreasonable to fix a certain loss on one side, without any benefit to the other." ⁴⁰

In the further development of the subject the emphasis thrown on these reasons has varied, and has differed somewhat in England and in the United States. With the greater ease of changing occupations in modern life, less weight is attached to the reason that the promisor will be rendered a charge upon the community and himself suffer undue hardship. This reason is, moreover, wholly inapplicable where the promisor is a corporation. The modern English law has thrown the emphasis almost entirely upon the impropriety of requiring a promise greater in extent than is required for the needs of the promisee, since thereby the promisor would be injured without any corresponding advantage to the promisee. The American law, on the other hand, has been chiefly concerned with the injury to the public;—not that arising indirectly from the injury to the promisor, but that arising from lack of competition, with the consequent tendency to at least a partial monopoly owing to the withdrawal of the promisor from the field. Though emphasis thus varies, it is true in the United States, as well as in England, that a covenant exceeding the reasonable requirements of the promisee may be unlawful for that reason alone. ⁴¹ If the agreement affects interstate trade or commerce, its validity will be judged by Federal law and not by that of the State where the contract was made. ⁴²

§ 1636. Reasonableness of restraint.

It is everywhere agreed that in order to be valid a promise

⁴⁰ *Mitchel v. Reynolds*, 1 Peere Wms. 181, 190.

⁴¹ See *infra*, § 1641, n. 75. The general rule most frequently quoted in England and America is laid down in *Horner v. Graves*, 7 Bing. 735, 743. "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere

with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

⁴² *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620.

imposing a restraint in trade or occupation must be reasonable. The question of reasonableness is for the court, not the jury;⁴³ and in considering what is reasonable, regard must be paid to (a) the question whether the promise is wider than is necessary for the protection of the covenantee in some legitimate interest, (b) the effect of the promise upon the covenantee and, (c) the effect upon the public. If the restraint imposed is greater than is necessary for the protection of the covenantee, the promise is necessarily invalid. One whose business is confined to York is not helped by the promise of another not to do business in London, and if the promise is enforced by injunction the promisor is injured, while the promisee is not correspondingly helped. Such a case in the simple form supposed would not often arise, but very commonly a promise is exacted which includes not only a restriction advantageous to the promisee, but one injurious to the promisor without corresponding benefit to the promisee. Such a promise unless divisible,⁴⁴ is wholly invalid. Even if no objection can be taken on this ground, the effect may conceivably be so harsh in its effects upon the promisor that enforcement of the promise will be refused. Finally, even though neither of the foregoing objections exist, the effect of the promise on the public interest may be such as to make enforcement contrary to public policy. In considering the nature of this last objection, it must be recognized at the outset that the purpose of any restrictive covenant is almost always to lessen competition with the promisee, thereby enabling him to do a larger business and on terms more favorable to himself than he could do if he had not obtained the promise in question. This general purpose has been regarded, especially in America, as so inimical to the public interest that it is only in cases where the restrictive promise is ancillary to some other transaction that its validity has been upheld.⁴⁵ Thus if a dealer should pay

⁴³ *Dowden v. Pook*, [1904] 1 K. B. 45; *Linn v. Sigsbee*, 67 Ill. 75; *Knight, etc., Co. v. Miller*, 172 Ind. 27, 87 N. E. 823; *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064.

⁴⁴ See *infra*, § 1659.

⁴⁵ See the following section, also, *e. g.*, *Harris v. Theus*, 149 Ala. 133, 43 So. 131, 10 L. R. A. (N. S.) 204, 123

Am. St. Rep. 17; *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738; *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559; *Euston v. Edgar*, 207 Mo. 287, 105 S. W. 773; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357; *Harbinson-Walker Refractories Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988.

a competitor to promise to go out of business, or cease to compete, the agreement would be invalid.⁴⁶ But if the same promise were part of a transaction by which the competitor's business was bought, the promise would be valid, unless tending to a dangerous monopoly.⁴⁷ The policy of allowing the owner of property to sell it on such terms as to secure to the buyer the value of the property must here be balanced against the policy opposing restrictions of competition. A rule of the early decisions, still operative, that consideration must be given for a restrictive promise, even though it is under seal,⁴⁸ accords with the broader principle that the restrictive promise must be ancillary to some permissible transaction. Moreover, what is often the only effective redress for breach of such a promise—an injunction—may be denied if the consideration is grossly inadequate.⁴⁹

§ 1637. Statement by Taft, J., of permissible restraints.

In a leading case decided by the Circuit Court of Appeals,⁵⁰ Taft, J., thus summarized what the law permits:

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to inter-

⁴⁶ *Gross v. Bibo*, 19 N. Mex. 495, 145 Pac. 480. See *infra*, § 1644. This is true even though the promisor had previously been a party with the promisee to a contract of sale, employment or partnership to which the promise might legally have been attached. *Cleaver v. Lenhart*, 182 Pa. 285, 37 Atl. 811; *Prescott v. Bidwell*, 18 S. Dak. 64, 99 N. W. 93.

⁴⁷ See *infra*, § 1641.

⁴⁸ *Mitchel v. Reynolds*, 1 P. Wms. 181; *Hutton v. Parker*, 7 Dowl. P. C. 739; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Marvel v. Jonah*, 81 N. J. Eq. 369, 86 Atl. 968.

⁴⁹ *Young v. Timmins*, 1 Crompt. &

J. 331; *Thayer v. Younge*, 86 Ind. 259; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Fries v. Parr* (N. Y. Supr.), 139 N. Y. S. 220; *Carroll v. Giles*, 30 S. Car. 412, 9 S. E. 422, 4 L. R. A. 154. Cf. *Styles v. Lyon*, 87 Conn. 23, 27, 86 Atl. 564; *Tarr v. Stearman*, 284 Ill. 110, 119, 105 N. E. 957; *Nelson v. Brassington*, 64 Wash. 180, 183, 116 Pac. 629, Ann. Cas. 1913 A. 289.

⁵⁰ *United States v. Addyston Pipe, etc., Co.*, 85 Fed. 271, 29 C. C. A. 141, 150, *aff'd in Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96.

fare, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (3) to the legitimate ends of the existing partnership; or, (4) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (5) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business.⁵⁰

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem

⁵⁰ The court continued: "Under the first class come the cases of *Mitchel v. Reynolds*, 1 P. Wms. 181; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; *Nordenfeldt v. Maxim Nordenfeldt Co.* [1894] App. Cas. 535; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Whittaker v. Howe*, 3 Beav. 383; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Beal v. Chase*, 31 Mich. 490; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Whitney v. Slayton*, 40 Me. 224; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Richards v. American Desk & Seating Co.*, 87 Wis. 503, 58 N. W. 787. In the second class are *Tallis v. Tallis*, 1 El. & Bl. 391, and *Lange v. Werk*, 2 Ohio St. 519. In the third class are *Troy Laundry Machinery Co.*

v. Dolph, 138 U. S. 617, 34 L. Ed. 1083, 11 Sup. Ct. 412, 28 Fed. 553, and *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741. In the fourth class are *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634, and *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80, both decisions of this court; *Oregon Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. While in the fifth class are the cases of *Homer v. Ashford*, 3 Bing. 322; *Horner v. Graves*, 7 Bing. 735; *Hitchcock v. Coker*, 6 Adol. & E. 438; *Ward v. Byrne*, 5 Mees. & W. 548; *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Perls v. Saalfeld*, [1892] 2 Ch. 149; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203; *Keeler v. Taylor*, 53 Pa. St. 467, 91 Am. Dec. 221; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850."

to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."⁵¹

§ 1638. Partial restraints are valid; limit of time.

Until recent times the law sought to fix by somewhat technical rules the validity of contracts restraining the exercise of a trade or profession; especially the question whether a restrictive promise unlimited in time or unlimited in space was not necessarily invalid was disputed. It was settled in England before the middle of the 19th century,⁵² that the mere fact that a covenant was unlimited in time did not necessarily make it unreasonable and unlawful. The court was greatly influenced by the fact that: "The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed."⁵³ And though at the present time the fact that a promise is unlimited as to time may be of great importance in determining that it is unreasonable, it is not conclusive of unreasonableness.⁵⁴ The upholding of a

⁵¹ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281, 29 C. C. A. 141, 150, *affd.* 175 U. S. 211, 44 L. Ed. 136, 205, S. Ct. 96.

⁵² *Hitchcock v. Coker*, 6 Adol. & El. 438.

⁵³ *Hitchcock v. Coker*, 6 Adol. & El. 438, 454, *per Tindal*, C. J.

⁵⁴ *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620; *Smith v. Webb*, 176 Ala. 596, 58 So. 913, 40 L. R. A. (N. S.) 1191; *Styles v. Lyon*, 87 Conn. 23, 86 Atl. 564; *Thayer v.*

Younge, 86 Ind. 259; *Arnold v. Kreutzer*, 67 Ia. 214, 25 N. W. 138; *Burrill v. Daggett*, 77 Me. 545, 1 Atl. 677; *Dean v. Emerson*, 102 Mass. 480; *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 79 N. E. 790; *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200; *Southworth v. Davidson*, 106 Minn. 119, 118 N. W. 363, 19 L. R. A. (N. S.) 769; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *McClurg's Appeal*, 58 Pa. 51; *Stewart v. Bedell*, 79 Pa. 336; *Henschke v. Moore*, 257 Pa.

promise is often made easier by construing it, though in terms unlimited in time, as meaning a reasonable time,⁵⁵ or for the promisee's life or continuance in business.⁵⁶

§ 1639. Limits of space.

In England undoubtedly the same result has been reached in regard to covenants unrestricted in space. There it is held that unlimited space does not necessarily involve the invalidity of a promise;⁵⁷ though if the restriction whatever it be is greater than is needed for the protection of the promisee, the promise is invalid.⁵⁸ The decisions in the United States also in recent years have leaned towards making the reasonableness of the transaction the test, rather than any consideration whether the promise in question was unlimited in regard to space.⁵⁹ It is not everywhere clear, however, that the mere

196, 205, 101 Atl. 308, 311; *French v. Parker*, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733; *Butler v. Burleson*, 16 Vt. 176; *Mison v. Pohoretzky*, 38 Dom. L. R. 214. But see *Mandeville v. Harman*, 42 N. J. Eq. 185, 193, 7 Atl. 37.

⁵⁵ *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427 (contract by seller of land not to sell adjoining land below a certain price).

⁵⁶ *Saddlery, etc., Co. v. Hillsborough Mills*, 68 N. H. 216, 44 Atl. 300, 73 Am. St. Rep. 569; *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586. See also *Wooten v. Harris*, 153 N. C. 43, 68 S. E. 898; and *infra*, § 1659.

⁵⁷ *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Badische Anilin & C. Fabrik v. Schott*, [1892] 3 Ch. 447; *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A. C. 535; *Robinson v. Heuer*, [1898] 2 Ch. 451.

⁵⁸ *Underwood & Son, Ltd., v. Barker*, [1899] 1 Ch. 300.

⁵⁹ This is indicated by the following cases, though the contracts involved in most of them were not wholly unlimited in space. *Fowle v. Park*, 131 U. S.

88, 33 L. Ed. 67, 9 Sup. Ct. 658; *Fisheries Co. v. Lennen*, 116 Fed. 217, *affd.* 130 Fed. 533, 65 C. C. A. 79; *National Enameling, etc., Co. v. Haberman*, 120 Fed. 415; *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *Thibodeau v. Hildreth*, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620 (unlimited either in space or time); *Moore, etc., Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. 41; *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70; *Milaneseo v. Calvanese*, 92 Conn. 641, 103 Atl. 841; *Swigert v. Tilden*, 121 Iowa, 650, 97 N. W. 82, 63 L. R. A. 608, 100 Am. St. Rep. 374; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. 403; *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548; *Beal v. Chase*, 31 Mich. 490; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *Western Woodenware Assoc. v. Starkey*, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Kronsnabel-*

lack of restriction in space will not as matter of law render a promise invalid without regard to the necessity of so extensive a promise. Nor is it clear whether a promise is to be considered unrestricted in space if it relates to the State or only if it relates to the whole United States.⁶⁰

Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; *Southworth v. Davison*, 106 Minn. 119, 118 N. W. 363, 19 L. R. A. (N. S.) 769, 16 Ann. Cas. 253; *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; *Bancroft v. Union Embossing Co.*, 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Ellerman v. Chicago Junc. Ry., etc., Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Leslie v. Lorrillard*, 110 N. Y. 519, 18 N. E. 363; *Good v. Daland*, 121 N. Y. 1, 24 N. E. 15; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 24 Am. St. Rep. 475; *Magnolia Metal Co. v. Price*, 65 N. Y. App. Div. 276, 72 N. Y. S. 792; *Shute v. Heath*, 131 N. C. 281, 42 S. E. 704; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

⁶⁰ In Massachusetts it was held that the single State is the unit, and a promise relating to the whole of Massachusetts was necessarily invalid. *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634. See also *Western Woodenware Assoc. v. Starkey*, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Lawrence v. Kidder*, 10 Barb. 641. The earlier Massachusetts cases have, however, been reversed on this point by later decisions, and it is now held that an unrestricted covenant at least when coupled with the sale of a business may be valid if necessary to secure to the purchaser the subject-matter of his purchase. *Anchor Elec-*

tric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 358, 79 N. E. 790; *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 424, 89 N. E. 548. In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, it was held that a promise was not unlimited in space unless it included the whole of the United States, and the exception from the terms of the promise of the State of Nevada and the territory of Montana was held to preclude any objection on the score of unlimited space. See also *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. S. 861; *Brett v. Ebel*, 29 N. Y. App. D. 256, 51 N. Y. S. 573. In *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, the court approved the decision of the preceding case that the boundaries of the United States only need be considered, but left undecided the question whether the exception of Nevada and Arizona precluded objection on the score of unlimited space in view of proof which was offered that it was impossible to carry on the pottery business which was in question in either of those localities. Under the California Civ. Code, §§ 1673-1675, all contracts in restraint of trade are invalid except that, on the sale of good will, the seller may contract not to engage in a similar business within a specified county, city or part thereof, and so long as the buyer or one deriving title to the good will from him carries on a like business therein; and a

§ 1640. Contract implied on sale of good will.

As a preliminary to considering what contracts may be made on the sale of a business, it is desirable to observe what obliga-

partner on dissolving partnership may make a similar contract limited to a city or town. These statutory provisions have been copied in Oklahoma, Rev. L. (1910), §§ 978-980, and in South Dakota Civ. Code, §§ 1277-1279; North Dakota Comp. L., §§ 5928-5930. See *Strobeck v. McWilliams*, (N. Dak. 1919), 171 N. W. 865.

In *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736, the court held that a covenant by the seller of a business that he would not engage in the same business in the United States for a period of twenty-five years was invalid as necessarily tending to create a monopoly whether it was necessary or not to the reasonable enjoyment of the good will purchased. See also the following cases tending to show that an absolute territorial limitation is essential: *Lansit v. J. W. Sefton Mfg. Co.*, 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171; *Union Strawboard Co. v. Bonfeld*, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346; *Linneman v. Allison*, 142 Ky. 309, 134 S. W. 134; *Boone v. Burnham*, 179 Ky. 91, 200 S. W. 315; *Western Woodenware Assoc. v. Starkey*, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. 686; *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. 559; *Mallinckrodt Works v. Nemnich*, 83 Mo. App. 6; *Mallinckrodt Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Henschke v. Moore*, 257 Pa. 196, 205, 101 Atl. 308, 311; *Berlin Works v. Perry*, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236.

On the other hand, in several cases in the Federal courts, the modern English test has been adopted, which altogether discards arbitrary limitations and

makes validity depend on what is necessary for the protection of the promisee, providing no injurious monopoly is attempted.

In *Cropper v. Davis*, 243 Fed. 310, 156 C. C. A. 90, one employed for five years covenanted that if released therefrom to enter another line of business it must be with an employer which did not use the plans or forms of the National Rating League, *in competition therewith*. The court said (p. 314): "It appears from the bill and is admitted that the defendants were carrying on business in Nebraska, North and South Dakota, Iowa, Kansas, and Oklahoma, and this is a part of the territory in which according to the admitted allegations the plaintiff was doing business." An injunction was accordingly granted, and the court said in supporting its conclusion:

"The rule is that a restrictive contract should be tested by determining on the facts of the particular case whether the restriction upon one party is greater than is reasonably necessary for the protection of the other party. *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, 227, L. R. A. 1916 C. 620."

In *Prame v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374, it was held that, though there was no specific limitation as to territory in the contract, it was valid at least throughout the United States; and under the circumstances should be regarded as intended to apply only to the United States.

In *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 308, 53 C. C. A. 484, 488, 58 L. R. A. 915, it was said: "It is urged that the contract in question is one in restraint of trade because of the covenant that during the

tions arise on such a sale without express promises. Good will which has been defined as "The probability that the old customers will resort to the old place,"⁶¹ but which includes unquestionably not only the probabilities attaching to a location, but those attaching to an established business wherever it may be situated,⁶² is protected as a kind of property. It forms part of the assets of a partnership which must be accounted for as such.⁶³ A contract to sell or a sale of the business includes impliedly as part of the subject-matter of the bargain, the good will;⁶⁴ and a sale of good will, either in express terms or implied from a sale of a business by the owner (whether an individual or a partnership) carries with it certain implied obligations on the part of the seller. Unless some express restriction is

stipulated time of service the appellant would not, directly or indirectly, become interested in the specified business within a radius of 1,500 miles from the city of Chicago otherwise than under his engagement with the appellee. . . .

"The restraint must not be arbitrary, but should be limited. It must be reasonable with respect to time and to the area within which the covenantee prosecutes his business. . .

"Within the modern doctrine we cannot say that this restraint is invalid."

In *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 1012, 70 C. C. A. 536, 540, it was said: "With respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go."

In *Carter v. Alling*, 43 Fed. 208, 211, it was said: "The courts have repeatedly recognized the validity of contracts in restraint of trade throughout an entire state or country, where such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee." In *Harbison-Walker & Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988 a covenant,

restricting the promisor from doing business in five States was upheld. See also *Swigert v. Tilden*, 121 Ia. 650, 97 N. W. 82, 63 L. R. A. 608, 100 Am. St. 374; *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738.

⁶¹ *Cruttwell v. Lye*, 17 Ves. 335; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736.

⁶² *Churton v. Douglas, Johns. (Eng.)* 174. See also *Trego v. Hunt*, [1896] A. C. 7, 16, 17, 23, 27; *Bell v. Ellis*, 33 Cal. 620; *Armstrong v. Atlantic Ice, etc., Corp.*, 141 Ga. 464, 81 S. E. 212; *People v. Roberts*, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126; *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293; *In re Ball*, 161 N. Y. App. Div. 79, 146 N. Y. S. 499; *Faust v. Rohr*, 166 N. C. 187, 81 S. E. 1096.

⁶³ *Gilmore, Partnership*, § 49.

⁶⁴ *Shipwright v. Clements*, 19 W. R. 599; *Menendes v. Holt*, 128 U. S. 514, 32 L. Ed. 526, 9 Sup. Ct. Rep. 143; *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; *Merry v. Hoopes*, 111 N. Y. 145, 18 N. E. 714; *Steinfeld v. National Shirt Waist Co.*, 99 N. Y. App. Div. 286, 90 N. Y. S. 964; *Dec. Dig., Good Will*, §§ 1-6.

placed on the seller, however, he may enter into subsequent competition with the buyer.⁶⁵ But he may not solicit his former customers to do business with him.⁶⁶ This is on the prin-

⁶⁵ *Churton v. Douglas*, Johns. (Eng.) 174; *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Trego v. Hunt*, [1896] A. C. 7; *Jennings v. Jennings*, [1898] 1 Ch. 378; *Re David & Matthews*, [1899] 1 Ch. 378; *Gillingham v. Beddow*, [1900] 2 Ch. 242; *Curl Bros., Ltd., v. Webster*, [1904] 1 Ch. 685; *Knoedler v. Boussod*, 47 Fed. 465; *Knoedler v. Glaenser*, 55 Fed. 895, 5 C. C. A. 305, 14 U. S. App. 336, 20 L. R. A. 733; *Cottrell v. Babcock, etc., Mfg. Co.*, 54 Conn. 122, 6 Atl. 791; *Porter v. Gorman*, 65 Ga. 11; *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380; *Findlay v. Carson*, 97 Iowa, 537, 66 N. W. 759; *Drake v. Dodsworth*, 4 Kans. 159; *Bergamini v. Bastian*, 35 La. Ann. 60, 48 Am. Rep. 216; *Bassett v. Percival*, 5 Allen, 345; *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; *Wessel v. Havens*, 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913 C. 1377; *Smith v. Gibbs*, 44 N. H. 335; *Snyder Pasteurized Milk Co. v. Burton*, 80 N. J. Eq. 185, 83 Atl. 907; *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293; *Close v. Fleisher*, 8 N. Y. Misc. 299, 28 N. Y. S. 737, 59 N. Y. State Rep. 283; *Farrand v. Farrand*, 84 N. Y. Misc. 234, 147 N. Y. S. 89; *Faust v. Rohr*, 166 N. C. 187, 81 S. E. 1096; *Moody v. Thomas*, 1 Disney (Ohio), 294; *In re Hall's Appeal*, 60 Pa. 458, 100 Am. Dec. 584; *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862; *Zanturjian v. Boornasian*, 25 R. I. 151, 55 Atl. 199; *Moreau v. Edwards*, 2 Tenn. Ch. 347; *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; *Fish Bros. Wagon Co. v. LaBelle Wagon Co.*, 82 Wis. 546,

52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72.

In Massachusetts a stricter rule is laid down: "In each case where the good-will of a business is sold and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale," per Loring, J., in *Old Corner Book Store v. Upham*, 194 Mass. 101, 105, 80 N. E. 228, 120 Am. St. Rep. 532. See also *Gordon v. Knott*, 199 Mass. 173, 19 L. R. A. (N. S.) 762; *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548; *Batchelder v. Batchelder*, 220 Mass. 42, 107 N. E. 455; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620. And in some States a distinction is observed between the sale of the good will of a mercantile business and that of a professional man. In the latter case "the personal qualities of integrity, professional skill and ability attached to and follow the person and not the place," per Braley, J. *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200. See also *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *Brown v. Benzinger*, 118 Md. 29, 36, 84 Atl. 79, Ann. Cas. 1914 B. 582; *Yeakley v. Gaston*, 50 Tex. Civ. App. 405, 111 S. W. 768.

⁶⁶ *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Ginesi v. Cooper*, 14 Ch. D. 596; *Trego v. Hunt*, [1896] A. C. 7 (overruling *Pearson v. Pearson*, 27 Ch. D. 145, and *Vernon v. Hallam*, 34 Ch. D. 748); *Jennings v. Jennings*, [1898] 1 Ch. 378; *Gillingham v. Beddow*, [1900] 2 Ch. 242; *Curl v. Webster*, [1904] 1 Ch. 685; *Acker & Co. v. McGaw*, 144

ciple that the seller may not derogate from his own grant. In an involuntary sale, as by a receiver or trustee in bankruptcy, there is no such implied contract. A discharged bankrupt may compete with the purchaser from his trustee, and solicit his own former customers.⁶⁷ Though the seller of a business may subsequently use his own name in a competing business,⁶⁸ he cannot make use of any other trade name under which his former business was conducted.⁶⁹ Nor can he represent himself as successor of the old business.⁷⁰

§ 1641. Sale of business with restrictive covenant is valid.

The importance of enabling the owner of a business to dispose of it and the consequent necessity of allowing him to secure to the purchaser the value of the business which is sold by engaging not to destroy the good will thereof by immediate competition, has led to the well-established rule that a restriction

Fed. 864; *Myers v. Tuttle*, 183 Fed. 235; *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; *Brown v. Benzinger*, 118 Md. 29, 84 Atl. 79, Ann. Cas. 1914 B. 582; *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.), 1200; *Fairfield v. Lowry*, 207 Mass. 352, 93 N. E. 598; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; *Althen v. Vreeland* (N. J. Eq.), 36 Atl. 479; *Snyder Pasteurized Milk Co.*, 80 N. J. Eq. 185, 83 Atl. 907; *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293; *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199. But see *Cottrell v. Babcock Printing Press Mfg. Co.*, 54 Conn. 122, 6 Atl. 791; *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; *Fish Bros. Wagon Co. v. LaBelle Wagon Works*, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72.

⁶⁷ *Walker v. Mottram*, 19 Ch. D. 355; *Dawson v. Beeson*, 22 Ch. D. 504; *Griffiths v. Kirley*, 189 Mass. 522, 70 N. E. 201; *Von Bremen v. MacMon-*

nies, 200 N. Y. 41, 93 N. E. 186, 32 595, 16 L. R. A. 453, 33 Am. St. Rep. 72. L. R. A. (N. S.) 293; *Van Dyk v. F. V. Reilly Co.*, 130 N. Y. S. 755, 73 N. Y. Misc. 87.

⁶⁸ *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862.

⁶⁹ *Drake v. Dodsworth*, 4 Kans. 159; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; *Horner v. Lawrence*, 86 N. Y. Misc. 95, 149 N. Y. S. 82. In *Churton v. Douglas, Johns* (Eng.) 174, John Douglas, sold his interest in the firm of John Douglas & Co., and subsequently started a competing business under that name. An injunction was granted.

⁷⁰ *Knoedler v. Glaesner*, 55 Fed. 895, 5 C. C. A. 305, 14 U. S. App. 336, 20 L. R. A. 733; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; *Fish Bros. Wagon Co. v. LaBelle Wagon Works*, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72.

no wider than is necessary to protect the business sold and which does not tend to create a monopoly is valid,⁷¹ subject to the possible qualification, previously alluded to, that even

- ⁷¹ *Brampton v. Beddoes*, 13 C. B. (N. S.) 538; *Leather Cloth Co. v. Lorsont*, L. R. 9 Eq. 345; *Vernon v. Hallum*, 34 Ch. D. 748; *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A. C. 535; *Goldsoll v. Goldman*, [1914] 2 Ch. 603; *Herbert Morris Co., Ltd., v. Saxelby*, [1916], 1 App. Cas. 688, 701; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946; *National, etc., Stamping Co. v. Haberman*, 120 Fed. 415; *Walker v. Lawrence*, 177 Fed. 363, 101 C. C. A. 417; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620; *Moore, etc., Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23; *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537; *Hampton v. Caldwell*, 95 Ark. 387, 129 S. W. 816; *Kimbro v. Wells*, 121 Ark. 45, 180 S. W. 342; *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129; *Barrows v. McMurtry Mfg. Co.*, 54 Colo. 432, 131 Pac. 430; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Styles v. Lyon*, 87 Conn. 23, 86 Atl. 564; *Bullock v. Johnson*, 110 Ga. 496, 35 S. E. 703; *Busk v. Wolf*, 143 Ga. 18, 84 S. E. 63; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735; *Alcock v. Alcock*, 267 Ill. 422, 108 N. E. 671; *Telford v. Smith*, 186 Ill. App. 631; *Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 93; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Bennett v. Carmichael Produce Co.*, (Ind. App. 1917), 115 N. E. 793; *Swigert v. Tilden*, 121 Ia. 650, 97 N. W. 82, 63 L. R. A. 608, 100 Am. St. Rep. 374; *Mills v. Cleveland*, 87 Kan. 549, 125 Pac. 58; *Sauser v. Kearney*, 147 Ia. 335, 126 N. W. 322; *Fox v. Barbee*, 94 Kans. 212, 146 Pac. 364; *Thorn v. Dinsmoor (Kans.)*, 178 Pac. 445; *Western District Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Linneman v. Allison*, 142 Ky. 309, 134 S. W. 134; *Breeding v. Tandy*, 148 Ky. 345, 146 S. W. 742; *F. T. Gunther Grocery Co. v. Koll*, 153 Ky. 446, 155 S. W. 1145; *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738; *Moorman v. Parkerson*, 131 La. 204, 59 So. 122, Ann. Cas. 1914 A. 1150; *Whitney v. Slayton*, 40 Me. 224; *Flaherty v. Libby*, 108 Me. 377, 81 Atl. 166; *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164; *Warfield v. Booth*, 33 Md. 63; *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 105, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; *Beal v. Chase*, 31 Mich. 490; *Doty v. Martin*, 32 Mich. 462; *Buck v. Coward*, 122 Mich. 530, 81 N. W. 328; *Buckhout v. Witwer*, 157 Mich. 406, 122 N. W. 184, 22 L. R. A. (N. S.) 506; *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Espenson v. Koepke*, 93 Minn. 278, 101 N. W. 168; *Southworth v. Davison*, 106 Minn. 119, 118 N. W. 363, 19 L. R. A. (N. S.) 769, 16 Ann. Cas. 253; *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415; *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805; *Engles v. Morgenstern*, 85 Neb. 51, 122 N. W. 688; *Ammon v. Keill*, 95 Neb. 695, 146 N. W. 1009, 52 L. R. A. (N. S.) 503; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 680; *Palumbo v.*

though the business sold was unlimited in extent geographically, the restrictive promise must not be.⁷²

If a sale of the business is made to one who previously was not a competitor, it is obvious that there is no diminution of competition by the sale, and the promise accompanying it. There is less competition than there would be if the purchaser had entered the field as a competitor without making the purchase in question, but *non constat* that he would have done this. Where, however, one who is at the time a competitor purchases a business there is a real restriction of competition if the seller engages not to compete. Nevertheless, a restrictive promise in such cases is regarded as reasonable and is upheld.⁷³

Piccioni (N. J. Eq.), 103 Atl. 815; Gross Kelly & Co. v. Bibb, 19 N. Mex. 495, 145 Pac. 480; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357; Magnolia Metal Co. v. Price, 65 N. Y. App. D. 276, 72 N. Y. S. 792; Broadbrooks v. Tolles, 114 N. Y. App. Div. 646, 99 N. Y. S. 996; Metropolitan Opera Co. v. Hammerstein, 162 N. Y. App. D. 691, 147 N. Y. S. 532; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; King v. Fountain, 126 N. C. 196, 35 S. E. 427; Anders v. Gardner, 151 N. Car. 604, 66 S. E. 665; Wooten v. Harris, 153 N. C. 43, 68 S. E. 898; Threlkeld v. Steward, 24 Okl. 403, 103 Pac. 630, 138 Am. St. 888; Feenaughty v. Beall (Oreg.), 178 Pac. 600; Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9; Smith's Appeal, 113 Pa. 579, 590, 6 Atl. 251; Patterson v. Glassmire, 166 Pa. 230, 31 Atl. 40; Harbison-Walker, etc., Co. v. Stanton, 227 Pa. 55, 75 Atl. 988; Public Opinion Pub. Co. v. Ransom, 34 S. Dak. 381, 148 N. W. 838; Baird v. Smith, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917 A. 376; Erwin v. Hayden (Tex. Civ. App.),

43 S. W. 610; Nelson v. Brassington, 64 Wash. 180, 116 Pac. 629, Ann. Cas. 1913 A. 289; Washington Charcrete Co. v. Campbell, 72 Wash. 566, 131 Pac. 208, Ann. Cas. 1914 D. 630; Boggs v. Friend, 77 W. Va. 531, 87 S. E. 893; Kellogg v. Larkin, 3 Pinn. (Wis.) 123, 56 Am. Dec. 164; Cottingham v. Swan, 128 Wis. 321, 107 N. W. 336; Cussen v. O'Connor, 32 L. R. Ir. 330; Parker's Dye Works v. Smith, 20 Dom. L. R. 500; Mison v. Pohoretsky, 38 Dom. L. R. 214; Kelly v. McLaughlin, 21 Manitoba, 789. See also United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; United States v. Joint Traffic Assoc., 171 U. S. 505, 43 L. Ed. 259, 19 S. Ct. 25; Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201. But see California, Michigan, S. Dakota and N. Dakota statutes referred to *supra*, § 1639, n. 60; and *infra*, § 1643. Also Strobeck v. McWilliams (N. Dak.), 171 N. W. 865.

⁷² *Supra*, § 1639.

⁷³ Nordenfelt v. Maxim Nordenfelt Guns Co., [1894] A. C. 535; United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946; Moore, etc., Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 6 So. 41; California Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Beard v. Dennis, 6

Nor is the promise invalidated by the circumstance that no tangible property was transferred and the transaction amounts merely to the sale of good will accompanied by a promise not to engage further in a competing occupation.⁷⁴

If, however, the restrictive promise is unduly harsh or wider than the necessities of the promisee require, it is invalid;⁷⁵ and likewise if the effect of a sale or lease with restrictive covenants to a competitor is designed to give a monopoly, or a predominance approximating thereto.⁷⁶

Ind. 200, 63 Am. Dec. 380; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Palumbo v. Piccioni (N. J. Eq.), 103 Atl. 815; Chappel v. Brockway, 21 Wend. 157; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Kellogg v. Larkin, 3 Pinn. (Wis.) 123, 56 Am. Dec. 164. But see *contra* Gamewell Fire-Alarm Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458; Carroll v. Giles, 30 S. C. 412, 9 S. E. 422, 4 L. R. A. 154.

In *Palumbo v. Piccioni* (N. J. Eq.), 103 Atl. 815, the plaintiff, then proprietor of a business, bought out a competitor's business taking a restrictive covenant, and for a time operated both establishments. Later he sold the establishment which he had purchased to a third person who did not object to the resumption of business by the defendant, the original seller. It was held that the plaintiff was entitled to enjoin such resumption. See also *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 120, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125.

⁷⁴ *Wickens v. Evans*, 3 Y. & J. 318; *Rowe v. Toon* (Ia.), 169 N. W. 38; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *Wood v. Whitehead Bros. Co.*, 165

N. Y. 545, 59 N. E. 357; *Mapes v. Metcalf*, 10 N. Dak. 601, 88 N. W. 713.

⁷⁵ *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 957; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770; *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913; *Marvel v. Jonah*, 81 N. J. Eq. 369, 86 Atl. 968. See cases cited *supra*, n. 71.

⁷⁶ *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 52 L. Ed. 865, 28 Sup. Ct. 572; affirming *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846; *Stewart v. Stearns, etc., Lumber Co.*, 56 Fla. 570, 48 So. 19, 24 L. R. A. 649; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189 (writ of error dismissed, 187 U. S. 651, 47 L. Ed. 349, 23 Sup. Ct. 841); *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502. See also *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559; *Lufkin Rule Co. v. Fringeli*, 57 Oh. St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736. Cf. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Monongahela River Consolidated, etc., Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088, 105 Am. St. Rep. 812.

In certain corporations the value of the business is largely dependent on the good will of one or more officers or stockholders, and just as the corporation might on sale of its business contract to refrain from competition, so officers or stockholders either on selling their stock, or on the corporation selling its business, may make effectively a reasonable restrictive agreement not to compete with the corporation or with a purchaser of its business.⁷⁷

§ 1642. Sale or lease of property with restrictive covenant.

The seller or lessor of property as distinguished from a business or good will may by a restrictive promise reasonably limited agree to refrain from himself engaging in a business or from disposing of his property in such a way that others can engage in a business which would impair the value of the property to the buyer for the purpose for which he intended to use it,⁷⁸ or from selling other property remaining in his hands at a

⁷⁷ *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *Davis v. Booth*, 131 Fed. 31, 65 C. C. A. 269; *Barrows v. McMurtry*, 54 Colo. 432, 131 Pac. 430; *Holtman v. Knowles*, 141 Ga. 613, 81 S. E. 852; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; *Buckhout v. Witwer*, 157 Mich. 406, 409, 122 N. W. 184, 23 L. R. A. (N. S.) 506; *Kronschnabel-Smith Co. v. Kronschnabel*, 87 Minn. 230, 91 N. W. 892; *Anders v. Gardner*, 151 N. C. 604, 66 S. E. 665; *Bradford v. Furniture Co.*, 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233. Under a local statute (see *supra*, § 1639, *n.* 60), the California court felt constrained to reach a different conclusion. *Merchants' Ad Sign Co. v. Sterling*, 124 Cal. 429, 57 Pac. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879. But the Michigan court, construing a similar statute followed the rule of the common law. *Buckhout v.*

Witwer, 157 Mich. 406, 122 N. W. 184, 23 L. R. A. (N. S.) 506.

⁷⁸ *Altman v. Royal Aquarium Soc.*, 3 Ch. D. 228; *Holloway v. Hill*, [1902] 2 Ch. 612; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80; *Fleischman v. Rahmstorf*, 226 Fed. 443, 141 C. C. A. 273; *Morris v. Tuscaloosa Mfg. Co.*, 83 Ala. 565, 3, So. 689; *Harris v. Theus*, 149 Ala. 133, 43 So. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17; *University Club v. Deakin*, 265 Ill. 257, 106 N. E. 790, L. R. A. 1915 C. 854; *Vanover v. Justice*, 180 Ky. 632, 203 S. W. 321, L. R. A. 1918 E. 662; *Boone v. Burnham*, 179 Ky. 91, 203 S. W. 315; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842; *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Stines v. Dorman*, 25 Oh. St. 580; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 288. *Cf. Carr v. King*, 24 Cal. App. 713, 142 Pac. 131; *Stewart v. Stearns & Co. Lumber Co.* 56

price which would depreciate the value of the buyer's purchase.⁷⁹ Similarly a buyer may make a reasonable contract restricting himself from using the property which he has bought in a way which would compete with the seller,⁸⁰ or be obnoxious to him.⁸¹ It seems indeed to have been suggested by the Supreme Court of the United States,⁸² that as to patented articles there is an inherent inconsistency in selling property and imposing a restriction on the buyer. This can only mean, however, that the patent laws give no protection to restrictive promises exacted from a buyer and that they must stand or fall under the common law as if the article was unpatented. That one who transfers the title to property may limit the use of it in various ways is clear. The seller of real estate may reserve an easement or he may bind the buyer by a contract, which will not create an easement in the land, to refrain from using his ownership in certain ways; as, for instance in selling intoxicating liquors.⁸³

Fla. 570, 48 So. 19, 24 L. R. A. (N. S.) 649; *Texas &c. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919.

⁷⁹ *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427 (land).

⁸⁰ *Pavkovich v. Southern Pacific R. Co.*, 150 Cal. 39, 87 Pac. 1097; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

⁸¹ Thus a provision in a deed that no intoxicating liquors shall be manufactured or sold on the premises has uniformly been upheld. *Cowell v. Springs Co.*, 100 U. S. 52, 57, 25 L. Ed. 547; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Ferris v. American Brewing Co.*, 155 Ind. 539, 542, 58 N. E. 701, 52 L. R. A. 305; *O'Brien v. Wetherell*, 14 Kan. 616; *Orchard Canal Co. v. Sikes*, 8 Gray, 562; *Smith v. Barrie*, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 39; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363. Unless the grantor's covenants are of such a nature as to create an easement in property retained by him (as to which see *supra*, § 491), they will not be en-

forced against subsequent purchasers of the property. *Norcross v. James*, 140 Mass. 188, 2 N. E. 946; *Napa Valley Wine Co. v. Boston Block Co.*, 44 Minn. 130, 46 N. W. 239, 20 Am. St. 562; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676. Cf. *Waldorf-Astoria Segar Co. v. Salomon*, 109 N. Y. App. D. 65, 95 N. Y. S. 1053, *aff'd* 184 N. Y. 584, 77 N. E. 1197.

⁸² *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 38 Sup. Ct. 473, 482, 62 L. Ed. 968, *infra*, n. 85.

⁸³ In the following cases such a covenant of the grantee was held binding not only upon him but upon subsequent purchasers with notice. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Sullivan v. Kohlenberg*, 31 Ind. App. 215, 67 N. E. 541; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; *Whealkate Min. Co. v. Mulari*, 152 Mich. 607, 116 N. W. 360, 18 L. R. A. (N. S.) 147. A similar covenant by a grantor re-

The only limits imposed by the law on the owner of property restricting his power to exact contracts from a subsequent purchaser to refrain from using the property in a certain way are those imposed by public policy, and though public policy forbids unreasonable restraint of trade, and therefore forbids a system of contracts attempting to control prices on resale,⁸⁴ there seems no reason why it should prohibit contracts which reasonably protect a business of either buyer or seller without tending to affect the public injuriously by monopoly or enhancement of prices. How far equity will enforce the obligation of the contract against a third person who acquires the property with knowledge of the contract—that is, when a contract concerning the use of property will create an equitable easement is another question, elsewhere considered.⁸⁵ A lease of patented articles by the owner of the patent has been distinguished in a recent case from a sale of such articles—that is, the lessor may impose restrictions which the law might not permit if the articles were not patented.⁸⁶

The “tying clauses” in the leases under consideration in that case provided, even though one machine only was leased, in

garding adjoining property retained by him was enforced in *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911. In *Catt v. Tourle*, L. R. 4 Ch. 654, a covenant by the purchaser of land that the vendor should have the exclusive right to supply beer to any public house erected on the land was enforced against a sub-purchaser.

⁸⁴ See *infra*, § 1649.

⁸⁵ See *supra*, §§ 491–493.

⁸⁶ In *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 38 Sup. Ct. 473, 482, 62 L. Ed. 968, the court said: “There is, however, a limitation upon [the owner of a patent]; he cannot grant the title and retain the incidents of it. *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 61 L. Ed. 866, L. R. A. 1917 E. 1196, 37 Sup. Ct. 412, Ann. Cas. 1918 A. 955; *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185 33 Sup. Ct. Rep. 616, Ann. Cas. 1915,

A. 150; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 510, 61 L. Ed. 871, 876, L. R. A. 1917, E. 1187, 37 Sup. Ct. 416, Ann. Cas. 1918 A. 959.

“These cases have received review and application in *Boston Store v. American Graphophone Co.*, decided March 4, 1918 (246 U. S. 8, 38 Sup. Ct. Rep. 257, 62 L. Ed. 551). The principle of them was expressed to be that where an article has been sold it passes beyond the monopoly given by the patent, and conditions cannot be imposed upon it. Leases are not of this character; they do not convey the title. It is not contended, nor could it be, that in this case they are a disguise for something else, artifices to convey the machinery and yet keep it subject to the patent right and its exercise. It, therefore, follows that conditions may be imposed by them.”

the most stringent manner for exclusive use of the lessor's machinery for a period of seventeen years in all of the processes of manufacture by the lessee. It may be urged that however lawful the lessor's monopoly in the property leased, his right to impose conditions or covenants in return for its use cannot include the privilege of thereby securing an unlawful monopoly in regard to other articles. Where the effect of the covenant is for a short time and narrowly limited in space and will not produce a monopoly, its provisions for exclusive dealing are not objectionable. Thus a covenant by a lessee to sell no beer, except that of a particular brewer, has also been upheld.⁸⁷

§ 1643. Promises ancillary to contracts of employment.

Courts are less disposed to sustain an agreement which forms part of a contract of employment to refrain from subsequently engaging in competitive occupation than where a similar agreement is attached to a contract of sale.⁸⁸ There is likely

* *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Rose v. Gordon*, 158 Wis. 414, 149 N. W. 158. See also *Catt v. Tourle*, L. R. 4 Ch. 654; *Clay v. Powell*, 85 Ala. 538, 5 So. 330, 7 Am. St. Rep. 70; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304, 95 N. W. 687. Cf. *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103; *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241.

* *Herbert Morris, Ltd., v. Saxelby*, [1916] 1 A. C. 688; *Allen Mfg. Co. v. Murphy*, 23 Ont. L. R. 467. See also *Ward v. Byrne*, 5 M. & W. 548; *Leng v. Andrews*, [1909] 1 Ch. 763, 773; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Caroll v. Giles*, 30 S. C. 412, 9 S. E. 422, 4 L. R. A. 154; *George Weston, Ltd., v. Baird*, 31 Dom. L. R. 730; *Mison v. Pohoretzky*, 38 Dom. L. R. 214, 215. As to the right of the employee, apart from restrictive promise, to compete with his former employer, see *supra*, § 1025, *ad fin.*

In *Herbert Morris Ltd. v. Saxelby*,

[1916] 1 App. Cas. 688 (affirming [1915] 2 Ch. 57), the House of Lords, held that in determining whether a covenant in restraint of trade was enforceable, a covenant exacted by the purchaser from the vendor on a sale of the good will of a business stood on a different footing from a covenant exacted by an employer against his employee; and apparently in the latter case a covenant against competition *per se* (that is where no violation of the employer's business secrets is involved), will not be enforced.

The plaintiff company were the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant had been in the company's employment as draughtsman and otherwise from the time he left school. After several years' service the defendant was engaged by the company as engineer for two years certain and thereafter, subject to four months' notice on either side, upon the terms of an agreement which contained a covenant by the defendant with the company that he would not during a

to be greater hardship to the promisor and therefore injury to the public, in the former case, as for instance where an employee, expert in a narrow and technical specialty, engages not to practice his specialty. The distinction, however, seems unadvisable as a positive rule of law. If it is rightful to protect a business when it is purchased it should be lawful to protect an established business from injury by an employee,⁸⁹ unless circumstances of great hardship exist. The ultimate question should be the same in both cases,—what is necessary for the protection of the promisee's rights and is not injurious to the public.⁹⁰

period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connection with any other person, firm, or company, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes. It was held that in any event the covenant was wider than was required for the protection of the plaintiff company and was not enforceable.

⁸⁹ This argument was upheld in *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N. S.) 119.

⁹⁰ In the following cases agreements of employees to refrain from subsequent competition were sustained: *Dendy v. Henderson*, 11 Exch. 194 (solicitor's clerk agreed not to practice as a solicitor for 21 years after end of employment within 21 miles); *Gravely v. Barnard*, L. R. 18 Eq. 518 (surgeon's assistant agreed not to practice as a surgeon at the place of employment); *Sainter v. Ferguson*, 7 C. B. 716 (like the preceding); *Rousillon v. Rousillon*, 14 Ch. Div. 351 (traveller for the sale of wine agreed not to engage in cham-

pagne trade for ten years after end of employment); *Parsons v. Cotterill*, 56 L. T. (N. S.) 839 (employee of wine merchant agreed not to enter competing occupation within fifty years); *Rogers v. Maddocks*, [1892] 3 Ch. 346 (brewer's employee agreed not to be concerned for two years in sale of malt liquor within a hundred miles); *Underwood v. Barker*, [1899] 1 Ch. 300 (employee of wholesale hay and straw dealers agreed that for twelve months after the end of his employment, he would not compete in Great Britain, or in certain specified foreign countries where the employer did business); *May v. O'Neill*, 44 L. J. Ch. (N. S.) 660 (a solicitor's clerk agreed not to act in that profession, after the end of his employment, within two miles); *Lyndon v. Thomas*, 17 T. L. Rep. 450 (a stockholder's clerk agreed not to enter competing business within fifty miles for twenty years after the end of employment); *Edmundson v. Render*, 90 L. T. (N. S.) 814 (a solicitor's clerk agreed not to practice that profession within a radius of fifteen miles); *Carter v. Alling*, 43 Fed. 208 (travelling salesman of manufacturers agreed not to accept employment for a competitor for three years after the end of employment); *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915 (travelling sales-

Where an employee will acquire by virtue of his employment trade secrets, the law permits greater restriction to be imposed by contract on the employee than in other contracts of employ-

man for manufacturer agreed not to accept employment from a competitor within 1500 miles of Chicago for three years); *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536 (employee of a manufacturing company on leaving agreed for consideration not to enter into competing employment for ten years); *Cropper v. Davis*, 243 Fed. 310, 156 C. C. A. 90 (stated *infra*, § 1660, n. 40); *Freudenthal v. Espey*, 45 Colo. 488, 102 Pac. 280, 26 L. R. A. (N. S.) 961. (Physician employed by another agreed not to practice in city of Trinidad for five years after end of employment); *Hoops Tea Co. v. Dorsey*, 99 Ill. App. 181 (solicitor for tea company agreed not to compete in the city for two years after the end of his employment); *American Ice Co. v. Lynch*, 74 N. J. Eq. 298, 70 Atl. 138 (solicitor for ice company agreed not to compete on the same route or within five squares for a year after the end of his employment); *Hackett v. Reynolds Co.*, 30 N. Y. Misc. 733, 62 N. Y. S. 1076 (solicitor for groceries agreed not to compete within ten miles of the city for six months after the end of his employment); *Magnolia Metal Co. v. Price*, 65 N. Y. App. Div. 276, 72 N. Y. S. 792 (travelling salesman for manufacturer agreed not to enter competing occupation for five years after the end of employment); *Stover v. Gamewell Fire-Alarm Telegraph Co.*, 164 N. Y. App. Div. 155, 149 N. Y. S. 650 (an agreement by a corporation to pay its president a stipulated sum for life upon the severing of his connection, in consideration of his refraining to enter into competition); *Wilkinson v. Ebbets*, 103 N. Y. Misc. 324, 170 N. Y. S. 1041 (employee of a paper jobber who had

bought the good will of the former, agreed not to engage in similar business in New York and five other States for three years from termination of employment); *Srolowitz v. Roseman* (Pa.), 107 Atl. 322 (meat dealer's employee agreed not to enter into similar business or accept employment in such business in Philadelphia for year after the end of his employment); *Tillinghast v. Boothby*, 20 R. I. 59, 37 Atl. 344 (a dentist's assistant agreed not to engage in dentistry within the county after the end of his employment); *Turner v. Abbott*, 116 Tenn. 718, 94 S. W. 64, 6 L. R. A. (N. S.) 892 (a dentist's assistant agreed not to engage in dentistry within the town or its vicinity after the end of his employment); *Patterson v. Crab* (Tex. Civ. App.), 51 S. W. 870 (a teacher agreed not to accept employment as a teacher in the same city after the end of his employment). Cf. *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37, where an agreement by a physician unlimited in time, though limited to a single town was held invalid.

In Michigan any agreement or contract not to engage in any trade, profession or business whether reasonable or unreasonable, partial or general, limited or unlimited, is declared by statute illegal and void. See *Grand Union Tea Co. v. Lewitsky*, 153 Mich. 244, 116 N. W. 1090. So far as concerns contracts of employees, such also seems to be the effect of Calif. Civ. Code, §§ 1673-1675, and similar provisions in Oklahoma. Every contract restraining one from exercising a lawful trade, profession or business, is made void with two exceptions. A partner on dissolution of partnership may agree not to carry on a similar business in the same town, and on

ment;⁹¹ but the restraint must not be unreasonable even in such a case.⁹² An agreement by an employee that all patents for inventions relating to a particular art to which the employment was related which he should secure should belong to his employer, has been upheld and specifically enforced in regard to a patent applied for after the termination of the employment.⁹³

§ 1644. Partners may make restrictive promises.

The contract of a partner not to compete with the partnership either directly or indirectly is not opposed to public policy;⁹⁴ but such an agreement must be ancillary to the contract

sales of good will, the seller may agree not to carry on a similar business within a county or city for the period during which the promisee, or one who derives title from him continues the business for the benefit of which the restriction is imposed. See *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628; *Getz v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114; *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129; *Hulen v. Earel*, 13 Okla. 246, 73 Pac. 927; *Public Opinion Pub. Co. v. Ransom*, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917 A. 1010. In the following cases restrictive promises of employees were held invalid. *Dowden v. Pook*, [1904] 1 K. B. 45; *Leng v. Andrews*, [1909] 1 Ch. 763; *Mason v. Provident, etc., Co.*, [1913] A. C. 724; *Herbert Morris, Ltd., v. Saxelby*, [1916] 1 A. C. 688; *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 957; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753; *Oppenheimer v. Hirsch*, 5 N. Y. App. Div. 232, 38 N. Y. S. 311; *Tolman v. Mulcahy*, 119 N. Y. App. Div. 42, 103 N. Y. S. 936; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Carroll v.*

Giles, 30 S. C. 412, 9 S. E. 422, 4 L. R. A. 154.

⁹¹ *Harrison v. Glucose Sugar Ref. Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; *Sanitas Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454; *Eastman Co. v. Reichenbach*, 47 N. Y. S. 435, 20 N. Y. S. 110; *National Gum & Mica Co. v. Braendly*, 27 N. Y. App. Div. 219, 51 N. Y. S. 93; *G. F. Harvey Co. v. National Drug Co.*, 75 N. Y. App. Div. 103, 77 N. Y. S. 674; *Fralich v. Despar*, 165 Pa. 24, 30 Atl. 521.

⁹² *Badische &c. Fabrik v. Schott*, [1892] 3 Ch. 447; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. 753.

⁹³ *Wege v. Safe Cabinet Co.*, 249 Fed. 696, 161 C. C. A. 606. As the court points out (p. 704) if the promise were limited to patents applied for during the term of employment, "the inventor might through knowledge obtained in his employment evade the contract later and render it valueless."

⁹⁴ *Tallis v. Tallis*, 1 E. & B. 391; *Dayer-Smith v. Hadsley*, 108 L. T. (N.

of partnership or to a contract by which a partner disposes of his interest. After a partner has withdrawn without having made any restrictive engagement, a subsequent agreement for new consideration to refrain from competition is invalid.⁹⁵ Moreover, the restriction must be reasonable in its limits, like a similar promise by an employee.⁹⁶

When two or more persons, previously engaged in the same business enter into a partnership or joint adventure, the legality of their arrangement depends upon its purpose and effect. Certainly there is no sweeping denial of any right to enter into such agreements. It is only when the purpose or effect is substantially to limit competition or increase prices that the inhibition of the law becomes applicable.⁹⁷ Also "there is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require, and in giving such agent the exclusive right to do the buying."⁹⁸

S.) 897; *Prame v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374; *Callahan v. Donnolly*, 45 Cal. 162, 13 Am. Rep. 172; *Milaneso v. Calvanese*, 92 Conn. 641, 103 Atl. 841; *Hursen v. Gavin*, 59 Ill. App. 66, affd. 162 Ill. 377, 44 N. E. 735; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Western District Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Moorman v. Parkerson*, 127 La. 835, 54 So. 47; *Angier v. Webber*, 14 Allen (Mass.), 211, 92 Am. Dec. 748; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Marvel v. Jonah*, 83 N. J. Eq. 295, 90 Atl. 1004, L. R. A. 1915 B. 206, Ann. Cas. 1916, C. 185; *Curtis v. Gokey*, 68 N. Y. 300; *Wooten v. Harris*, 153 N. C. 43, 68 S. E. 898; *Siegel v. Marcus*, 18 N. Dak. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769; *Lange v. Werk*, 2 Oh. St. 519; *Thomas v. Miles*, 3 Oh. St. 274; *Feenaughty v. Beall* (Oreg.), 178 Pac. 600; *Schlag v. Johnson* (Tex. Civ. App.), 208 S. W. 369.

⁹⁵ *Cleaver v. Lenhart*, 182 Pa. 285, 37 Atl. 811; *Prescott v. Bidwell*, 18 So. Dak. 64, 99 N. W. 93, and see *supra*, § 1630. In *Milaneso v. Calvanese*,

92 Conn. 641, 103 Atl. 841, the covenant was upheld, though the parties seem never to have been actually partners, but to have separated after a vain attempt to agree on a partnership.

⁹⁶ See cases cited *supra*, n. 94. Also California, Oklahoma and S. Dakota statutes referred to *supra*, § 1639, n. 60.

⁹⁷ See cases cited *infra*, § 1648.

⁹⁸ *Pulp Wood Co. v. Green Bay Paper &c. Co.*, 157 Wis. 604, 623, 147 N. W. 1058, cert. denied, 249 U. S. 610, 39 S. Ct. 291, citing: *Anderson v. United States*, 171 U. S. 604, 613, 614, 19 S. Ct. 50, 43 L. Ed. 300; *Connolly v. Union S. P. Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679 (read in connection with additional facts stated in dissenting opinion of Justice Holmes in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 486); *Arkansas B. Co. v. Dunn & Powell*, 173 Fed. 899, 97 C. C. A. 454, 35 L. R. A. (N. S.) 464; *Burley T. Soc. v. Gillaspy*, 51 Ind. App. 583, 100 N. E. 89; *Reeves v. Decorah &c. Soc.*, 160 Iowa, 194, 140 N. W. 844, 44 L. R. A.

"Such an arrangement becomes unlawful when it injuriously affects the public, or, in other words, when it unduly restricts competition or restrains trade."⁹⁹

§ 1645. Agreements for exclusive dealing.

A contract to sell within a certain territory goods of a specified kind to, or through the agency of, one person only, generally is valid;¹ but it is otherwise if such a contract is part of a scheme whereby it is sought to establish a monopoly;² or if

(N. S.) 1104; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Wheeler Stenzel Co. v. American W. G. Co.*, 202 Mass. 471, 476, 89 N. E. 28, L. R. A. 1915 F. 1076; *First Nat. Bank v. Missouri &c. Co.*, 169 Mo. App. 374, 152 S. W. 378; *New York T. R. Co. v. Brown*, 61 N. J. L. 536, 43 Atl. 100. The Wisconsin court added: "We do not wish to be understood as approving all that is said in these cases."

⁹⁹ *Pulp Wood Co. v. Green Bay Paper &c. Co.*, 157 Wis. 604, 623, 147 N. W. 1058, cert. denied, 249 U. S. 610, 39 S. Ct. 291. See further s. c. 168 Wis. 400, 170 N. W. 230.

¹ *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25, 43, 50; *Attorney General v. Adelaide S. S. Co.*, [1913] A. C. 781, 812; *Singer Sewing Machine Co. v. Union Button Hole, etc., Co.*, Holmes, 253; *Baran v. Goodyear Tire &c. Co.*, 256 Fed. 571; *Keith v. Herschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 79 N. E. 313, 9 L. R. A. (N. S.) 446; *Superior Coal Co. v. Darlington Lumber Co.*, 236 Ill. 83, 86 N. E. 180, 127 Am. St. Rep. 275; *Over v. Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302; *Roller v. Ott*, 14 Kans. 609; *Peck-Williamson Heating, etc., Co. v. Miller (Ky.)*, 118 S. W. 376; *Mitchell-Taylor Tie Co. v.*

Whitaker, 158 Ky. 651, 166 S. W. 193; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 78 N. E. 463; *State v. St. Paul Gaslight Co.*, 92 Minn. 467, 100 N. W. 216; *Houck v. Wright*, 77 Miss. 476, 27 So. 616; *Standard Fireproofing Co. v. St. Louis, etc., Fireproofing Co.*, 177 Mo. 559, 76 S. W. 1008; *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53; *New York Trap Rock Co. v. Brown*, 61 N. J. L. 536, 43 Atl. 100; *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 180 N. Y. 280, 73 N. E. 48; *Stemmerman v. Kelly*, 150 N. Y. App. Div. 735, 135 N. Y. S. 827; *Walter A. Wood, etc., Co. v. Greenwood Hardware Co.*, 75 S. C. 378, 55 S. E. 973, 9 L. R. A. (N. S.) 501; *Watkins v. Morley*, 2 Tex. App. Civ. Cas. (Willson), § 723; *Anheuser-Busch Brewing Asso. v. Houck (Tex. Civ. App.)*, 27 S. W. 692; *Vandeweghe v. American Brewing Co. (Tex. Civ. App.)*, 61 S. W. 526; *Clark v. Crosby*, 37 Vt. 188; *Thurmond v. Paragon Colliery Co. (W. Va.)*, 95 S. E. 816. See also *Graham v. J. I. Case &c. Co.*, 19 Manitoba, 27; *Louisville Board v. Johnson*, 133 Ky. 797, 119 S. W. 153, 24 L. R. A. (N. S.) 153.

² *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Detroit Salt Co. v. National Salt*

freedom of dealing with a public service corporation is impaired³ it will not be enforced;⁴ and local anti-trust statutes have in some jurisdictions limited the right to make such contracts.⁵ An agreement to buy from or deal in the goods of one person has been almost universally held valid.⁶ In leases of machinery

Co., 134 Mich. 103, 96 N. W. 1; *State v. St. Paul Gaslight Co.*, 92 Minn. 467, 470, 100 N. W. 216; *Burns v. Wray Farmers' Grain Co.* (Colo.), 176 Pac. 487. See also *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. 452. But see *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629.

³ *Coombs v. Burk* (Cal. App., 1919), 180 Pac. 59. Cf. *State v. St. Paul Gaslight Co.*, 92 Minn. 467, 100 N. W. 216.

⁴ In *Rosenthal v. Light*, 173 N. Y. S. 743, a contract to organize a corporation and to have such corporation execute an agreement whereby it would become a selling agency, bound to buy goods and to sell them at a price dictated by the seller was held invalid because the directors of the corporation would be deprived of the free exercise of their judgment.

⁵ See *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. 452; *S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.), 51 S. W. 355. And it seems that where the price at which the goods shall be sold is fixed by the seller, *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232, 54 S. W. 804, or where not only an exclusive right is given to dispose of a manufacturer's goods, but the person to whom such right is given agrees not to deal in competing goods, the contract is forbidden by the Texas anti-trust law. *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 35 L. R. A. 241; *Simmons v. Terry* (Tex. Civ. App.), 79 S. W. 1103. But see *Norton v. W. H.*

Thomas & Sons Co., 99 Tex. 578, 91 S. W. 780. In *Merchants' Legal Stamp Co. v. Murphy*, 220 Mass. 281, 107 N. E. 968, L. R. A. 1915 D. 520, trading stamps and books were held "articles" within the Mass. St. 1908, c. 454, § 1, prohibiting monopoly in production or sale of any article or commodity, and the contract of a trading stamp company for the sale of its trading stamps to a dealer was held monopolistic in tendency and void. Cf. *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755.

⁶ *Catt v. Tourle*, L. R. 4 Ch. App. 654; *Altman v. Royal Aquarium Soc.*, 3 Ch. D. 228; *Hanbury v. Cundy*, 58 L. T. 155; *Metropolitan Elec. Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67; *Heimbuecher v. Goff*, 119 Ill. App. 373; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Healy v. Southern, etc., Mfg. Co.*, 125 La. 1038, 52 So. 150; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283; *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. (N. S.) 843; *Fleming v. Mulloy*, 143 Mo. App. 309, 127 S. W. 105; *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738; *Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703, affd. 72 N. J. Eq. 949, 68 Atl. 1116; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; *Ripley v. Art Wall Paper Mills*, 41 Okla. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33; *Home Pattern Co. v. Mascho* (Okla.),

"tying clauses" which make it a condition of the lease that the lessee shall use only materials and machinery of the lessor's manufacture have also been upheld.⁷ Sometimes the desired result is sought by an agreement to give a rebate, if at the end of a stipulated period a buyer has bought exclusively from a particular seller. Such a contract also has been sustained.⁸ And one who is not engaged in an occupation charged with a public duty may contract to sell goods or render services to a particular person for a lower price than will be charged to others;⁹ but if the exaction by a seller of an agreement in any form for exclusive dealing were part of a scheme to obtain a

148 Pac. 131; *Walter A. Wood, etc., Co. v. Greenwood Hardware Co.*, 75 S. Car. 378, 55 S. E. 973; *Sullivan v. Rime*, 35 S. Dak. 75, 150 N. W. 556; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817; *Butterick Publishing Co. v. Rose*, 141 Wis. 533, 124 N. W. 647. In some of these cases the court laid stress on the agreement being limited in time and space. In *Ripy v. Art Wall Paper Mills*, *supra*, at p. 23, the Oklahoma court said: "An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade." Citing *Olmstead v. Distilling, etc., Co.* (C. C.), 77 Fed. 265; *Brown v. Rounsavell*, 78 Ill. 589. *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 230, 91 N. W. 892; *Arnold Bros. v. Kreutzer*, 67 Iowa, 214, 25 N. W. 138; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Live Stock Assn. v. Levy*, 54 N. Y. S. 32; *Threlkeld v. Steward*, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888. See also *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 62

L. Ed. 968, 38 Sup. Ct. 473. Local statutes, however, may limit the right to make such contracts. See *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 127 S. W. 426.

⁷ *United Shoe Machinery v. Brunet*, [1909] A. C. 330; *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968. In the latter case the question involved was the liability of the corporation to prosecution under the Sherman Act; but in view of the construction given to the words "restraint of trade" in that Act (see *infra*, § 1658), the decision in effect upholds the validity at Common Law of the clauses in question. Three of the seven justices taking part in the decision dissented.

⁸ See *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25 (holding merely that a system of contracts of the sort was not a tort against a commercial rival); *Corn Products Ref. Co. v. Oriental Candy Co.*, 168 Ill. App. 585, 590; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Queen v. American Tobacco Co.*, 3 La Revue de Jurisprudence, 453.

⁹ *Edgar Lumber Co. v. Cornie Stave Co.*, 95 Ark. 449, 130 S. W. 452. Even a common carrier was held justified in contracting to give lower rates to all who would do business with it exclusively—the privilege offered being

monopoly, the contract seems opposed to the principle now apparently generally recognized in the United States, denying validity to contracts having this purpose.¹⁰ The nature of a business, moreover, may be such as to make any agreement for exclusive dealing obviously opposed to public policy;¹¹ and by the Clayton Act it is made so by statute if the seller was engaged in interstate commerce, and the effect is substantially to lessen competition.¹² In some States also agreements for exclusive dealing may fall under the prohibition of local statutes.¹³

open to all. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712.

¹⁰ In Illinois a by-law of a press association binding members not to purchase news from any antagonistic association was held void. *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184. See also *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, 357, 27 C. C. A. 542.

In Missouri and New York, however, such a by-law has been upheld. *Star Publishing Co. v. Associated Press*, 150 Mo. 410, 60 S. W. 91, 51 L. R. A. 151; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741; *Bleistein v. Associated Press*, 136 N. Y. 662, 32 N. E. 981; *Dunlop's Cable News Co. v. Stone*, 15 N. Y. S. 2, 27 *Abbott's New Cases*, 28.

¹¹ In *Central N. Y. Teleph. & Teleg. Co. v. Averill*, 190 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878, a contract giving a telephone company the exclusive right to furnish connections with a hotel for a term of years, although only in partial restraint of trade, was held to be against public policy and void.

¹² Sec. 3. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other com-

modities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 U. S. Stat. 730, 731. In *Standard Fashion Co. v. Magrane Houston Co.*, 250 Fed. 792 (C. C. A.) a contract for the agency to sell patterns for two years, during which the agent engaged not to sell patterns of other make was held invalid within the Clayton Act; the court holding that the passage of that law after similar restrictions had been held not obnoxious to the common law or the Sherman Act created an inference that Congress intended to change the law. *Cf. United States v. United Shoe Machinery Co.*, 247 U. S. 32, 62 L. Ed. 968, 38 Sup. Ct. 473.

¹³ See *Merchants' Legal Stamp Co.*

Though an agreement to give exclusive rights may be valid, an agreement to boycott those who interfere with such rights is illegal.¹⁴

§ 1646. Contracts not to divulge trade secrets are valid.

The law recognizes a right of property in trade secrets.¹⁵ As such property loses its only value if the secret is disclosed, any one who acquires knowledge thereof in a confidential capacity, as that of an employee, is under an obligation, which equity will enforce, not to disclose the secret or use it for his own advantage, even if he makes no express contract to this effect.¹⁶ It necessarily follows that express contracts which prohibit the disclosure by those entrusted with knowledge of them are

v. Murphy, 220 Mass. 281, 107 N. E. 968, L. R. A. 1915 D. 520; *Merchants' Legal Stamp Co. v. Scott*, 220 Mass. 389, 107 N. E. 969.

¹⁴ In *Eastern States Lumber Association v. United States*, 234 U. S. 600, 614, 58 L. Ed. 1490, 34 S. C. Rep. 951 the court said: "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

¹⁵ *Morrison v. Moat*, 9 Hare, 241;

Yovatt v. Winyard, 1 Jac. & W. 394; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488, 47 N. W. 814, 11 L. R. A. 267, 36 Am. St. Rep. 755. The principles governing trade secrets are applicable not only to secret processes of manufacture but to unpublished literary dramatic and artistic work. See *Board of Trade v. Christie Grain, etc., Co.*, 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. 637.

¹⁶ *H. B. Wiggins' Sons Co. v. Cott-A-Lap Co.*, 169 Fed. 150; *Sanitas Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339; *G. F. Harvey Co. v. National Drug Co.*, 75 N. Y. App. Div. 103, 77 N. Y. S. 674; *Witkop & Holmes Co. v. Boyce*, 61 N. Y. Misc. 126, 112 N. Y. S. 874: "Any one may use it who fairly by analysis and experiment discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract." *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 402, 55 L. Ed. 502, 31 Sup. Ct. Rep. 376.

valid and may be as broad as is necessary to protect the owner from injury by the disclosure of the secret or its competitive use. Especially, contracts by employees may restrain them from disclosing secrets of their employment,¹⁷ and the owner of a secret on selling it, may effectively promise not to compete by making use of the process himself or divulging it to others.¹⁸ Indeed the sale of a secret process as such carries with it the implied obligation not to disclose it to others.¹⁹ But the fact that an article is manufactured by a secret process will not validate a system of contracts for maintaining the price of the article.²⁰ And if a trade secret relates to an article of prime necessity,²¹ or if the effect of restriction will virtually preclude an employee from ever using his professional or technical skill except in the promisee's employ,²² it is open to question whether courts of equity at least will lend their aid to the enforcement of the promise by injunction. It has been said:²³ "Trade Secrets, the names of customers, all such things, which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents

¹⁷ *Thibodeau v. Hildreth*, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; *Magnolia Metal Co. v. Price*, 65 N. Y. App. Div. 276, 72 N. Y. S. 792; *Witkop & Holmes Co. v. Boyce*, 61 N. Y. Misc. 126, 112 N. Y. S. 874. A contract also is enforceable by which the employee's compensation is diminished if he leaves his employment for a competitive occupation. *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536; *Bossert v. S. Jarvis Adams Co.*, 135 Fed. 1015, 70 C. C. A. 23.

¹⁸ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 402, 55 L. Ed. 502, 31 Sup. Ct. 376; *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. 637; *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 163; *Thum v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200,

68 Am. St. Rep. 469; *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 132, 115 N. W. 714; *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475.

¹⁹ *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 53, 35 L. Ed. 55, 11 Sup. Ct. 478; *Vickery v. Welch*, 19 Pick. 523.

²⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376.

²¹ See *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, 13, affd. 169 Mo. 388.

²² See *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753.

²³ *Herbert Morris, Ltd., v. Saxelby*, [1916] 1 A. C. 688, 714, *per Lord Shaw*,

a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large." The importance of the distinction thus suggested may be conceded, but it will not solve all difficulties arising from restrictive covenants by employees. The objective is frequently so entwined with the subjective, that as a practical matter, a former employee cannot use his subjective skill in competition with his former employer without utilizing objective knowledge gained in his old employment. In such a case all circumstances must be considered, and unless excessive and unreasonable hardship is thereby caused a covenant exacted to protect the employer's business should be enforced even though the employee is thereby deprived of exerting his subjective skill in a particular direction.

Moreover, the inquiry is pertinent whether an employer as a condition of developing a high degree of even purely subjective skill in an employee, may not fairly exact a promise that the skill shall not later be exercised in competition with himself. If the scope of the promise leaves ample opportunity for the exercise of the employee's skill where he will not compete with his old employer, there seems no reason why the promise should be regarded as opposed to public policy, and the American decisions support this conclusion.²⁴

§ 1647. Patented and copyrighted articles.

The owner of a patent acquires a legal monopoly. He needs no contract or combination in restraint of trade to make his monopoly complete and secure. He may keep his invention out of use altogether,²⁵ and may exercise "the power of grant-

²⁴ See *supra*, § 1643, n. 90.

S. 405, 52 L. Ed. 1122, 22 S. Ct.

²⁵ Paper Bag Patent Case, 210 U. 748.

ing it to some and withholding it from others, a right of selection of persons and terms." ²⁶ But the ownership of competing patents by different persons gives them no right to make a monopolistic combination of their rights. Any such combination involving interstate commerce is obnoxious to the Sherman Act, ²⁷ and contracts in furtherance of the monopolistic purpose of such a combination are invalid. ²⁸ Moreover, there is a limit to the right of a patentee to impose conditions on licenses or grants, or to exact promises in return for them. The conditions or promises must not be illegal, and if they have for their object the creation of a monopoly broader than that granted by the patent, as by subjecting a whole industry to a plan for fixing prices ²⁹ or even for the fixing of resale prices for the patented article itself, ³⁰ or for the wholesale admission of the validity of the patents of the licensor, ³¹ the patent laws afford no protection. Whether at common law by contract or condition the purchasers of a patented article can be restricted to the exclusive use of supplies or other goods from the patentee is not so clear. ³² Probably this depends on whether such a contract or condition is part of a scheme to obtain a monopoly wider than that of the patented article. ³³ Certainly this result cannot be achieved by mere notices on patented articles. ³⁴ The principles governing copyrighted articles are doubtless similar. ³⁵ The Clayton Act has now made

²⁶ *United States v. United Shoe Mach. Co.*, 247 U. S. 32, 62 L. Ed. 968, 38 S. Ct. 473, 482.

²⁷ *United Shoe Machinery Co. v. La Chappelle*, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913 D. 715. See also *United States v. United Shoe Mach. Co.*, 247 U. S. 32, 62 L. Ed. 968, 38 S. Ct. 473.

²⁸ *United Shoe Mach. Co. v. La Chappelle*, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913 D. 715.

²⁹ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, 33 S. Ct. 9.

³⁰ *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 62 L. Ed. 551, 38 S. Ct. 257, Ann. Cas. 1918 C. 447. See further § 1649.

³¹ *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414, 12 Sup. Ct. Rep. 637.

³² That such restrictions may be imposed in a lease of patented machinery as distinguished from a sale was held in *United States v. United Shoe Mach. Co.*, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968.

³³ See *supra*, § 1645.

³⁴ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 61 L. Ed. 871, 37 S. Ct. 416, L. R. A. 1917 E. 1187, Ann. Cas., 1918, A. 959.

³⁵ See *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. Ed. 1086, 28 S. Ct. 722; *Scribner v. Straus*, 210 U. S. 352, 52 L. Ed. 1094, 28 S. Ct. 735; *Straus*

such contracts by one engaged in Interstate Commerce illegal.³⁶

§ 1648. Agreement among competitors to limit competition or maintain prices.

Numerous agreements have been made, especially prior to 1900, by competing firms or corporations having for their object fixing prices, pooling profits, limiting output, controlling supply, or dividing territory, for the purpose either of limiting competition for business or of precluding the lowering of prices by means of competition. Such agreements have been almost universally held invalid because of their tendency to injure the public.³⁷ Under the English law it is not clear that a contract

v. American Publishers' Assoc., 231 U. S. 222, 58 L. Ed. 192, 34 S. Ct. 84.

³⁶ See *supra*, § 1645, n. 7.

³⁷ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 S. Ct. 553; *American Biscuit Co. v. Klotz*, 44 Fed. 721; *Oliver v. Gilmore*, 52 Fed. 562; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; *Arnold v. Jones Cotton Co.*, 152 Ala. 501, 44 So. 662, 12 L. R. A. (N. S.) 150; *Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542; *Santa Clara, etc., Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Denver Jobbers' Assoc. v. People*, 21 Colo. App. 326, 122 Pac. 404; *Craft v. Conoughby*, 79 Ill. 346, 22 Am. Rep. 171; *Chicago Gaslight & Coke Co. v. People's Gas-Light & Coke Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Ludowese v. Farmers' Mut. Coop. Co.*, 164 Ia. 197, 145 N. W. 475; *Anderson v.*

Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; *Clemons v. Meadows*, 123 Ky. 178, 94 S. W. 13, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 339; *Merchants' Ice, etc., Co. v. Rohrman*, 138 Ky. 530, 128 S. W. 599, 30 L. R. A. (N. S.) 973, 137 Am. St. Rep. 390; *Arctic Ice Co. v. Franklin, etc., Ice Co.*, 145 Ky. 32, 139 S. W. 1080; *India Bagging Assoc. v. Koch*, 14 La. Ann. 168; *Webb Press Co. v. Bierce*, 116 La. 905, 41 So. 203; *Klingel's Pharmacy v. Sharp*, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976; *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A., 785, 84 Am. St. Rep. 559; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655; *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. S. 406, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33; *Pittsburg Carbon Co. v. McMillin*, 23 Abbott N. C. 298, 6 N. Y. S. 433; *Strait v. National Harrow Co.*, 18 N. Y. S. 224; *Judd v. Harrington*, 19 N. Y. S. 406; *Shute v. Shute* (N. C.), 97 S. E. 392; *Central Ohio Salt Co. v. Guthrie*, 35 Oh. St. 666; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 24

not unreasonable in view of the interests of the parties and intended for their own advantage, not for the injury of others, is ever invalid because in restraint of trade.³⁸ Certainly the mere fact that the purpose of an agreement is to maintain prices or to suppress competition does not invalidate it.³⁹ And

N. E. 660, 21 Am. St. Rep. 819; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *Nester v. Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894; *Crandall v. Scott* (Tex. Civ. App.), 161 S. W. 925; *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 47 S. E. 247, 65 L. R. A. 342, 104 Am. St. Rep. 1013; *Charleston Natural Gas Co. v. Kanawha, &c., Co.*, 58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936; *Pocahontas Coal Co. v. Powhatan Coal Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268; 116 Am. St. Rep. 901; *Manson v. Hunt*, 82 Wash. 291, 144 Pac. 45; *Fairbanks v. Leary*, 40 Wis., 637.

Decisions involving the illegality of such agreements under local statutes are *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 54 L. Ed. 826, 30 S. Ct. 535; *Ford v. Chicago Milk Shippers' Assoc.*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298; *Chicago, etc., Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770; *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N. E. 823; *Reeves v. Decorah Farmers' Coöperative Soc.*, 160 Ia. 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104; *State v. Wilson*, 73 Kans. 334, 80 Pac. 639, 84 Pac. 737; *Hunt v. Riverside Coöperative Club*, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420; *Retail Lumber Dealers' Assoc. v. State*, 95 Miss. 337, 48 So. 1021, 35 L. R. A. (N. S.) 1054; *Walsh v. Assoc. of Master Plumbers*, 97 Mo. App. 280, 71 S. W. 455; *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145; *State v. Armour Packing Co.*, 265 Mo.

121, 176 S. W. 382; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; *People v. Dwyer*, 160 N. Y. App. Div. 542, 145 N. Y. S. 748; *Bailey v. Master Plumbers*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561.

In a few cases agreements having an obvious purpose of the sort have been upheld at common law. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; *Dolph v. Troy Laundry Mach. Co.*, 28 Fed. 553 (before the Supreme Court, but question of damages only discussed, 138 U. S. 617, 34 L. Ed. 1083, 11 S. Ct. 412); *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Skrainka v. Scharringhausen*, 8 Mo. App. 523; *Reed v. Saslaff*, 78 N. J. L. 158, 73 Atl. 1044; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

³⁸ *Attorney General v. Adelaide S. S. Co.*, [1913] A. C. 781.

³⁹ In *North Western Salt Co., Ltd., v. Electrolytic Alkali Co.*, [1914] A. C. 461, the plaintiff, a combination of salt manufacturers, entered into a contract with the defendant, a salt producer, not a member of the combination, the obvious purpose of the contract being to control supply and prices, but it was said (p. 469): "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public."

agreements for the division of business,⁴⁰ or of territory with a view of lessening competition,⁴¹ or for the maintenance of prices,⁴² have there been upheld. In the United States, however, such agreements are illegal whether they are proved in fact to be detrimental to the public or not. It is enough to render the agreement invalid if it is not ancillary to some permitted transaction and if it "in its necessary or contemplated operation upon the actions of the parties to it, tends to restrain their natural rivalry and competition."⁴³ The invalidity of such attempts to obtain by contract the advantages of monopoly having been clearly established, an attempt was next made to make consolidations first in the form of a trust,⁴⁴ and later by creating a corporation which should control or purchase the business of various competitors. This final method whether it might have been effective at common law or not,⁴⁵ falls

Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement."

In *Evans v. Heathcote*, [1917] 2 K. B. 336, [1918] 1 K. B. 418, an agreement between manufacturers of cased tubes which provided for the restriction of a total output and a distribution of the permissible output among several members of an association was held invalid, but this was not because of injury to the public from monopoly but because the agreement was unreasonable with reference to the parties thereto since no means were provided for withdrawing from the agreement and the limitation imposed on the

right of any member to enter into contracts were extremely drastic.

⁴⁰ *Collins v. Locke*, L. R. 4, H. L. 674, an agreement between stevedores in Melbourne that they should be entitled to have the stevedoring of vessels arriving in future in the port in a certain order was upheld, and damages given for its breach.

⁴¹ *Wickens v. Evans*, 3 Y. & J. 318.

⁴² *Shrewsbury, etc., Ry. Co. v. London, etc., Ry. Co.*, 17 Q. B. 652; *Jones v. North*, L. R. 19 Eq. 426; *Cade v. Daly*, [1910] 1 Ir. Rep. 306. Cf. *Urmston v. Whitelegg Bros.*, 63 L. T. 455.

⁴³ *Keene Syndicate v. Wichita Gas, etc., Co.*, 69 Kans. 284, 288, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164, citing: *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678. See also cases *supra*, n. 32.

⁴⁴ See *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843.

⁴⁵ In *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, a corporation formed for monopoly was held illegal. See also *Distilling, etc., Co. v. People*, 156 Ill. 448, 41 N. E. 188,

within the ban of the Sherman law and other enactments if the purpose and effect of the combination is to produce a condition approaching monopoly.⁴⁶ It is clear that wherever such a combination is illegal, a contract to form it is equally illegal.

§ 1649. Limitations on resale prices.

An attempt has frequently been made by manufacturers to maintain the price of the manufactured article by making a series of contracts with jobbers, to whom the manufactured goods are sold, that they shall not be resold at less than a stated price. Sometimes, an attempt is made to bind each purchaser of the goods by notice attached thereto. Sometimes, instead of exacting a contractual agreement, a condition qualifying the right of the purchaser is attached to the transfer of title. Though a series of contracts to this sort is lawful in England,⁴⁷ and in some of the United States,⁴⁸ the United States Supreme Court has in a series of decisions held such an attempt to maintain a resale price invalid at common law, and when affecting interstate commerce, in violation of the Sherman Act,

47 Am. St. Rep. 200; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189.

⁴⁸ In *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968, *Clarke, J.* (diss.), briefly summarised the progress of the law: "This idea that the 'harmonious arrangement' [between competitors] was unlawful was doubtless inspired by the decision in the *Trans-Missouri Freight Assoc. Case*, 168 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. Rep. 540, rendered in 1897, and he probably shared a then not uncommon notion that the holding company and the merger were devices lawfully available for evading the congressional purpose expressed in the Anti-trust Act. But in the *Northern Securities Co. Case*, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. Rep. 436, this court decided in 1904, that the holding company was a futile device, and in the

American Tobacco Co. Case, 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632, it was decided in 1911, that the merger was also a mere 'subterfuge of form' which the courts would not permit to shield those who violated the act."

⁴⁹ *Elliman v. Carrington & Son, Ltd.*, [1901] 2 Ch. 275; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, [1908] 1 Ch. 335; *Dunlop Pneumatic Tyre Co. v. Selfridge*, 29 T. L. R. 270.

⁵⁰ *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 295; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Park & Sons Co. v. National Wholesale Druggist Assoc.*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. *Cf. Fisher Flouring Mills v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

whatever form the attempt takes, even though the goods affected by the attempt are manufactured by a secret process,⁴⁹ or are protected by the copyright,⁵⁰ or patent laws⁵¹ of the United States.

The argument has been made that since the law protects patents, copyrights, and secret processes, contracts controlling the resale price of articles thus protected should not be obnoxious to the law. But it has been well said in answer to this argument, "It is the policy of the law to reward individual thought and research by protecting the enjoyment of their fruits; thus the author,⁵² the news gatherer,⁵³ and the owner of an unpatented invention,⁵⁴ are protected against the piratical use of their peculiar property. A similar protection is extended to the chemist who has discovered a secret formula."⁵⁵ But it does not follow that because a secret process or formula will be protected against betrayal by those to whom it has been communicated in confidence under a contract for a restricted use,

⁴⁹ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 L. R. A. 376, 55 L. Ed. 502.

⁵⁰ *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086.

⁵¹ *Bauer v. O'Donnell*, 229 U. S. 1, 33 S. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915 A. 150; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L. R. A. [1917] E. 1196, Ann. Cas. 1918 A. 955; *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 37 S. Ct. 416, 61 L. Ed. 871, L. R. A. 1917 E. 1187, Ann. Cas. 1918 A. 959; *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. Rep. 257, 62 L. Ed. 551, Ann. Cas. 1918 C. 447. The case last cited overruled the decision of *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 S. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913 D. 880, which sustained the right of the manufacturer of the patented article to qualify the sales by a condition requiring material essential for working

the machine to be bought from the seller.

⁵² *Donaldson v. Beckett*, 2 Brown P. C. 129; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

⁵³ *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147; *Board of Trade v. Christie*, 198 U. S. 236, 49 L. Ed. 1031, 25 S. Ct. 637; *Dodge v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412.

⁵⁴ *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740.

⁵⁵ *Harrison v. Glucose Sugar, etc., Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; *Thum v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. See also *Maxim Nordenfelt v. Nordenfelt*, [1893] 1 Ch. Div. 630, for a review of the English cases.

that a system of contracts for the control of all sales and sub-sales of the article when produced will be outside of the rules in restraint of trade, simply because it is the product of such secret formula."

The attempt has also been made to control resale prices by agreeing to give rebates to such dealers as maintain the list prices of the manufacturer. This method gives an inducement to resell only at fixed price, but imposes no obligation to do so. There is, therefore, less reason for objection and contracts of this sort have been upheld.⁵⁶ Another method, which involves no contract, is simply to name resale prices and refuse to supply more goods to any one who cut these prices,⁵⁷ but in view of the latest decision of the United States Supreme Court,⁵⁸ and of the facts that the method of rebates can be so used as to produce practically the same effect as a restrictive covenant, and that if the effect is opposed to public policy the means used whatever their nature are likely to be so also, it seems probable that any contract, at least if resulting in a general maintenance of prices, or made for that purpose will be held illegal by that court.

§ 1650. Recovery of agreed payment for performing restrictive promise.

So harmless did contracts in restraint of trade appear to the English courts in the nineteenth century, except for the oppression of the promisor, that if an agreement, invalid because imposing an unreasonable restraint of trade was actually performed by the party subjected to the restraint, he might recover any payment promised him in return for the restraint.⁵⁹ But this view is not now accepted in England,⁶⁰ and would not be followed in the United States.⁶¹

⁵⁶ *In re Greene*, 52 Fed. 104; *Gottschalk v. Distilling, etc., Co.*, 62 Fed. 901; *Clark v. Frank*, 17 Mo. App. 602; *Walsh v. Dwight*, 40 N. Y. App. D. 513, 58 N. Y. S. 91.

⁵⁷ This was held not indictable under the Sherman Act in the absence of an intent to create a monopoly. *United States v. Colgate*, 250 U. S. 300, 39

S. Ct. Rep. 465. See 19 Columbia L. Rev. 149.

⁵⁸ *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. Rep. 257, 62 L. Ed. Ann. Cas. 1918 C. 447.

⁵⁹ *Bishop v. Kitchin*, 38 L. J. Q. B. 20.

⁶⁰ *Evans v. Heathcote*, [1918] 1 K. B. 418.

⁶¹ *Oliver v. Gilmore*, 52 Fed. 562;

§ 1651. Public service corporations.

Public service companies are more strictly limited than others in entering into contracts in restraint of trade, because of their duty to give equal service to the public. They can make no contracts inimical to that duty.⁶² Thus an agreement by a railway company to give a single telegraph company the exclusive right of establishing a line of telegraphic communication along its road is invalid, being both in restraint of trade, and contrary to the policy of a particular statute;⁶³ and an agreement for an exclusive right of way over a tract of land to be given a natural gas company or oil company, also has been held invalid.⁶⁴

A carrier may contract with a particular transfer company that the latter shall have an exclusive right to solicit custom on its trains or premises.⁶⁵ The same has been held in regard

Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Clancey v. Onondaga Salt Co.*, 62 Barb. 395. But see *Rosenbaum v. United States Credit System Co.*, 65 N. J. L. 255, 48 Atl. 237, 53 L. R. A. 449.

⁶² *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 S. Ct. Rep. 396; *Chicago Gas Light, etc., Co. v. People's Gas Light, etc., Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Dunbar v. American Tel. & Tel. Co.*, 238 Ill. 456, 87 N. E. 521; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

The effect of the Interstate Commerce Acts must also be considered.

⁶³ U. S. Comp. St., § 10072 (U. S. Rev. Stat., § 5263); *United States v. Union Pacific Ry. Co.*, 160 U. S. 1, 40 L. Ed. 319, 16 S. Ct. 190; *Western Union Telegraph Co. v. Burlington & S. Ry. Co.*, 3 McCrary, 130; *Western Union Telegraph Co. v. American Union Tel. Co.*, 9 Biss. 72; *Western Union Tel. Co. v. Baltimore & O. Tel. Co.*, 19 Fed. 660; *Western Union Tel. Co. v. Balto., etc., Tel. Co.*, 23 Fed. 12;

Mobile & O. R. Co. v. Postal Tel. Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223. And see *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Western Union Tel. Co. v. American U. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *St. Louis & C. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382.

⁶⁴ *Calor Oil & Gas Co. v. Fransell*, 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

⁶⁵ *The D. R. Martin*, 11 Blatchf. 233; *Fed. Cas. No. 1030*; *Jencks v. Coleman*, 2 Sumn. 221, *Fed. Cas. No. 7258*; *Kates v. Atlanta Baggage, etc., Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; *Dingman v. Duluth, etc., R. Co.*, 164 Mich. 328, 130 N. W. 24, 32 L. R. A. (N. S.) 1181; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *Barney v. Oyster Bay, etc., Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Lewis v. Weatherford, etc., R. Co.*, 36 Tex. Civ. App. 48, 81 S. W. 111.

to express business,⁶⁶ but not without dissent.⁶⁷ Exclusive privileges to hackmen,⁶⁸ and to load logs between stations,⁶⁹ have been held not invalid as a monopoly in restraint of trade.

§ 1652. Agreements unduly restricting personal liberty are invalid.

One of the prominent reasons for holding contracts invalid which restrict the right of a party to carry on trade or business, is the hardship upon him, and though in most cases this reason is combined with others—as that the scope of the promise is wider than the requirements of the promisee, or that the public will suffer some more direct injury than that due to the individual hardship of the promisor—there is a broad policy for-

⁶⁶ Express Companies' Cases, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542; *Blank v. Illinois, etc., R. Co.*, 182 Ill. 332, 55 N. E. 332; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; *Dulaney v. United Railways, etc., Co.*, 104 Md. 423, 65 Atl. 45; *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805.

⁶⁷ *New England Exp. Co. v. Main R. Co.*, 57 Me. 188, 2 Am. Rep. 31; *Kidder v. Fitchburg R. Co.*, 165 Mass. 398, 43 N. E. 115; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72; *Sandford v. Catawissa, etc., R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667; *Texas v. Missouri, etc., R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783.

⁶⁸ *Barker v. Midland Ry. Co.*, 18 C. B. 46; *Beadell v. Eastern Counties Ry. Co.*, 2 C. B. (N. S.) 509; *Painter v. London, B. & S. C. Ry. Co.*, 2 C. B. (N. S.) 702; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192, 26 Sup. Ct. 91; *Jencks v. Coleman*, 2 Sumn. 221; *The D. R. Martin*, 11 Blatch. 233; *Union Depot & R. Co. v. Meeking*, 42 Colo. 89, 94 Pac. 16, 126 Am. St. 145; *New York, N. H.*

& H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; *Hart v. Atlanta Terminal Co.*, 128 Ga. 754, 58 S. E. 452; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811, overruling 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204, and 70 N. H. 631, 47 Atl. 614; *Barney v. Oyster Bay & H. S. B. Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Snyder v. Union Depot Co.*, 19 Ohio C. C. 368, rev'g 7 Ohio N. P. 64; *State v. Union Depot Co.*, 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792; *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777.

⁶⁹ *Yasoo & M. V. R. Co. v. Crawford*, 107 Miss. 355, L. R. A. 1915 C. 250, 65 So. 462.

bidding a man from contracting himself into slavery or unduly restricting his personal liberty.⁷⁰ This policy is apparent not only in cases where employees make restrictive promises⁷¹ (wherefore a contract to withdraw from all business whatever even within a limited space is invalid),⁷² but also where creditors for greater security impose restrictive contracts upon their debtors;⁷³ or the owners of patents exact excessive and ineq-

⁷⁰ "There are certain fundamental rights which no man can barter away, such, for instance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers." *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, 234, 36 L. Ed. 414, 12 Sup. Ct. 632.

⁷¹ See, e. g., *Herbert Morris, Ltd., v. Saxelby*, [1916] 1 A. C. 688.

⁷² *Baker v. Hedgecock*, 39 Ch. D. 520; *Perls v. Saalfeld* [1892] 2 Ch. 149. A contract for "permanent employment" was, however, enforced against the employer in *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488. See *supra*, § 39 n. 27.

⁷³ In *Horwood v. Millar's Timber & Trading Co., Ltd.*, [1916] 2 K. B. 44, the plaintiff as assignee of the earnings of one Bunyan, an employee of the defendant, sued to recover them. The court denied recovery, Lush, J. saying (p. 50): "The question is whether this contract can be said to operate, if I may use a comprehensive term, in restraint of trade; whether it is a contract which unduly and improperly fetters the free disposal of the assignor's labour. If it so restricts it, if it applies such fetters upon it as to make it injurious not only to the man himself but injurious to the public interest, we should be justified in holding, and indeed bound to hold, that the contract is not one which can be enforced at the suit of the plaintiff. I propose, therefore, to examine somewhat more closely the terms of the deed. In it

Bunyan is called 'the mortgagor' and is described as a clerk in the employment of the present defendants. It recites that the mortgagor is indebted to the various persons mentioned in the schedule and has requested the lender to pay those debts, which the lender agrees to do on having the repayment secured. [His Lordship read clause 1 [which assigned all future wages in any employment] and continued:] Clause 2 provides for redemption; then follow certain covenants by the mortgagor which go to strengthen the security. Clause 3, sub-clause (d), is as follows: 'That during the continuance of these presents the mortgagor shall diligently and faithfully devote himself to his duties wheresoever he may be employed and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced but shall use his best endeavours to advance his position wheresoever employed.' So far no objection can be taken to that provision, but then follow these words: 'and shall not without the express sanction in writing of the lender determine his engagement with Messrs. Millar's Timber and Trading Company Limited or other his employer for the time being.' By sub-clause (h) the mortgagor covenants not to borrow or attempt to borrow, and not to enter into any gambling contract, bet, or wager. Sub-clause (i) says 'Not without the consent of the lender in writing first had and obtained

uitable promises not to contest the validity of the patents.⁷⁴ A contract to remove from a city or limited district and remain away from it is, however, enforceable;⁷⁵ and one entering an asylum may contract that he will submit to restraint of his personal liberty for a limited stated period.⁷⁶

§ 1653. Any contract may be rendered invalid if tending to produce monopoly.

A fundamental objection of public policy to contracts in unreasonable restraint of trade is their tendency to produce monopoly and enhanced prices; and any contract which is part of a scheme to produce an obnoxious monopoly will be unenforceable. Thus, though a purchase of a business may be accompanied by a promise of the seller not thereafter to compete, if the purchaser made such contracts with a large number of competitors so that, if all the transaction were carried out, a monopoly would be effected, each one of them though on its face apparently valid, would be rendered unenforceable by the other circumstances of the case.⁷⁷ It may even be supposed that the first purchase and contract was made without evil intent on the part of the purchaser, but thereafter with a view of

to remove from or take any other dwelling-house or residence.' If these clauses are indivisible and the deed has to be construed as one entire contract I can come to no other conclusion than that this contract did so unduly fetter and restrict the disposal of the mortgagor's labour, and so unduly restrict him in his mode of living and in choosing the mode of living best adapted for the purpose he had in view, as to be against public policy. . . .

"The illegal clauses are so many and so mixed up with the legal clauses that it is impossible to separate them or to apply to them the divisibility doctrine."

An agreement by a daughter to cancel indebtedness due from her mother on condition that the latter should not sell or mortgage her

property or incur any indebtedness in excess of \$1000, is not an unlawful restraint. *Robinson v. Thurston*, 248 Fed. 420, 160 C. C. A. 430.

⁷⁴ *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414, 12 Sup. Ct. 632; *Buffalo Specialty Co. v. Gougar*, 26 Colo. App. 523, 144 Pac. 325.

⁷⁵ *Upton v. Henderson*, 106 L. T. 839; *Wallace v. McPherson*, 138 Tenn. 458, 197 S. W. 565, L. R. A. 1918 A. 1148.

⁷⁶ *In re Baker*, 29 How. Pr. (N. Y.) 485.

⁷⁷ *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452. See also *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. 280; *G. W. McNear, Inc., v. American & British Mfg. Co. (R. I.)*, 107 Atl. 242.

obtaining a monopoly he made a number of similar contracts with other competitors. Presumably not only the later contracts, but the first one also would be unenforceable.⁷⁸ It is chiefly because a system of contracts with all dealers not to resell a manufactured article below a fixed price creates a monopoly that a single contract forming part of such a system is invalid.⁷⁹

§ 1654. Trade union agreements; English law.

The largest element of cost in most economic production is that of labor. It is for the interest of employers to pay as little as possible, and for the interest of employees to obtain as large pay as possible. These objects can be promoted, if the law permits it, by agreements of employers or employees with those of their own class, not to employ or not to work except on specified advantageous terms. There has been much litigation involving the legality of combinations of workmen, and of the acts of the combinations, but most of it has been concerned with questions of torts or crimes, which are without the scope of this book. If indeed a combination of workmen for the ordinary purposes of a trade union were a crime or if making those purposes effective by any combined action were necessarily a tort against persons injured thereby, it would follow that the agreement by which the workmen entered into the combination is invalid and unenforceable as between the parties, but the converse is not true. The contract may be invalid and unenforceable—illegal in the sense in which contracts in restraint of trade are illegal at common law—and yet neither the making nor performance of the contract involve a crime or tort. In England from an early time statutes strictly limited the rights of labor-

⁷⁸ See *supra*, §§ 1630-1632, showing that not the character of the contract but the character of the plaintiff is the basis of the defence of the legality; and *infra*, §§ 1759, 1760, as to the effect of performance, legal when a contract was made, becoming illegal.

⁷⁹ See *supra*, § 1649. In a proceeding under the Sherman Act the United States Supreme Court has said: "It is suggested that the

several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful." *Swift v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518, 25 Sup. Ct. 276. See also *United States v. Reading*, 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90. The same principle is applicable to the validity of contracts at common law.

ers to refuse to work,⁸⁰ and made combinations or agreements among them to work only at a fixed rate, criminal.⁸¹ As late as 1800 it was enacted that any laborer who entered into any combination to obtain an advance of wages or lessen or alter the hours of work, was punishable by imprisonment,⁸² and though presumably not enforced for years prior to its repeal, this law kept its place on the statute books until the latter part of the nineteenth century. There could be no doubt then that any agreement of laborers having these objects was illegal while such statutes remained in force, but even if the statutes had not existed it is sufficiently clear that such agreements would have been invalid as between the parties, because in restraint of trade.⁸³ Nor did the common law discriminate in this between master and man. An agreement among manufacturers to give identical rates of wages, hours and conditions of labor to their employees for a year was likewise held invalid,⁸⁴ though, as has been seen,⁸⁵ the English law views with far more leniency than that of the United States agreements having for their purpose limiting of competition and fixing of prices. By recent statutes, in England,⁸⁶ however, trade unions for somewhat limited "statutory objects" have been legalized.⁸⁷

§ 1655. Trade union agreements; American law.

In the United States, if the logic of early cases were followed, there can be no doubt that the agreement of members of a trade union with one another would be invalid as in restraint of trade. The primary purpose of such organizations is to en-

⁸⁰ 23 Edw. III, c. 1; 25 Edw. III, Stat. 1. See 3 Stephen, *Hist. Crim. Law*, 204.

⁸¹ 2 and 3 Edw. VI, c. 15; 5 Eliz. c. 4; 7 Geo. 1 Stat. 1 c. 13; 40 Geo. III. c. 106.

⁸² 40 Geo. III, c. 106.

⁸³ See *Hornby v. Close*, L. R. 2 Q. B. 153; *Russell v. Amalgamated Soc. of Carpenters*, [1910] 1 K. B. 508, [1912] A. C. 421; *cf. Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540. For a fuller discussion of the English law see 25 *Harv. L. Rev.* 579.

⁸⁴ *Hilton v. Eckersley*, 6 E. & B. 47.

But such an agreement would not be a tort against an injured commercial rival. *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25.

⁸⁵ *Supra*, § 1648, n. 33.

⁸⁶ 34 and 35 Vict., c. 31; 39 and 40 Vict., c. 22; 2 and 3 Geo. V, c. 30.

⁸⁷ Associations of employers, as well as of employees are within the protection of these statutes, see *Chamberlain's Wharf, Ltd., v. Smith*, [1900] 2 Ch. 605. See also *Merrifield v. Liverpool Cotton Assoc.*, 105 L. T. 97; *British Assoc. v. Nettlefold*, 27 T. L. Rep. 527.

hance wages, to lessen the hours of work to be given for the wages, and to obtain for members of the organization available work to the exclusion of others. A trade agreement among stenographers to maintain prices, though far less drastic in its objects than those of an ordinary labor union has been held unenforceable as in unlawful restraint of trade.⁸⁸ It might also be argued that the iron control that the modern labor union seeks to exercise over its members makes the agreement of membership an undue restriction of personal liberty.⁸⁹ But in view of the modern social and economic attitude of large numbers of the community towards labor unions and the judicial expressions in certain cases involving, to be sure, allegations of criminal or tortious combinations, not the validity of a contract as such, it seems probable that the ordinary principles governing contracts in restraint of trade would not now generally be applied to combinations of workmen. This result has been helped by an ambiguous use of the words "unlawful" and "illegal" and their opposites. That it is neither a crime nor a tort at common law to combine to raise wages is clear, but neither is it to combine to raise the price of commodities. It was said in a recent case of union workmen,—“The employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization.”⁹⁰ Such language certainly seems to mean more than an

⁸⁸ *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216.

⁸⁹ See *supra*, § 1652.

⁹⁰ Taft, J., in *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed. 803. See also for similar statements *Hitchman Coal*

& Coke Co. v. Mitchell, 245 U. S. 229, 253, 62 L. Ed. 260, 38 S. Ct. Rep. 65, Ann. Cas. 1918 B. 461; *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790. *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 321, 63 N. E. 369; 58 L. R. A. 135, 88 Am. St. Rep. 648;

assertion that such organizations are not necessarily either tortious to other persons or a crime against the State. If similar words were used of manufacturers "they have goods to sell and if they stand together they are often able, all of them, to command better prices for their goods than when dealing singly with the public," the reasoning would be thought to show conclusively that the agreement between the manufacturers was illegal at common law in the sense of being unenforceable and regarded as opposed to public policy. Presumably also if it was said of manufacturers "They have labor to buy. If they stand together they are often able, all of them, to command more labor for their money than when dealing singly with their employees," it would be thought to prove the illegality of an agreement by the manufacturers in the combination, at least if it was part of the object of the agreement, to bring all manufacturers into the agreement.⁹¹

Grassi Contracting Co. v. Bennett, 174 N. Y. App. Div. 244, 249, 160 N. Y. S. 279.

⁹¹ In *Grassi Contracting Co. v. Bennett*, 174 N. Y. App. Div. 244, 249, 160 N. Y. S. 279, the court said:

"It has been held that employers may not combine and agree to employ either only union or non-union labor when such employers control the trade in any community or control it to such an extent that it would be practically impossible for those thus discriminated against to obtain employment, for in such case the agreement would be oppressive and contrary to public policy. *McCord v. Thompson-Starrett Co.*, 129 N. Y. App. Div., 130, 113 N. Y. S. 385, *affd.* 198 N. Y. 587, 92 N. E. 1090; *Farrelly v. Schaettler*, 143 N. Y. App. Div. 273, 128 N. Y. S. 157, *affd.* 207 N. Y. 644, 100 N. E. 1127. . . .

"It is perfectly lawful to organize to advance or to maintain a scheduled rate of wages, and to call a strike for those purposes, where no contract rights are violated; but not for the *primary* purpose of restricting the freedom of others by coercing them under

a penalty of loss and deprivation of employment to join a labor union, Penal Law, § 582; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802; *Mills v. United States Printing Co.*, 99 N. Y. App. Div. 605, 91 N. Y. S. 185, but the refusal by the members of a labor union to work with those not belonging to the union, or *vice versa*, or a threat to strike if others are not discharged, where the action is *primarily* for their own benefit, does not constitute an unlawful interference with the freedom of others and affords no ground for action either for damages or for injunctive relief. *Wunch v. Shankland*, 59 N. Y. App. Div. 482, 69 N. Y. S. 349, appeal dismissed, 170 N. Y. 573, 62 N. E. 1102, S. C. 81 N. Y. App. Div. 655, 81 N. Y. S. 1151, *affd.* 179 N. Y. 545, 71 N. E. 1142, on authority of *National Protective Assn. v. Cumming*, 53 N. Y. App. Div. 227, 65 N. Y. S. 948, *affd.* 170 N. Y. 315, 63 N. E. 369; *Mills v. United States Printing Co.*, 99 N. Y. App. Div. 605, 91 N. Y. S. 185; *Davis v. United Engineers*, 28 N. Y. App. Div. 396, 51 N. Y. S. 180."

§ 1656. Effect of trade union being in restraint of trade.

The validity of the agreement binding members of a union does not ordinarily become of direct importance. Unions have other ways of making their members comply with what they undertook on becoming members, than by bringing actions at law. But indirectly the question is of great importance. Many statutes now make contracts in restraint of trade a tort or a crime. If indeed a statute confines its prohibition to combinations restraining trade in "commodities,"²² a trade union is not obnoxious to it. Labor is certainly not a "commodity"; but it is equally true that the invalidity of contracts in restraint of trade does not relate exclusively or even primarily to commodities. The typical cases on which the law on the subject has been built relate to contracts restricting the right to labor; and if a statute simply refers to contracts or combinations in restraint of trade, the phrase should naturally and properly be held to include such contracts and agreements as the common law held invalid for that reason. Such has been the construction of the Sherman Act.²³ It would seem, therefore, that labor unions would come within the prohibition of such a statute. In another way it becomes of indirect importance to decide whether the agreement between members of a trade union is an unreasonable restraint of trade. Contracts, *e. g.*, for the

²² As in Iowa, see—*Rohlf v. Kasemier*, 140 Ia. 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261.

²³ See *infra*, § 1658. In *Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488, 28 S. Ct. 301 (on demurrer), 235 U. S. 522, 59 L. Ed. 341, 35 S. Ct. 170 (after trial on the facts), the Supreme Court held a union of hatters liable under the Sherman Act. It is true that the language of the court does not intimate that the union would have been obnoxious to the Act if its purposes and acts had been confined to an agreement of all to refuse to work if a certain scale of wages was not paid. There was evidence of endeavoring to boycott and to induce others to boycott

the plaintiff's goods. Presumably, however, this weapon is part of the regular armory of all powerful unions. See also *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492, 34 L. R. A. (N. S.) 874. The illegality under the Sherman Act, of an association of grocers, members of which agreed with one another not to sell to certain persons was decided in *United States v. Southern Wholesale Grocers' Assoc.*, 207 Fed. 434. The Clayton Act subsequently has nullified the Sherman Act, so far as labor unions are concerned. See *infra*, § 1658; but the principles of the decision may well be applicable to cases arising under state statutes.

erection of buildings or for manufacture of goods, often provide that union labor only shall be employed, though neither party is a member of the union, but merely desires to avoid boycotts and other troubles. The Alabama court properly held on demurrer to a complaint on such a contract that it could not take judicial notice of the nature of a union, and that perhaps union men were desired because they were more efficient,⁹⁴ but if evidence were introduced showing that a union was a combination in unreasonable restraint of trade and that the provision regarding union labor in the contract was due to the success of the purposes of the combination, and that enforcement of the provision involved a furtherance of those purposes, it seems that the provision should be held invalid.⁹⁵

In the absence, however, of evidence of by-laws or practices contemplating tortious means by which a labor union was seeking to attain its ends, it is unlikely that this view would be taken, if the union was organized for the ordinary objects of a labor union. An agreement by an employer with a union to give all his work to members of the union has been held a valid agreement;⁹⁶ at least unless the agreement involved a monopolizing of all employment of the kind in the community.⁹⁷ The inquiry might also sometimes be pertinent whether the employer had entered into the contract under duress.⁹⁸ On the other hand, an employer may lawfully make it a term of his contract with his employees that they shall not join a union while the employment continues and such a provision will be enforced.⁹⁹

⁹⁴ *Birmingham Paint, etc., Co. v. Crampton* (Ala.), 39 So. 1020.

⁹⁵ In *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, it was held that a school board has no authority to insert such a provision in a building contract, and that for this reason the provision was invalid. In *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291, it was held that an ordinance requiring the insertion of such a provision in contracts for public works was invalid and unconstitutional.

⁹⁶ *Smith v. Bowen*, 232 Mass. 106, 121 N. E. 814; *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790; *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 271, 62 L. Ed. 260, 38 S. Ct. Rep. 65, Ann. Cas. 1918 B. 461.

⁹⁷ See *supra*, § 1655, n. 86.

⁹⁸ See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 250, 62 L. Ed. 260, 38 S. Ct. Rep. 65 Ann. Cas. 1918 B. 461.

⁹⁹ In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. Ed. 260,

§ 1657. Anti-Trust Acts; Sherman Act.

The prohibitions of the common law against contracts in restraint of trade have in most jurisdictions been reinforced by statutes, which are generally aimed not only at contracts, but at all combinations by which monopoly is sought or obtained. Particular examination of these statutes is impossible;¹ but something must be said of the Sherman Act, both because of its intrinsic importance and because of the effect of the decisions under it on the conception of illegal restraint of trade at common law. This Act makes criminal every contract, combination or conspiracy, in restraint of interstate or foreign commerce, and monopolizing or attempting to monopolize any part of such trade; and gives to any person injured in his business by anything forbidden by the statute a right to recover treble damages and costs.²

38 S. Ct. Rep. 65, Ann. Cas. 1918 B. 461, the court upheld an injunction restraining the leaders of a union from trying to "organise" the plaintiff's employees who had made such an agreement.

¹ They are summarized in "Trust Laws and Unfair Competition." U. S. Government Printing Office (1916).

² Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among

the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3 applies the prohibitions of the first section to commerce within the Territories or the District of Columbia or to commerce between such jurisdictions or between them and the States and foreign nations.

Sections 4 and 5 give the Federal circuit courts jurisdiction (now transferred to the United States District Courts) to enforce the law and provide that proceedings in equity may be brought by the United States Government to prevent and restrain violations thereof. The courts may make other persons parties to the proceedings.

Section 6 authorizes the seizure and condemnation of property in the course of transportation in interstate commerce or to a foreign country belonging to combinations, etc., prohibited in the first section.

§ 1658. Construction of the Sherman Act.

The statute being in terms limited to restraint of interstate or foreign trade or commerce, was at first held not to cover a combination of manufacturers;³ but this holding was later disregarded, and if a combination of manufacturers is engaged in selling goods in interstate or foreign commerce it is affected by the prohibition of the statute.⁴ No liability exists for acts done in foreign territory and there lawful under local law, though done pursuant to a conspiracy formed in the United States.⁵ Furthermore though an agreement or combination tends to produce a monopoly, it is not obnoxious to the statute unless it relates to something which is the object of trade or commerce. Therefore, a monopoly to control the business of baseball playing,⁶ or to control the business of selling trading stamps,⁷ is not within the terms of the Act. The principal controversy has been as to the meaning of "restraint of trade" as used in the Act. It was at first held that these words included every restraint whether reasonable or not;⁸ but a construction

Section 7 gives the right to treble damages stated in the text.

Section 8 defines person as including corporation.

³ *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249.

⁴ *Montague v. Lowry*, 193 U. S. 38, 48 L. Ed. 608, 24 S. Ct. 307; *Standard Oil Co. v. United States*, 221 U. S. 1, 68, 69, 55 L. Ed. 619, 31 S. Ct. 502, Ann. Cas. 1912 D. 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 S. Ct. 632.

⁵ *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 53 L. Ed. 826, 29 S. Ct. 511. For other decisions on the extent to which foreign commerce is covered by the statute, see *United States v. Pacific, etc., Navigation Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 S. Ct. 443; *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 Fed. 806; *United States v. Prince Line*, 220 Fed. 230.

⁶ *American League Baseball Club*

of *Chicago v. Chase*, 86 N. Y. Misc. 441, 149 N. Y. S. 6.

⁷ *Sperry Hutchinson Co. v. Fenster*, 219 Fed. 755.

⁸ *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540, four justices dissented. In *United States v. Joint Traffic Assoc.*, 171 U. S. 505, 43 L. Ed. 269, 19 S. Ct. 25, the sweeping language of the earlier case was somewhat modified, the court saying: "In *Hopkins v. United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement

which, if actually applied, would have made it a criminal offence to sell the business and good will of any corporation, firm or person engaged in interstate commerce, could not well be persisted in; and in later decisions the court has adopted the test of the common law—that of reasonableness.⁹ It may now

entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

⁹ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. 502, Ann. Cas. 1912 D. 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 S. Ct. 632. In the latter case the court said (pp. 179, 180): "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts

or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt."

Mr. Justice Harlan, though concurring in the decision of the two cases, dissented from the test adopted by other members of the court and adhered to the view that any restraint

be said that so far as contracts in restraint of trade are concerned the test of legality at common law and under the Sherman Act is the same, though the statute makes criminal executed transactions, and combinations which the common law might have found no way to attack. Not only contracts and combinations of ordinary traders and manufacturers are within the scope of the Act, but those of railroads,¹⁰ farmers,¹¹ and laborers;¹² but the application of the statute to farmers and laborers has been nullified by the Clayton Act.¹³ It is immaterial so far as the inhibitions of the Sherman Act are concerned what form a combination in unreasonable restraint of trade

whether reasonable or not was within the prohibition of the statute.

¹⁰ *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; *United States v. Joint Traffic Assoc.*, 171 U. S. 505, 43 L. Ed. 259, 19 S. Ct. 25; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436; *United States v. Union Pacific R. Co.*, 226 U. S. 470, 57 L. Ed. 306, 33 S. Ct. 162; *Darius Cole Transp. Co. v. White Star Line*, 186 Fed. 63, 108 C. C. A. 165.

¹¹ *Steers v. United States*, 192 Fed. 1, 112 C. C. A. 423. See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 441.

¹² *Loewe v. Lawlor (Danbury Hatters' Case)*, 208 U. S. 274, 52 L. Ed. 488, 28 S. Ct. 301, 235 U. S. 522, 59 L. Ed. 341, 35 S. Ct. 170; *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994.

¹³ Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from law-

fully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 provides, in substance, that in any case between an employer and employees, etc., relating to or growing out of a dispute as to the terms of employment, the United States courts shall not issue injunctions unless necessary to prevent irreparable injury to the property rights of the applicant.

This section provides further that an injunction shall not prohibit any person or persons, whether singly or in concert, from ceasing to work or persuading others to do so by peaceful means, or from attending at any place where he may lawfully be in order peacefully to communicate information or to persuade any person to abstain from working, or from ceasing to patronize or employ any party to such dispute, or persuading others thereto by peaceful and lawful means, or from paying or withholding strike benefits, or from peaceably assembling in a lawful manner and for lawful purposes. Finally, it is declared that the acts specified in this paragraph shall not be held to be violations of any law of the United States.

may take—whether it rests in harmonious understanding in contract, trust, holding company, or merger.¹⁴ Agreements to fix prices,¹⁵ by “cornering” the market,¹⁶ or otherwise; agreements to apportion or limit output or amount of business¹⁷ which have a similar effect; agreements to divide territory,¹⁸ or to divide profits,¹⁹ to fix resale prices,²⁰ to refrain from selling to an individual or a class,²¹ are all within the statute.²² Nor is it material that the products of the parties to a combination

¹⁴ See *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. 502, Ann. Cas. 1912 D. 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632; *United States v. International Harvester Co.*, 214 Fed. 987, 248 U. S. 588, 39 S. Ct. 5, 63 L. Ed. 9; *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 62 L. Ed. 968, 38 Sup. Ct. 473. The court in the case last cited favorably distinguished leases from sales, it may be supposed that had the finding of fact of the lower court been that the purpose and effect of the leases in question was unreasonably to restrain trade, the court would have found them obnoxious to the statute.

¹⁵ *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276; *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. 280; *United States v. Jellico Mountain, etc., Co.*, 46 Fed. 432. In *Baran v. Goodyear Tire & Co.*, 256 Fed. 571, A. N. Hand, J., held it no violation of the Sherman Act or of the Clayton Act for a manufacturer of tires who did not have a monopoly, to refuse to sell to a dealer who would not maintain list prices.

¹⁶ *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 33 Sup. Ct. 141. See also *G. W. McNear, Inc., v. American & British Mfg. Co. (R. I.)*, 107 Atl. 242.

¹⁷ *Cravens v. Carter-Crume Co.*, 92 Fed. 479, 34 C. C. A. 479; *Chesapeake, etc., Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256; *Gibbs v. McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Wheeler-Stenzel Co. v. National Window-Glass, etc., Assoc.*, 152 Fed. 864, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972; *United States Tobacco Co. v. American Tobacco Co.*, 163 Fed. 701.

¹⁸ *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. 502; *Pulp Wood Co. v. Green Bay Paper & Co. (Wis.)*, 170 N. W. 231.

¹⁹ *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, 29 S. Ct. 280; *United States v. MacAndrews Forbes Co.*, 149 Fed. 823.

²⁰ *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. 257, 62 L. Ed. 551; Ann. Cas. 1918 C. 447. And see *supra*, § 1649.

²¹ *United States v. Southern Wholesale Grocers' Assoc.*, 207 Fed. 434.

²² See *Kales, Good and Bad Trusts*, 30 Harv. L. Rev. 830.

are protected by patents,²³ or copyrights,²⁴ nor that the results of a combination have been advantageous. "The material fact is that it rests within the power of the monopoly to raise or lower prices at will, not that it has actually raised or lowered them."²⁵

§ 1659. Divisibility of promises imposing excessive restraint.

Contracts containing promises unlawful because of too extended restrictive effect have not been held so unlawful in their general purpose as to invalidate the whole transaction of which they were a part;²⁶ and the fact that a covenant in restraint of trade is more extended than the law allows will not preclude the enforcement of separable lawful restrictive promises. This is true where the restraint is over an excessive territory,²⁷ or for an excessive time,²⁸ is too broad in the nature of the busi-

²³ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9.

²⁴ *Straus v. American Publishers' Assoc.*, 231 U. S. 222, 58 L. Ed. 192, 34 Sup. Ct. 84.

²⁵ *Pulp Wood Co. v. Green Bay Paper &c. Co. (Wis.)*, 170 N. W. 230, 235, citing *Harding v. American &c. Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609.

²⁶ *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 593, 142 C. C. A. 220, L. R. A. 1916 C. 620, and cases cited. See also cases in the following note. Compare an agreement by which the owner of land agrees to use all legal means by argument before a legislative committee to bring about the passage of a bill; and also, if necessary, to bribe the legislators, in order to bring about the desired result. It may be supposed that the whole agreement would be invalid.

²⁷ *Price v. Green*, 16 M. & W. 346; *Tallis v. Tallis*, 1 E. & B. 391; *Under-*

wood v. Barker, [1899] 1 Ch. 300; *Goldsoll v. Goldman*, [1914] 2 Ch. 603; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Dean v. Emerson*, 102 Mass. 480; *Pelts v. Eichele*, 62 Mo. 171; *Mallinckrodt Chemical Works v. Nennich*, 169 Mo. 388, 69 S. W. 355; *Ammon v. Keill*, 95 Neb. 695, 146 N. W. 1009, 52 L. R. A. (N. S.) 503; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913; *Central New York &c. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. 878; *Lange v. Werk*, 2 Oh. St. 519; *Smith's Appeal*, 131 Pa. 579, 6 Atl. 251; *Monongahela River Consolidated, etc., Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088, 105 Am. St. Rep. 812.

²⁸ *Baines v. Geary*, 35 Ch. D. 154.

ness included,²⁰ or in the classes of persons with whom the promisor engages not to do business.²⁰

If, however, a promise is not only wider than is permissible but is also indivisible, the court will not attempt to give partial effect to the promise but the whole will fall.²¹ Thus a promise not to engage in business within the limits of a State, excepting in one city, is indivisible as to the whole territory included in the promise,²² while a promise not to engage in a particular business in a named city, or at any other place, is enforceable as to the city.²³ A promise not to engage "in any business whatever" is totally invalid,²⁴ while a promise not to engage in the business of baker, confectioner, or other business is valid as to the particular occupations named.²⁵ The test is whether the restriction can be stated as separate and distinct covenants.²⁶

§ 1660. Partial enforcement of promise indivisible in terms.

If a sharply defined line separated a restraint which is excessive territorially from such restraint as is permissible, there seems no reason why effect should not be given to a restrictive promise indivisible in terms, to the extent that it is lawful.²⁷ If it be said that the attempt to impose an excessive restraint invalidates the whole promise, a similar attempt should invalidate a whole contract, though the promises are in terms divisible. Questions involving legality of contracts

²⁰ *Parsons v. Cotterill*, 56 L. T. 839; *Rogers v. Maddocks*, [1892] 3 Ch. 348; *Maxim v. Nordenfelt, etc., Co. v. Nordenfelt*, [1893] 1 Ch. 630 (see also same case, [1894] A. C. 535); *Robinson v. Heuer*, [1898] 1 Ch. 451; *Haynes v. Doman*, [1899] 2 Ch. 13, 24; *Bromley v. Smith*, [1909] 2 K. B. 235.

²¹ *Nicholls v. Stretton*, 10 Q. B. 346; *Dubowski v. Goldstein*, [1896] 1 Q. B. 478.

²² *Perls v. Saalfeld*, [1892] 2 Ch. 149; *Rogers v. Maddocks*, [1892] 3 Ch. 348; *Hooper v. Willis*, 21 T. L. Rep. 691, 22 T. L. R. 451; *Leng v. Andrews*, [1909] 1 Ch. 763; *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770; *Althen v. Vreeland* (N. J.) 36 Atl. 479. But see *Fox v. Barbee*, 94 Kan. 212, 146 Pac. 364.

²³ *Consumers' Oil Co. v. Nunnamaker*, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193.

²⁴ *Pelts v. Eichele*, 62 Mo. 171. See also *Dean v. Emerson*, 102 Mass. 480; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251.

²⁵ *Baker v. Hedgecock*, 39 Ch. D. 520. See also *Continental Tyre & Rubber Co. v. Heath*, 29 T. L. R. 308.

²⁶ *Bromley v. Smith*, [1909] 2 K. B. 235.

²⁷ *Price v. Green*, 16 M. & W. 346.

²⁸ This is the case under the California Statute, which makes a restrictive promise accompanying the sale of good will lawful to the extent of the county or city where the business is carried on. *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628.

should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning. Covenants, in terms, unlimited as to time, have sometimes been divided in the way suggested,³⁸ but a covenant unlimited in time and space to withdraw from a business "so far as the law allows" has been held bad for unreasonableness if the quoted words are surplusage and for uncertainty if they are not.³⁹ On the other hand, a covenant restricting the promisor from entering a business "in competition" with a specified company was held valid for the territory within which the company was engaged in business, proof being allowed of what this territory was.⁴⁰ The fact that a covenant is wholly unenforceable will not prevent one who has purchased a business from acquiring and enforcing the rights which have previously⁴¹ been shown to be incident to the sale of good will, apart from any special covenant.⁴²

§ 1661. Collateral effects of illegal combinations.

Though an agreement forming an integral part of a plan to restrain trade unreasonably is unenforceable, the parties are

³⁸ In *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662, a time limit which the court held unreasonable was enforced for the length of time during which the promisee remained in business not exceeding the limit fixed by the contract. See also *Baines v. Geary*, 35 Ch. D. 154; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Harris v. Theus*, 149 Ala. 133, 43 So. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17; *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70.

³⁹ *Davies v. Davies*, 36 Ch. D. 359.

⁴⁰ *Cropper v. Davis*, 243 Fed. 310, 156 C. C. A. 90. The court said (p. 313): "The contract provides that, if the defendant is released from his agreement to devote five years to the business of the League under its instruction, to enter another line of business, it must be with an individual

firm, or company 'neither of which uses the plan, forms, or plan and forms, used by the National Rating League, in competition therewith.' It being possible for the court to ascertain by evidence in what territory the plaintiff did business, and whether another business of the same type would be in competition with the plaintiff, the contract was clearly limited to the territory thus described, and defendant was precluded from engaging in the like business as the plaintiff as clearly as though it had done so by geographical description. There is therefore no basis in fact for" the contention that the undertaking was too broad or too indefinite. See also *Fox v. Barbee*, 94 Kan. 212, 146 Pac. 364.

⁴¹ *Supra*, § 1640.

⁴² *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916 C. 620.

not thereby deprived of ordinary civil rights, therefore they may enforce contracts not related to the unlawful restraint, even between themselves,⁴³ and still more clearly as against third persons.⁴⁴ Ownership of property derived under a contract invalid because in restraint of trade, will be protected even against the person from whom it was derived.⁴⁵ Therefore, a trust or corporation formed in violation of the common law or of a statute prohibiting combinations in restraint of trade, may recover the price of goods sold by it,⁴⁶ unless the sale formed part of the plan to restrict trade,⁴⁷ or unless, as is the case in a few States, a local statute prohibits recovery.⁴⁸ Similarly, infringement of a copyright,⁴⁹ or patent,⁵⁰ will be enjoined though the complainant is a party to an illegal agreement or combination in restraint of trade. Indeed it may be

⁴³ *Metcalf v. Americian, etc., Co.*, 122 Fed. 115; *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 74 C. C. A. 462; *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27. See also *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208. *Cf. United Shoe Mach. Co. v. LaChapelle*, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913, D. 715.

⁴⁴ *Western Union Tel. Co. v. Burlington, etc., R. Co.*, 11 Fed. 1; *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; *Matthews Glass Co. v. Burk*, 162 Ind. 608, 70 N. E. 371; *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.*, 26 N. Y. Super. Ct. 411; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403.

⁴⁵ *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713, 75 Pac. 320.

⁴⁶ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431; *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491, 78 C. C. A. 607; *Bessire & Co. v. Corn*

Products Mfg. Co. 47 Ind. App. 298, 94 N. E. 353; *Moroney Hardware Co. v. Goodwin Pottery Co.* (Tex. Civ. App.), 120 S. W. 1088; *National Distilling Co. v. Cream City Imp. Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Pulp Wood Co. v. Green Bay & Co.*, 157 Wis. 604, 625, 147 N. W. 1058.

⁴⁷ *Continental Wall Paper Co. v. Louis Voight & Sons*, 212 U. S. 227, 53 L. Ed. 486, 29 S. Ct. 280.

⁴⁸ *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691; *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969. See also *Frank A. Menne Factory v. Harback*, 85 Ark. 278, 107 S. W. 991; *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120, 47 S. W. 288.

⁴⁹ *Scribner v. Strauss*, 130 Fed. 389.

⁵⁰ *General Electric Co. v. Wise*, 119 Fed. 922; *Johns-Pratt Co. v. Sachs Co.*, 175 Fed. 70, 99 C. C. A. 92; *Motion Picture Patents Co. v. Laemmle*, 178 Fed. 104; *Virtue v. Creamery Package Co.*, 179 Fed. 115, 102 C. C. A. 413; *Motion Picture Patents Co. v. Ullman*, 186 Fed. 174; *United States Fire Escape, etc., Co. v. Joseph Halsted Co.*, 195 Fed. 295.

broadly stated, rights of contract or property, unless directly promoting the illegal plan, are not curtailed by the plaintiff's participation in an illegal combination.⁵¹ And conversely, an illegal combination is liable on its contracts with a third person though he was aware of the illegality of the combination when the contract was formed.⁵²

§ 1662. Trust laws in foreign countries.

As the proper attitude of the law towards industrial agreements and combinations in restraint of trade, depends upon their economic effect, the experience of other nations, as illustrated by their laws, is of interest. They have been thus summarized:—

“In foreign countries the greatest diversity exists with respect to trust legislation. England has no prohibitory legislation, and in the interpretation of the common law the courts appear to favor freedom of contract more than freedom of industry. In the great English colonies, however, where conditions are most nearly like those in the United States, monopolistic combinations are generally forbidden. The laws of Germany allow a freedom of contract even wider than those of England, and generally uphold combinations or cartels even when they are practically monopolistic in character, while in France such combinations are prohibited in so far as they tend to disturb the natural course of prices as determined by free competition. In Austria such combinations are invalid but not prohibited by the criminal law. A similar diversity of law is found in other European countries.

One of the most remarkable features in the policy of certain foreign countries is the enactment of laws which restrict com-

⁵¹ *The Charles E. Wiswall v. Scott*, 74 Fed. 802, *affd.* 86 Fed. 671, 30 C. A. 339, 42 L. R. A. 85; *Boatmen's Bank v. Fritzen*, 175 Fed. 183. *Cp.* with *State v. Wilson*, 73 Kans. 334, 343, 80 Pac. 639, 84 Pac. 737, 117 Am. St. Rep. 479; *Louisville, etc., R. C. v. Burley Tobacco Co.*, 147 Ky. 22, 143 S. W. 1040; *Freed v. American Fire Ins. Co.*, 90 Miss. 72, 43 So. 947, 11 L. R. A. (N. S.) 368, 122 Am. St. Rep.

307; *Brooklyn Distilling Co. v. Standard Distilling, etc., Co.*, 120 N. Y. App. Div. 237, 105 N. Y. S. 264; *Kinner v. Lake Shore, etc., R. Co.*, 69 Ohio St. 339, 69 N. E. 614; *Springfield Fire, etc., Ins. Co. v. Cannon (Tex. Civ. App.)*, 46 S. W. 375.

⁵² *Brooklyn Distilling Co. v. Standard Distilling &c. Co.*, 120 N. Y. App. 237, 105 N. Y. S. 264 (action for rent under a lease).

petition in certain industries or even make obligatory the combination of competitors, as, for example, in the potash industry in Germany, the sulphur industry in Italy, and the petroleum industry in Roumania." ⁵³

§ 1663. Contracts not to bid at auction.

It is not permissible for intending buyers at auction or other competitive sales to make an agreement for a consideration, that only one of them shall bid in order that the property may be knocked down at a low valuation. It may probably be assumed that if the contract is against public policy, so far as the parties to it are concerned, it is also fraudulent as regards the seller, and the converse of this proposition is undoubtedly true. A somewhat nice distinction is taken in regard to such an agreement which was thus expressed in a Massachusetts case: ⁵⁴ "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced," ⁵⁵ "but such agree-

⁵³ Trust Laws and Unfair Competition (U. S. Gov't Printing Office, 1916), p. LIII.

⁵⁴ *Gibbs v. Smith*, 115 Mass. 592.

⁵⁵ *Kearney v. Taylor*, 15 How. 494, 519, 14 L. Ed. 607; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329; *Phippen v. Stickney*, 3 Met. 384; *Stillwell v. Glasscock*, 91 Mo. 658, 4 S. W. 438; *Murphy v. De France*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 86; *Whalen v. Brennan*, 34 Neb. 129, 51 N. W. 759; *Gulick v. Webb*, 41 Neb. 706, 60 N. W. 13, 43 Am. St. Rep. 720; *Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; *Bellows v. Russell*, 20 N. H. 427, 51 Am. Eec. 228; *Hunt-*

ington v. Bardwell, 46 N. H. 492; *National Bank v. Sprague*, 20 N. J. Eq. 159, 168; *De Baun v. Brand*, 61 N. J. L. 624, 41 Atl. 958; *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 83 N. Y. 14; *Smith v. Greenlee*, 2 Dev. L. 126, 18 Am. Dec. 564; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Smull v. Jones*, 6 W. & S. 122; *Maffet v. Ijams*, 103 Pa. St. 266; *McMinn's Legatees v. Phipps*, 3 Sneed, 196; *James v. Fulcro*, 5 Tex. 512, 55 Am. Dec. 743; *Flanders v. Wood*, 83 Tex. 277, 18 S. W. 572; *Dailey v. Hollis*, 27 Tex. Civ. App. 570, 66 S. W. 586; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93. *Cf. Woodruff v. Berry*, 40 Ark. 251; *Marshalltown Stone Co. v. Des Moines Brick Co.*, 114 Iowa, 574, 87 N. W. 496.

ment, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and, therefore, illegal."⁵⁶

Even an open statement, without misrepresentation, if calculated to chill bidding may render a sale voidable.⁵⁷ The English authorities, however, seem opposed to the American decisions, and to enforce agreements to refrain from bidding.⁵⁸ The American rule is not carried so far as to invalidate a con-

⁵⁶ *Hyer v. Richmond Traction Co.*, 80 Fed. 839, 42 U. S. App. 522, 26 C. C. A. 175, 168 U. S. 471, 18 S. Ct. 114, 42 L. Ed. 547; *McMullen v. Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117; *Atlas Nat. Bank v. Holm*, 71 Fed. 489, 34 U. S. App. 472, 19 C. C. A. 94; *Swan v. Chorpennning*, 20 Cal. 182; *Ray v. Mackin*, 100 Ill. 246; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Conway v. Garden City Co.*, 190 Ill. 89, 60 N. E. 82; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Shaw v. Elijah*, 54 Ind. App. 234, 102 N. E. 885; *Clark v. Stanhope*, 109 Ky. 521, 59 S. W. 856; *Gardiner v. Morse*, 25 Me. 140; *Weld v. Lancaster*, 56 Me. 453; *Hannah v. Fife*, 27 Mich. 172; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; *Wooton v. Hinkle*, 20 Mo. 290; *Miltenberger v. Morrison*, 39 Mo. 71; *Gobble v. O'Connor*, 43 Neb. 49, 61 N. W. 131; *McClelland v. Citizens' Bank*, 60 Neb. 90, 82 N. W. 319; *Gulick v. Ward*, 5 Halst. 87, 18 Am. Dec. 389; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793; *Kenny v. Lembeck*, 53 N. J. Eq. 20, 30 Atl. 525; *Jones v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *People v. Stephens*, 71 N. Y. 527; *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731; *Baird v. Sheehan*, 166 N. Y. 631, 60

N. E. 1107; *Coverly v. Terminal Warehouse Co.*, 83 N. Y. S. 369, 85 App. Div. 488; *Ingram v. Ingram*, 4 Jones L. 188; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Saxton v. Seiberling*, 48 Ohio St. 554, 562, 29 N. E. 179; *Kine v. Turner*, 27 Or. 356, 41 Pac. 664; *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. 642, 12 Am. St. Rep. 883; *In re Hay's Estate*, 159 Pa. St. 381, 28 Atl. 158; *Dudley v. Odom*, 5 S. C. 131, 22 Am. Rep. 6; *Wilson v. Wall*, 99 Va. 353, 356, 38 S. E. 181; *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953. See also *Fenner v. Tucker*, 6 R. I. 551; *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 37 Am. St. Rep. 765, 20 L. R. A. 545, and note. Compare *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627.

⁵⁷ *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765. In this case at a mortgagee's sale, the mortgagor announced that she was a widow dependent on the land for support and intended to bid. It was held that the sale should be set aside.

⁵⁸ *Galton v. Emuss*, 1 Coll. Ch. 243; *Re Carew's Estate*, 26 Beav. 187; *Heffer v. Martyn*, 36 L. J. Ch. 372; *Chattock v. Muller*, 8 Ch. D. 177. Compare *Levi v. Levi*, 6 C. & P. 239. See also 20 L. R. A. 543, note; *Phippen v. Stickney*, 3 Metc. 384, 387; 1 Story, Eq. Jur., § 293; *Story, Sales*, § 484.

tract to pay another money in consideration of his relinquishment of his right to purchase land at a price at which it had been offered to him.⁵⁹

§ 1664. Puffing.

Secret bidding by or on behalf of the seller may have a double importance. It may deprive the highest *bona fide* bidder of the goods and thereby cause a breach of a contract which he has made by being present and taking part in the sale. This aspect of the case has been previously considered;⁶⁰ but the bidding of the seller may also have the effect of inducing a buyer to whom the property is ultimately knocked down to make his successful bid, and on learning the facts he may wish to withdraw from the transaction on the ground of fraud. It is well settled that such a bidder has the right to withdraw under these circumstances.⁶¹ A rule was supposed to exist in English courts of equity that the employment of one puffer was justifiable, to prevent a sale of property for less than it was worth,⁶² but this rule was first changed by statute in England, so far as land is concerned,⁶³ and then by the Sale of Goods Act, so far as goods and chattels personal other than choses in action are

⁵⁹ *White v. McMath*, 127 Tenn. 713, 156 S. W. 470, 44 L. R. A. (N. S.) 1115. But see *Kincheloe v. Taylor*, 123 Va. 178, 96 S. E. 167; *sub nom.* *Kincheloe v. Strayer*.

⁶⁰ *Supra*, § 30.

⁶¹ *Green v. Baverstock*, 14 C. B. (N. S.) 204; *Veazie v. Williams*, 8 How. 134, 153, 12 L. Ed. 1018; *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 561; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Springer v. Kleinsorge*, 83 Mo. 152; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Bowman v. McClenahan*, 20 N. Y. App. Div. 346; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Woods v. Hall*, 1 Dev. Eq. 411; *McDowell v. Simms*, 6 Ired. Eq. 278, Busb. Eq. 130, 57 Am. Dec. 595; N. Dak. Civil Code, § 3994; *Walsh v. Barton*, 24 Ohio St. 28, 46; *Pennock's Appeal*, 14 Pa. St. 446, 53 Am. Dec. 561; *Staines v. Shore*, 16 Pa. St.

200, 55 Am. Dec. 492; *Yerkes v. Wilson*, 81 * Pa. St. 9; *Flannery v. Jones*, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648; S. Dak. Civil Code, § 1346. But see *East v. Wood*, 62 Ala. 313; *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345, 78 Am. St. Rep. 93. The rule which has been sometimes suggested (*National Bank v. Sprague*, 20 N. J. Eq. 159, 165; *Veazie v. Williams*, 3 Story, 611, 621) that the employment of a puffer will not make the sale voidable, if, after the bid of the puffer, there is a bid by a real buyer before that at which the property is knocked down seems unsound.

⁶² *Smith v. Clarke*, 12 Ves. 477, 483; *Flint v. Woodin*, 9 Hare, 618. But see *Mortimer v. Bell*, L. R. 1. Ch. 10, 16.

⁶³ 30, 31 Vict., c. 48.

concerned.⁶³ The American Uniform Sales Act has a similar provision.⁶⁴ The distinction between law and equity, in regard to the matter, never existed in the United States. Though bidding by the seller or his agents is fraudulent, it seems to be admitted, generally, that a right to bid may be expressly reserved on behalf of the seller.⁶⁵ It is, therefore, the secrecy of puffing which renders it a fraud upon bidders. The auctioneer may not himself be a bidder or agent for a bidder, because of the inconsistency of the position of selling as auctioneer and acting as buyer.⁶⁶ It may be questioned, however, whether an auctioneer may not properly bid a single specified sum for a purchaser.⁶⁷

⁶³ Sale of Goods Act, Sec. 58.

⁶⁴ Sec. 21 (4). The States which have enacted this statute are enumerated, *supra*, § 506 n. 2.

⁶⁵ *Thornett v. Haines*, 15 M. & W. 367; *Howard v. Castle*, 6 T. R. 642; *Miller v. Baynard*, 2 Houst. 559, 83 Am. Dec. 168; *Yerkes v. Wilson*, 81 * Pa. St. 9. So provided in Uniform Sales Act, Sec. 21 (3).

⁶⁶ *Veazie v. Williams*, 8 How. 134, 152, 12 L. Ed. 1018; *Mapps v. Sharpe*, 32 Ill. 13; *Gallatian v. Cunningham*, 8 Cow. 361; *Randall v. Lautenberger*, 16 R. I. 158, 13 Atl. 100; *Brock v. Rice*, 27 Gratt. 812; *Sugden, Vendors*, Col. 2 (14th Am. ed.), 687. *Contra*, *Scott v. Mann*, 36 Tex. 157.

⁶⁷ See *Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304.

CHAPTER XLV

ILLEGAL AGREEMENTS—WAGERS, USURY, SUNDAY LAWS

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§ 1664a. One party only need incur risk in a gaming contract.

As will appear from the following sections, wagers and gaming contracts are generally illegal. The typical wager is familiar but the essential feature of a wager making it illegal must be understood in order that the various kinds of agreements which come within the inhibition of the law as wagering or gambling agreements may be understood. It is the essence of such an agreement that if its terms are carried out and a promisor is compelled by the happening of the condition of his promise to perform it, on the one hand neither he nor a third person will have received anything of commensurate value, or regarded by the parties as of commensurate value, with the performance which he himself renders, and on the other hand the promisee will have suffered no detriment commensurate or regarded as commensurate with the performance. It is not essential that both parties shall make an aleatory promise. Doubtless such a bilateral chance is essential in what is strictly called a wager or bet; and in a jurisdiction where the illegality of wagering or gaming contracts depends wholly upon statutes, the words of the statute must be considered;¹ but no such narrow limits can be fixed for the prohibitions of public policy in a

¹ So in England it has been said "If either of the parties may win but cannot lose or may lose, but cannot win, it is not a wagering contract." Hawkins, J., in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, 491. See also *Thacker v. Hardy*, 4 Q. B. D. 685, 695; *Forget v. Ostigny*, [1895] A. C. 318, 326; *Quarles v. State*, 5 Humph. 561. Cf. the definition of "gambling" in *Lang v. Merwin*, 99 Me. 486, 59 Atl. 1021, 105 Am. St. 293; and see

Richards v. Starck [1911] 1 K. B. 296, 302, where Channell, J., said of the English definition that "a state of things has arisen which makes one doubt whether the definition can be treated as exhaustive." In that case although the plaintiff was to receive back, in any event, a deposit which he made, the loss of interest which he suffered if no profit was made was held to bring the transaction within the English Statute.

jurisdiction which holds wagering contracts invalid, apart from statute. It is the characteristic of a lottery that one party pays a definite sum in return for a promise of receiving a greater sum or greater value in a certain contingency. Yet "every lottery has the characteristics of a wager or bet although every wager is not a lottery."² Lotteries though almost universally prohibited by state constitutions and statutes, seem open, apart from legislation, to the same objection as any gambling contract in jurisdictions where the common law denies validity to wagers. Therefore a contract by which a purchaser pays a fixed sum in return for a promise to convey such a one of a number of lots, as may be determined by the drawing of lots, is invalid.³ A wagering policy of insurance also is invalid,⁴ though but one of the parties makes an aleatory promise.

§ 1665. When an aleatory promise involves gambling.

Every aleatory promise where the happening of the chance upon which performance of the promise depends involves no service by or disadvantage to the promisee, for which performance of the promise may be regarded as a compensation or an indemnity, is open to the same objection. An ordinary contract of guaranty or of insurance is unobjectionable because the happening of the condition on which performance depends is injurious to the promisee and performance of the promise is in the nature of compensation for the injury.⁵ But if the in-

² *Wilkinson v. Gill*, 74 N. Y. 63, 30 Am. Rep. 264, quoted in *Yellowstone Kit v. State*, 88 Ala. 196, 16 Am. St. Rep. 38. See also *Stone v. Mississippi*, 101 U. S. 814, 818, 25 L. Ed. 1079; *Grove Mfg. Co. v. Jacobs*, 117 Me. 163, 103 Atl. 14; *Roselle v. Farmers' Bank*, 141 Mo. 36, 42, 39 S. W. 274, 64 Am. St. Rep. 501; *Ex parte Kameta*, 36 Ore. 251, 254, 60 Pac. 394, 78 Am. St. Rep. 775.

³ *Glennville Investment Co. v. Grace*, 134 Ga. 572, 68 S. E. 301, 29 L. R. A. (N. S.) 758; *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; *Guenther*

v. Dwen, 11 Iowa, 133; *Wooden v. Shotwell*, 24 N. J. L. 789; *Allebach v. Godshalk*, 116 Pa. 329, 9 Atl. 444. In these jurisdictions lotteries were forbidden by statute or constitution, and a variety of raffles and gift enterprises are open to the same objection.

⁴ See the following section.

⁵ For this reason the contract in *Carill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256,—a promise by the seller of "smoke balls" to make a payment to any one who contracted influenza after using them—was unobjectionable.

sured has not what is called insurable interest the agreement is invalid, whether the insurance is marine,⁶ fire,⁷ or life.⁸ If the insured will sustain loss from the destruction of the subject-matter of the insurance, he will ordinarily have an insurable interest. It is of the essence of a gaming agreement that it is performable only upon the happening of a condition. Generally this condition will be a fortuitous event such as that furnished by an election, or a horse race, but this is not necessarily the case. A wager may relate to a trial of skill, or proof of an actual fact where the performance of the condition is or may be within the control of one of the parties.⁹ It is true, however, that though the condition may be within the power of one of the parties, this is not admitted by the other at the time of the bargain, and therefore as between the parties is regarded as fortuitous.¹⁰

On the other hand, a contract will not be open to objection because an advantage or disadvantage by the terms of the promise accrues to one of the parties on the happening of a purely fortuitous circumstance, provided that fortuitous circumstance adds to or depreciates the value of the consideration given the promisor;¹¹ while if the fortuitous cir-

⁶ *Moran v. Uzielli*, [1905] 2 K. B. 555; *Harrison v. Fortlage*, 161 U. S. 57, 40 L. Ed. 616; *Putnam v. Mercantile Marine Ins. Co.*, 5 Metc. 386; *Riggs v. Commercial Mutual Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516.

⁷ *Baldwin v. State Ins. Co.*, 60 Ia. 497, 15 N. W. 300; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 422.

⁸ *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4; *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 396; *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516.

⁹ *Hampden v. Walsh*, 1 Q. B. D. 189. The agreement in this case was

that a certain sum was to be paid for proof of the convexity of any railway, canal, or lake, a promise being made in return to pay a like sum in case of failure to make the proof. See also *Comer v. Powell* (Tex. Civ. App.), 189 S. W. 88. A lottery, however, it seems, must depend on a purely fortuitous event. See *Stoddart v. Sagar*, [1895] 2 Q. B. 474; *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47; *Reilly v. Gray*, 77 Hun, 402, 28 N. Y. S. 811. Cf. *State v. Lovell*, 39 N. J. L. 458.

¹⁰ See *supra*, § 119.

¹¹ In *Ferguson v. Coleman*, 3 Rich. L. 99, 45 Am. Dec. 761, the purchaser of land agreed to give a certain price if the market price of cotton advanced to 8 cts. a lb. by a certain day, and a smaller sum if the price did not so advance. The contract was held unobjectionable. It will be seen that the

cumstance bears no relation to the value of the consideration the transaction will be a wager.¹²

§ 1666. A promised prize for competition by others does not involve gambling.

Where a prize is offered for competition, the acceptance of the offer by competitors does not constitute a wagering contract if the offeror of the prize does not take part in the competition.¹³ And the fact that an entrance fee is required of the contestants has been held not to invalidate the transaction.¹⁴

value of the land depended on the price of cotton, and therefore an agreement to pay a larger sum if cotton advanced than if it did not, was merely a method of adjusting the price to the value of the property. Decisions involving the same point are: *Newell v. Smith*, 53 Conn. 72, 3 Atl. 674; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Wolf v. National Bank*, 178 Ill. 85, 52 N. E. 896; *Phillips v. Gifford*, 104 Iowa, 458, 73 N. W. 1033; *Deyo v. Hammond*, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719; *Treacy v. Chinn*, 79 Mo. App. 648; *Harper v. Crain*, 36 Ohio St. 338, 38 Am. Rep. 589; *Clyde v. Mohn*, 4 Ohio C. C. 537, 2 Ohio Civ. Dec. 694; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155. See also *United States v. Olney*, 1 Abb. (U. S.) 275; *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; *Dion v. St. John Baptiste Soc.*, 82 Me. 319, 19 Atl. 825; *Miller v. Eagle, etc., Ins. Co.*, 2 E. D. Smith, 268; *Edson v. Pawlet*, 22 Vt. 291; *Stevens v. Freund*, 169 Wis. 68, 171 N. W. 300; *Dunham v. St. Croix Mfg. Co.*, 34 N. Bruns. 243. But see *contra*, *Burney v. Blanks* (Tex. Civ. App.), 136 S. W. 806, and *q. Comer v. Powell* (Tex. Civ. App.), 189 S. W. 88.

¹² In the following cases promises to pay a price for property made wholly or partly contingent on the election of a certain official were held

to be wagers: *Givens v. Rogers*, 11 Ala. 543; *Merchants' Sav., etc., Co. v. Goodrich*, 75 Ill. 554; *Hiser v. State*, 12 Ind. 330; *Davis v. Leonard*, 69 Ind. 213; *Craig v. Andrews*, 7 Iowa, 17; *Todd v. Coplinger*, 4 Bush, 139; *Commonwealth v. Shouse*, 16 B. Mon. 325, 63 Am. Dec. 551; *Bates v. Clifford*, 22 Minn. 52; *Lucas v. Harper*, 24 Ohio St. 328; *Harper v. Crain*, 36 Oh. St. 338, 38 Am. Rep. 589; *Somers v. State*, 5 Sneed, 438.

¹³ *Applegarth v. Colley*, 10 M. & W. 723; *Alvord v. Smith*, 63 Ind. 58; *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830; *Morrison v. Bennett*, 20 Mont. 560, 568, 52 Pac. 553, 40 L. R. A. 158; *People v. Fallon*, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; *Harris v. White*, 81 N. Y. 532; *State v. De Boy*, 117 N. C. 702, 23 S. E. 167; *Ballard v. Brown*, 67 Vt. 586, 32 Atl. 485. See also *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479; *Moahier v. LaCrosse County Agricultural Soc.*, 90 Wis. 37, 62 N. W. 932. Similarly a contest where the person receiving most votes of third persons is awarded a prize, is unobjectionable though the voters pay for the privilege of voting. *Dion v. St. John Baptiste Soc.*, 82 Me. 319, 19 Atl. 825.

¹⁴ *Hankins v. Ottinger*, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76; *Wilson v. Conlin*, 3 Ill. App. 517; *Molk*

This result must be defended on the ground that the entrance fee is paid rather to cover the expenses of the contest than as purchasing the chance to secure a larger sum, as where a lottery ticket is purchased for a small fixed sum; but a sweepstakes where the winner receives the aggregate of the entrance fees of other contestants is wagering.¹⁵ The English statute, however, permits such transactions unless the game is unlawful.¹⁶

§ 1667. How far wagers are illegal at common law in England.

The mere fact that an agreement was a wager did not make it unenforceable or opposed to public policy according to the English common law.¹⁷ Statutes, however, restricted various forms of betting, and apart from such statutes wagers were held against public policy as matter of common law if the subject-matter of the bet was deemed to be obnoxious to the public welfare.¹⁸ In many of the cases to this effect the court displayed considerable ingenuity in finding a reason to invalidate a wagering contract on account of its subject-matter.¹⁹ By

v. Daviess County &c. Assoc., 12 Ind. App. 542; *People v. Fallon*, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; *Harris v. White*, 81 N. Y. 532; *Porter v. Day*, 71 Wis. 296, 37 N. W. 259; *Gates v. Tinning*, 5 U. C. Q. B. 540. But see *Bronson Agricultural &c. Assoc. v. Ramsdell*, 24 Mich. 441; *Comly v. Hillegass*, 94 Pa. 132, 39 Am. Rep. 774.

¹⁵ *Harris v. White*, 81 N. Y. 532; *Dudley v. Flushing Jockey Club*, 14 N. Y. Misc. 58, 35 N. Y. S. 245; *State v. De Boy*, 117 N. C. 702, 23 S. E. 167. See also *West v. Carter*, 129 Ill. 249, 21 N. E. 782.

¹⁶ See *Jenks v. Turpin*, 13 Q. B. D. 505; *Trimble v. Hill*, 5 A. C. 342.

¹⁷ In *Jones v. Randall*, 1 Cowp. 37, Lord Mansfield allowed the winner of a wager to recover, and in *Hampden v. Walsh*, 1 Q. B. D. 189, Cockburn, C. J., said:

"It is well established by numerous authorities, which it would be here

superfluous to cite, that at common law, a wager, being a contract by A to pay money to B on the happening of a given event, in consideration of B paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on."

¹⁸ *DaCosta v. Jones*, 2 Cowp. 729; *Atherfold v. Beard*, 2 T. R. 610; *Eltham v. Kingsman*, 1 B. & Ald. 683; *Gilbert v. Sykes*, 16 East, 150.

¹⁹ In *Thackoorseydass v. Dhondmull*, 6 Moore's P. C. 300, 310, Lord Campbell said: "I regret to say that we are bound to consider the common law of England to be, that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look

statute, however, in 1845,²⁰ a wager was made unenforceable, and since that time, no recovery can be had on such a contract. It is looked upon, however, as merely unenforceable as distinguished from positively unlawful, a distinction which leads to certain consequences where a wagering agreement is only collaterally involved. Thus negotiable paper given in payment of a wager is not illegal, but merely lacks sufficient consideration.²¹ So if a person lost a wager and requested another to pay it, he was liable to repay the sum,²² until 1892 when a further statute prohibited recovery in such a case.²³

§ 1668. Common law of the United States.

In most of the United States there are doubtless statutes making wagers illegal, but irrespective of such statutes such agreements are generally held opposed to public policy.²⁴ In

with concern and almost with shame, on the subterfuges and contrivances and evasions to which Judges in England long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the legislature, an event which probably would have happened much sooner without the abortive attempts to accomplish the object by judicial decision."

²⁰ 8 and 9 Vict., c. 109, § 18.

²¹ *Fitch v. Jones*, 5 E. & B. 238. There the burden was held to be on the defendant to prove that an indorsee (the plaintiff) was not a purchaser for value, though had fraud or illegality instead of lack of consideration been shown, the burden would have shifted to the defendant to prove that he was a purchaser for value.

²² *Rosewarne v. Billing*, 15 C. B. (N. S.) 316.

²³ 55 Vict., c. 9; *Tatam v. Reeve*, [1893] 1 Q. B. 44.

²⁴ In *Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225, 4 S. Ct. 160, Matthews, J., for the court, said: "Generally, in this country, all wagering contracts are held to be illegal and

void as against public policy," citing: *Melchert v. American Union Telegraph Co.*, 3 McCrary, 521, s. c. 11 Fed. 193, and note; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Love v. Harvey*, 114 Mass. 80; *Gregory v. Wendell*, 40 Mich. 432; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Dickson's Executor v. Thomas*, 97 Pa. 278; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252." In *Love v. Harvey*, 114 Mass. 80, 82, Gray, C. J., for the court said: "In Massachusetts, the English law on this subject has never been adopted, used, or approved, and, although the question has not been directly adjudged, it has long been understood that all wagers are unlawful. Const. Mass., c. 6, art. 6; *Amory v. Gilman*, 2 Mass. 1, 6; *Ball v. Gilbert*, 12 Met. 397, 399; *Sampson v. Shaw*, 101 Mass. 145, 150, 3 Am. Rep. 327, Metcalf, Contracts, 239. There are decisions or opinions to the same effect in each of the New England States," citing from New England: *Wheeler v. Spencer*, 15 Conn. 28, 30; *Lewis v. Littlefield*, 15 Me. 233; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104,

a few States, however, the English common law has been followed so far as statutes permitted.²⁵

§ 1669. Speculative contracts of purchase and sale.

Sales and contracts to sell are not in their nature wagers, but the machinery of stock exchanges and produce exchanges has been used for the purpose of speculation in making bargains which have been held to amount to wagers. Statutes in some jurisdictions have increased the severity of the rules of the common law. Aside from such statutes, the fact that transactions are entered into on a margin does not make them gaming contracts,²⁶ though they are made such by statute in Califor-

25 Am. Dec. 451; *Stoddard v. Martin*, 1 R. I. 1, 2, 19 Am. Dec. 643; *Collamer v. Day*, 2 Vt. 144; *West v. Holmes*, 26 Vt. 530; and adding: *Edgell v. McLaughlin*, 6 Whart. 176, 36 Am. Dec. 214; *Rice v. Gist*, 1 Strob. 82. To the cases thus cited may be further added *Chester v. Brannan*, 3 Calif. 328; *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139; *Western Union Tel. Co. v. State*, 165 Ind. 492, 510, 76 N. E. 100, 3 L. R. A. (N. S.) 153; *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 614, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317; *Gibney v. Olivette*, 196 Mass. 294, 82 N. E. 41; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93; *Bernard v. Taylor*, 23 Oreg. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; *Waugh v. Beck*, 114 Pa. 422, 6 Atl. 923, 60 Am. Rep. 354. And the general recognition of the invalidity of wagering contracts of insurance points in the same direction.

²⁵ This was especially true in New York, until by statute all wagering contracts were made illegal. See 3 Kent's Comm. 277, 278. See also as upholding the English common-law rule as to wagers: *Morgan v. Pettit*, 4 Ill. 529; *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100; *Walker v. Armstrong*, 54 Tex. 609.

²⁶ *Universal Stock Exchange v. Stevens*, 66 L. T. (N. S.) 612; *Forget v. Ostigny*, [1895] A. C. 318; *Union Nat. Bank v. Carr*, 15 Fed. 438; *Clews v. Jamieson*, 182 U. S. 461, 21 S. Ct. 845, 44 L. Ed. 1183; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; *Titcomb v. Richter*, 89 Conn. 226, 93 Atl. 526; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Oldershaw v. Knowles*, 101 Ill. 117; *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336, 9 Am. St. Rep. 571; *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Ball v. Campbell*, 30 Kans. 177, 2 Pac. 165; *Sawyer v. Taggart*, 14 Bush, 727; *Durant v. Burt*, 98 Mass. 161; *Bullard v. Smith*, 139 Mass. 492, 2 N. E. 86; *Bingham v. Scott*, 177 Mass. 208, 58 N. E. 687; *Clay v. Allen*, 63 Miss. 426; *Stenton v. Jerome*, 54 N. Y. 480; *Gruman v. Smith*, 81 N. Y. 25; *Minor v. Beveridge*, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804; *Taylor's Estate*, 192 Pa. St. 304, 309, 313, 43 Atl. 973, 975, 73 Am. St. Rep. 812; *Smyth v. Glendinning*, 194 Pa. St. 550, 45 Atl. 364; *Fearson v. Little*, 227 Pa. 348, 76 Atl. 72; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl.

nia.²⁷ Nor is a contract giving one party or the other an option to carry out the transaction or not at pleasure, a wager. It is legal unless forbidden by statute.²⁸

In Illinois and perhaps other States, however, such statutes have been passed.²⁹ A contract to sell goods in the future, which the seller does not own at the time, is, aside from statute, not only legal but common.³⁰ In some jurisdictions, however, such contracts also are made illegal by statute under special circumstances which cannot always be assumed to be identical with the single requirement of the common law that the parties must not contemplate settling the contract by payment of differences instead of performing it by actual delivery.³¹

106, 64 L. R. A. 160; *Allen's Exec. v. Virginia Trust Co.*, 116 Va. 319, 82 S. E. 104.

²⁷ *Cashman v. Root*, 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482; *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140; *Sheey v. Shinn*, 103 Cal. 325, 37 Pac. 393; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Parker v. Otis*, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56.

²⁸ *Union Nat. Bank v. Carr*, 15 Fed. 438; *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621; *Godman v. Meixsel*, 65 Ind. 32; *Mason v. Payne*, 47 Mo. 517; *Pieronnet v. Lull*, 10 Neb. 457, 6 N. W. 759; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Story v. Salomon*, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 92, 38 Am. Rep. 398; *Lester v. Buel*, 49 Ohio St. 240, 252, 30 N. E. 821, 34 Am. St. Rep. 556; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155.

²⁹ See as to construction of the Illinois statutes, *Ubber v. Binnian*, 182 Ill. 508, 55 N. E. 552; *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043; *Miller v. Sincere*, 273 Ill. 194, 112 N. E. 664, and cases cited. *Stewart v. Dodson*, 282 Ill. 192, 118 N. E. 405, 1 A. L. R. 1544.

³⁰ See *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1133, 21 S. Ct. 845;

Bond v. Hume, 243 U. S. 15, 61 L. Ed. 565; *Springs v. James*, 137 N. Y. App. Div. 110, 121 N. Y. S. 1054; *International Life Ins. Co. v. Stuart* (Tex. Civ. App.), 201 S. W. 1088.

³¹ See *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *Johnson v. Miller*, 67 Ark. 172, 53 S. W. 1052; *Hartnett v. Wilson*, 31 Cal. App. 678, 161 Pac. 281; *Branch v. Palmer*, 65 Ga. 210; *Moss v. Exchange Bank*, 102 Ga. 806, 30 S. E. 267; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Wright v. Vaughan*, 137 Ga. 52, 72 S. E. 412; *Carey v. Myers*, 92 Kan. 493, 141 Pac. 602, 171 N. C. 1916 B. 1056; *Lemonius v. Mayer*, 71 Miss. 514, 14 So. 33; *Dillard v. Brenner*, 73 Miss. 130, 18 So. 933; *Violett v. Mangold* (Miss.), 27 So. 875; *Weld v. Austin*, 107 Miss. 279, 65 So. 247; *Cohn v. Brinson*, 112 Miss. 348, 73 So. 59, Ann. Cas. 1918 E. 134; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184, 132 Mo. 150, 33 S. W. 783; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Staples v. Gould*, 9 N. Y. 520; *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731; *Coffe v. Wilhite*, 56 Okl. 394, 156 Pac. 169; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143; *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939; *Saunders v. Phelps Co.*, 53 S. O. 173,

§ 1670. Test of validity is intent to make actual delivery.

The test adopted in the absence of statute distinguishes between agreements to buy and sell in which an actual delivery of the property is contemplated, and similar agreements in which it is contemplated merely that a settlement shall be made between the parties based on fluctuations in the market price. An agreement of the former kind is legal; one of the latter kind involves wagering and is illegal.³² The importance of observing that objection to recovery is not so much the character of the contract as the guilt of the plaintiff³³ is illustrated in wagering contracts of this sort; for if either of the parties contracts in good faith, intending that the goods shall be actually delivered, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of

31 S. E. 54; Mackay Telegraph-Cable Co. v. Bain (Tex. Civ. App.), 163 S. W. 98. See also in regard to "short" sales of stock, Fiske v. Doucette, 206 Mass. 275, 92 N. E. 255; Adams v. Dick, 226 Mass. 46, 115 N. E. 227.

³² Thacker v. Hardy, 4 Q. B. D. 685; Universal Stock Exchange v. Strachan, [1896] A. C. 166; *In re Baxter*, 152 Fed. 137, 81 C. C. A. 355, 11 Ann. Cas. 437; Ware v. Pearsons, 173 Fed. 878, 98 C. C. A. 364; Murphy v. Spring, 200 Fed. 372, 118 C. C. A. 524, 45 L. R. A. (N. S.) 539; James v. Clement, 223 Fed. 385, 138 C. C. A. 621; Birmingham, etc., Sav. Co. v. Currey, 175 Ala. 373, 57 So. 962; Barnes v. State, 77 Ark. 124, 91 S. W. 10; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Titcomb v. Richter, 89 Conn. 226, 93 Atl. 526; Hartnett v. Wilson, 31 Cal. App. 678; Kilpatrick v. Richter, 139 Ga. 643, 77 S. E. 1065, 143 Ga. 470, 85 S. E. 319, 146 Ga. 277, 91 S. E. 51; Lamson v. West, 201 Ill. App. 251; Pelouze v. Slaughter, 241 Ill. 215, 89 N. E. 259; Carey v. Myers, 92 Kans. 493, 141 Pac. 602, L. R. A. 1916 B. 1056; Stafford County Grain Co. v. Rock Milling, etc., Co., 94 Kans. 360, 146 Pac. 1139; Timmons v. Timmons, 145 Ky. 539, 140 S. W. 164; Lancaster

v. Ames, 103 Me. 87, 68 Atl. 533, 17 L. R. A. (N. S.) 229, 125 Am. St. Rep. 286; Richter v. Poe, 109 Md. 20, 71 Atl. 420, 22 L. R. A. (N. S.) 174; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Chandler v. Prince, 221 Mass. 495, 109 N. E. 374; Cohn v. Brinson, 112 Miss. 348, 73 So. 59, Ann. Cas. 1918 E. 134; Smith v. Bailey (Mo. App.), 209 S. W. 945; Sunderland v. Hibbard, 97 Neb. 21, 149 N. W. 57; Blessing v. Smith, 74 N. J. Eq. 593, 70 Atl. 933; Weld v. Postal Tel. Cable Co., 199 N. Y. 88, 92 N. E. 415; Stiebel v. Lissberger, 166 N. Y. App. D. 164, 151 N. Y. S. 822; Orvis v. Holt-Morgan Mills, 173 N. C. 231, 91 S. E. 948; Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; Snider v. Harvey, 215 Pa. 538, 64 Atl. 687; Gwathmey v. Burgiss, 104 S. C. 280, 88 S. E. 816; Coles v. Morrow, 128 Tenn. 550, 162 S. W. 577; Wolfe v. Andrews (Tex. Civ. App.), 192 S. W. 266; Pate v. Wilson Bros. Mercantile Co. (Tex. Civ. App.), 208 S. W. 235; Talbot v. Martindale (Tex. Civ. App.), 211 S. W. 302; Beamish v. Richardson, 49 Can. S. C. 595; and see cases *infra* n. 34.

³³ See *supra*, § 1630.

the other party;³⁴ while the party guilty of an intent to gamble cannot recover.³⁵

§ 1671. Nature of transactions on Exchanges.

There is no question anywhere that the dealings of a "bucket shop," where market prices are used as a basis for the settlement of differences on so-called purchases and sales and where

³⁴ *Grizewood v. Blane*, 11 C. B. 526; *Clews v. Jamieson*, 182 U. S. 461, 489, 45 L. Ed. 1183, 21 Sup. Ct. 845; *Wilhite v. Houston*, 200 Fed. 390, 118 C. C. A. 542; *In re Trion Mfg. Co.*, 214 Fed. 161; *Flowers v. Bush & Witherspoon Co.*, 254 Fed. 519, 166 C. C. A. 77; *Hooper v. Nuckles (Ala.)*, 39 So. 711; *Johnston v. Miller*, 67 Ark. 172, 53 S. W. 1052; *Whitehead v. Ballinger*, 38 Colo. 66, 88 Pac. 169; *Watson v. Haslehurst*, 127 Ga. 298, 56 S. E. 459; *Robson v. Weil*, 142 Ga. 429, 83 S. E. 207; *Logan v. Musick*, 81 Ill. 415; *Scanlon v. Warren*, 169 Ill. 142, 48 N. E. 410; *Vigel v. Gatton*, 61 Ill. App. 98; *Semler Milling Co. v. Fyffe*, 127 Ill. App. 514; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788; *Murray v. Ocheltree*, 59 Iowa, 435, 13 N. W. 411; *Counselman v. Reichert*, 103 Iowa, 430, 72 N. W. 490; *Sawyer v. Taggart*, 14 Bush, 727; *Rumsey v. Berry*, 65 Me. 570, 573; *Dillaway v. Alden*, 88 Me. 230, 33 Atl. 981; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Davy v. Bangs*, 174 Mass. 238, 54 N. E. 536; *Gibney v. Olivette*, 196 Mass. 294, 82 N. E. 41; *Gregory v. Wendell*, 40 Mich. 432; *Donovan v. Daiber*, 124 Mich. 49, 82 N. W. 848; *Cadwell v. Lean's Est.*, 169 Mich. 117, 134 N. W. 1110; *McCarthy v. Weare Commission Co.*, 87 Minn. 11, 91 N. W. 33; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Ed-

wards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617; *Deierling v. Sloop*, 67 Mo. App. 446 (but see Missouri decisions at end of this note); *Rogers v. Marriott*, 59 Neb. 759, 82 N. W. 21; *Thompson v. Williamson*, 67 N. J. Eq. 212, 58 Atl. 602; *Amsden v. Jacobs*, 75 Hun, 311, affd., without opinion, 148 N. Y. 762, 43 N. E. 985; *Zeller v. Leiter*, 114 N. Y. App. D. 148, 99 N. Y. S. 624; *Botts v. Mercantile Bank*, 170 N. Y. App. D. 879, 156 N. Y. S. 700; *Dows v. Glaspel*, 4 N. Dak. 251, 60 N. W. 60; *MacDonald v. Gessler*, 208 Pa. 177, 57 Atl. 361; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; *Carson v. Milwaukee Produce Co.*, 133 Wis. 85; 113 N. W. 393; *Kassuba Commission Co. v. Blodgett*, 155 Wis. 529, 143 N. W. 1060; *Jacobs v. Wisconsin Nat. Ins. Co.*, 162 Wis. 318, 156 N. W. 159. The law of Missouri on this point seems otherwise. The wrongful intention of one party makes the transaction invalid. *Wilhite v. Houston*, 200 Fed. 390, 118 C. C. A. 542; *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202; *Taylor v. Sebastian*, 158 Mo. App. 147, 138 S. W. 549; and so in Tennessee, *McGrew v. City Produce Exchange*, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771.

³⁵ *Higgins v. McCrea*, 116 U. S. 671, 685, 29 L. Ed. 764, 6 Sup. Ct. 557; *Nash Wright Co. v. Wright*, 156 Ill. App. 243.

no delivery is ever made or expected, are gambling;³⁶ but the bulk of the speculative transactions in the United States is carried on through the machinery of stock and produce Exchanges, by the rules of which an actual delivery of the stock or produce (or of its symbols) is required as between the members of the Exchanges who contract with one another as principals. These contracts made on the Exchanges are, therefore, not within the definition of gambling transactions, and the use of a clearing house where contracts to buy and to sell made by the same broker on the same day may be set off against one another without actual deliveries in so far as the contracts cancel one another, is not objectionable.³⁷ As between the broker and his customer the situation is different. The party called a broker is in reality much more than that. He does not bring his customer in contact with a principal, but contracts on the Exchange himself as a principal. He advances in speculative transactions ordinarily the greater part of the capital needed to finance them on the Exchange. He knows frequently that the customer's resources are insufficient to enable the latter to pay in full either immediately or within any probable time in the future the full cost of the stock or produce purchased on his account, or to furnish the full amount of anything sold "short" for his account. The ordinary method of carrying on the business will, therefore, involve the making of new transactions on the Exchange of the converse kind to those first made, and a settlement of differences between broker and customer. No agreement to this effect is ordinarily made and none is needed, for the Exchanges being in constant operation, the customer always has it in his power to order the settlement of his account by new transactions on the Exchange, and if the customer's margin becomes insufficient, the broker similarly has power to close the account by making the necessary transactions on the Exchange, and applying whatever credit or securities of the customer he may have towards the balance. This being the ordinary situation, two questions arise:

³⁶ See cases cited in notes to the preceding section.

³⁷ *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, 21 Sup. Ct. 845; *Board of Trade v. Christie, etc., Co.*, 198 U. S.

236, 49 L. Ed. 1031, 25 Sup. Ct. 637; *Cleage v. Laidley*, 149 Fed. 346, 79 C. C. A. 284; *Dillaway v. Alden*, 88 Me. 230, 235, 33 Atl. 981.

(1) May the contract between broker and customer be invalid, though the contracts or sales entered into on the Exchange for the customer's account are valid?

(2) Assuming that the first question is answered in the affirmative, is the contract between broker and customer invalid under such circumstances as are stated above?

§ 1672. Whether contract between broker and customer may be invalid, though that made on the Exchange is valid.

If a transaction is carried out on an Exchange as outlined in the preceding section, it seems difficult to see why an agreement between the broker and customer that the latter should only be required to settle differences, should make the transaction any more objectionable. The broker in no event can make or lose anything except the amount of his commissions, and interest, unless his customer becomes insolvent with insufficient margin and these opportunities of gain or loss are the same whether or not he makes the agreement suggested with his customer. Likewise the speculative risks of the customer are in no way affected by such an agreement with his broker, for even though no such agreement is made it is always possible by entering into new transactions on the Exchange to close his account by paying differences, and in any event he must get the gain or suffer the loss which advance or depreciation of what has been bought or sold for his account involves.

In England it seems that assuming the intention of the broker and customer to effect real transactions of purchase or sale, and that such transactions were entered into, it would probably be conclusive of the validity of the contract.³⁸ Perhaps this is also true in New York;³⁹ but in Illinois,⁴⁰ Massa-

³⁸ 20 Law Quar. Rev. 59, discussing *Thacker v. Hardy*, 4 Q. B. D. 685; *Forget v. Ostigny*, [1895] A. C. 318, and other cases.

³⁹ See *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, 21 Sup. Ct. 845;

Hurd v. Taylor, 181 N. Y. 231, 233, 73 N. E. 977; *Springs v. James*, 137 N. Y. App. D. 110, 121 N. Y. S. 1054.

⁴⁰ *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302.

chusetts,⁴¹ and doubtless most other States,⁴² the agreement between the customer and broker may be held invalid though the transactions contemplated on the Exchange were valid.

§ 1673. Evidence of intention that there shall be no actual delivery.

The language of the cases is nearly uniform that what is requisite in order to invalidate a contract which provides in terms for the purchase or sale of stock or produce is that the parties intend or contemplate a settlement of differences instead of actual deliveries. In most speculative contracts made through brokers both customer and broker must certainly expect that transactions will be closed by the payment of differences, but they recognize the possibility of either party calling upon the other for actual performance. Though they may know that it will be wholly impossible for the customer actually to carry out all of the transactions which he has ordered they also recognize that he may call for actual performance of some of them at least, and those if any that may thus be performed are undetermined when the transactions are ordered.

Where the validity of a contract depends on the intent of the parties, undoubtedly if they agree to settlement by payment of differences, this will make their contract invalid. How far a mutual intention or expectation which falls short of an actual agreement produces the same effect is somewhat troublesome. The Massachusetts court has said: "If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market

⁴¹ *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Fiske v. Doucette*, 206 Mass. 275, 92 N. E. 455; *Adams v. Dick*, 226 Mass. 46, 115 N. E. 227. See also *Houghton v. Keveney*, 230 Mass. 49, 119 N. E. 447.

⁴² See *Counselman v. Reichart*, 103 Ia. 430, 72 N. W. 490; *Snider v. Harvey*, 215 Pa. 538, 64 N. E. 687; *Waite v. Frank*, 14 S. Dak. 626, 86 N. W. 645; *Carson v. Milwaukee Produce Co.*, 133 Wis. 85, 113 N. W. 393.

price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract."⁴³ But other cases would indicate that the predominant expectation will make an agreement invalid although the parties had not excluded by contract the possibility of actual performance.⁴⁴

§ 1674. Subsequent changes of intention.

If an agreement is originally valid because the parties contemplated actual delivery, it is not invalidated by the discharge of the contract by a subsequent agreement to pay differences as they exist at the time of the subsequent agreement.⁴⁵ There

⁴³ *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. By statute originally passed in 1890 and now Mass. Rev. L., c. 99, § 6, it was enacted that the fact that settlements had been made without actual deliveries should be *prima facie* evidence that there was an intention that there should be no actual deliveries. See *Fiske v. Doucette*, 206 Mass. 275, 92 N. E. 455; *Adams v. Dick*, 226 Mass. 46, 115 N. E. 227.

⁴⁴ In *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302, the court said: "The intention of the parties may be determined from a variety of circumstances. Among these circumstances, besides the mode of dealing between the parties, is the pecuniary ability of the party purchasing. If the purchases of a party, as ordered through a broker, are larger in amount than he is able to pay for, it is a strong circumstance indicating that there was no intention of receiving the property, but rather an intention to settle the difference between the market price and the contract price. Such intention may also be inferred where the party, making the purchase, never calls upon the party, ordering the purchase, for the purchase money, but only for margins. It makes no difference, whether the

real intention is formally expressed in words or not, if the facts and circumstances in proof show, that it was the real understanding that there should be no actual purchase and no delivery or acceptance of the property involved in the contract, but merely an adjustment of damages upon differences." And in the following decisions the courts recognized that no express agreement between the parties for the settlement of differences is requisite to invalidate the transaction, but that intention may be sought from all the surrounding circumstances. *Boyd v. Hanson*, 41 Fed. Rep. 174; *Hooper v. Nuckles* (Ala.), 39 So. 711; *Phelps v. Holderness*, 56 Ark. 300, 19 S. W. 921; *Johnston v. Miller*, 67 Ark. 172, 181, 53 S. W. 1052; *Weare Commission Co. v. People*, 209 Ill. 528, 70 N. E. 1076; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. 490; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862; *Sprague v. Warren*, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; *Jennings v. Morris*, 211 Pa. St. 600, 61 Atl. 115; *Snider v. Harvey*, 215 Pa. 538, 64 Atl. 687; *Waite v. Frank*, 14 S. Dak. 626, 86 N. W. 645; *Carson v. Milwaukee Produce Co.*, 133 Wis. 85, 113 N. W. 393. Cf. *Baker v. Lehman*, 186 Ala. 493, 65 So. 321.

⁴⁵ *Dillon v. McCrea*, 59 Ill. 505;

is nothing illegal in such a settlement. It is the executory agreement to make it in the future which is invalid; and the invalidity seems the same whether such an executory agreement is made at the outset or is subsequently adopted in substitution of a prior legal contract. The distinction is between an agreement to pay differences which may exist in the future and an agreement to pay the differences which exist at the time the agreement is made.

If the parties originally make an illegal agreement contemplating settlement by payment of differences, they may substitute for it subsequently a valid contract contemplating actual delivery.⁴⁶

§ 1675. Negotiable instruments.

If negotiable paper made by the loser is given to the winner in a gambling transaction, the latter can maintain no action upon it.⁴⁷

An indorsee of an instrument who is not a holder in due course clearly stands in no better position than the original payee.⁴⁸ A renewal of a negotiable instrument originally given for an unenforceable gambling debt is itself unenforceable;⁴⁹

Tomblin v. Callen, 69 Iowa, 229, 28 N. W. 573.

⁴⁶ *In re Taylor's Estate*, 192 Pa. St. 304, 43 Atl. 973, 73 Am. St. Rep. 812; *Young v. Glendinning*, 194 Pa. St. 550, 45 Atl. 364; but see *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939.

⁴⁷ *Hay v. Ayling*, 16 Q. B. 423; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164; *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139; *Bates v. Cronin's Estate*, 196 Ill. App. 178; *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745; *Kemp v. Hammond Hotels*, 226 Mass. 409, 115 N. E. 572; *Remer v. Ettinger*, 48 N. Y. Misc. 641, 96 N. Y. S. 263; *Orvis v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948; *Gaw v. Bennett*, 153 Pa. 247, 25 Atl. 1114, 34 Am. St. 699; *Booher v. Anderson*,

35 Tex. Civ. App. 436, 80 S. W. 385; *Ash v. Clark*, 32 Wash. 390, 73 Pac. 351. And see many cases collected 119 Am. St. Rep. 174 n., also cases *infra* in this section.

⁴⁸ *Hawley v. Bibb*, 69 Ala. 52; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568; *Benson v. Dublin Warehouse Co.*, 99 Ga. 303, 25 S. E. 645; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35; *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

⁴⁹ *Hay v. Ayling*, 16 Q. B. 423; *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135; *Stone v. Mitchell*, 7 Ark. 91;

and an agreement of compromise of such a claim is equally invalid.⁵⁰

§ 1676. Rights of a holder in due course.

The only conflict concerning the enforceability of a negotiable instrument given for a gambling debt arises when it has come into the hands of a holder in due course. In regard to illegality generally the rule is clear that unless a statute clearly declares void a negotiable instrument in the hands of all parties a holder in due course can recover.⁵¹ But some statutes so plainly de-

Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164; International Bank v. Van Kirk, 39 Ill. App. 23; Campbell Co. Bank v. Schmitt, 143 Ky. 421, 136 S. W. 625; Cutler v. Welsh, 43 N. H. 497; Hollingsworth v. Moulton, 53 Hun, 91, 6 N. Y. S. 362; Haley v. Long, 1 Peck (Tenn.), 93.

⁵⁰ Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164; Emery v. Royal, 117 Ind. 299, 20 N. E. 150; Creutz v. Heil, 89 Ky. 429, 12 S. W. 926; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Grandin v. Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; Haley v. Long, 1 Peck (Tenn.), 93; Reed v. Brewer (Tex. Civ. App.), 36 S. W. 99; Everingham v. Meigham, 55 Wis. 354, 13 N. W. 269. But see Hyams v. Stuart King, [1908] 2 K. B. 696.

⁵¹ In the case cited below, recovery was allowed: Birch v. Jervis, 3 C. & P. 379 (bill for not opposing bankrupt's discharge); Simpson v. Pogson, 3 Dowl. & R. 567 (note for fraudulent preference); Bluthenthal v. Columbia, 175 Ala. 398, 57 So. 814 (note for illegal sale of liquor); Moseley v. Selma Nat. Bank, 3 Ala. App. 614, 57 So. 91 (falsely dated note made on Sunday); Citizens, Nat. Bank v. Bucheit, 14 Ala. App. 511, 71 So. 82, 72 So. 1019 (note of foreign corporation doing

business illegally); Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 So. 760 (note given in performance of illegal corporate contract); Hunt v. Davenport, 138 Ga. 622, 75 S. E. 644 [note illegally omitting to state that it was for price of patent. But a holder in due course was held not entitled to recover in Exchange Nat. Bank v. Henderson, 139 Ga. 260, 77 S. E. 36, 51 L. R. A. (N. S.) 549, on a note given to bribe a voter, or in International Agricultural Corporation v. Spencer, 17 Ga. App. 649, 87 S. E. 1101, on a note given for fertilizer not properly inspected or labelled]; State Bank v. Lawrence, 177 Ind. 515, 96 N. E. 947, 42 L. R. A. (N. S.) 326 (note for services of unlicensed physician); Pontiac Sav. Bank v. Reinforced Concrete Pipe Co., 178 Mich. 261, 144 N. W. 486 (note to partnership which had not filed required certificate); Farmers' Saving Bank v. Reed, 192 Mo. App. 344, 180 S. W. 1002 (note for illegal assignment of liquor license); Lawrence v. Clark, 36 N. Y. 128 (note for extra payment to composition creditor); Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70 (note for illegal fees to assignee in bankruptcy); Carrollton Press Brick Co. v. Davis (Tex. Civ. App.), 155 S. W. 1046 [note of foreign corporation illegally doing business within the State; but in Jones v. Abernathy (Tex. Civ. App.), 174 S. W. 682, and Republic Trust Co. v. Taylor

clare the instrument void that under them even an innocent holder has been denied recovery.⁵² The possible effect of the Negotiable Instruments Law upon the question has been previously considered.⁵³ Unless the object of the law is to protect the maker of the instrument as one imposed upon, rather than to prevent and punish the transaction, the holder in due course should clearly be allowed to recover, for the result of a failure to allow recovery is that the maker,—a party to the illegality—escapes liability and the wrongdoing payee has obtained a price for the instrument from the innocent purchaser, which the latter may have trouble in recovering.

The tendency of the modern law in regard to instruments illegal because based on a gambling consideration is to protect the holder in due course.⁵⁴ But a number of decisions resting

(Tex. Civ. App.) 184 S. W. 772, notes in violation of a special statute were held absolutely void]; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042 (note for illegal rebate of insurance premium); American Sav. Bank v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913 A. 390 (usurious note); Samson v. Ward, 147 Wis. 48, 132 N. W. 629 (note illegally omitting to state it was for price of stallion); Crombie v. Overholtzer, 11 U. C. Q. B. 55 (note for goods illegally sold on Sunday); Canadian Bank of Commerce v. Gurley, 30 U. P. C. P. 583 (note for compounding felony).

⁵² Birch v. Jervis, 3 C. & P. 379 (bill for signing bankrupt's certificate); Lowe v. Waller, 2 Doug. 736 (usury); German Bank v. DeShon, 41 Ark. 331 (usury); Ensign v. Coffelt, 102 Ark. 568, 145 S. W. 231 (note for patent); Perry Savings Bank v. Fitzgerald, 167 Iowa, 446, 149 N. W. 497 (usury); Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673 (usury); Unger v. Boas, 13 Pa. St. 601; Cohn v. Lunn, 133 Tenn. 547, 182 S. W. 584 (notes for patent); *In re Summerfeldt v. Worts*, 12 Ont. 48 (check for gaming losses); and see

Georgia and Texas cases in the preceding note.

⁵³ *Supra*, § 1159.

⁵⁴ Fitch v. Jones, 5 El. & Bl. 238; Edwards v. Dick, 4 B. & Ald. 212; Haight v. Joyce, 2 Cal. 64; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164; Boughner v. Meyer, 5 Col. 71, 40 Am. Rep. 139; Sullivan v. German Nat. Bank, 18 Colo. App. 99, 70 Pac. 162; Adams v. Woolridge, 3 Scam. (4 Ill.) 255; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Biegler v. Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23 (*cf.* Irwin v. Marquett, 26 Ind. App. 383, 59 N. E. 38, 84 Am. St. Rep. 297); Kushner v. Abbott, 156 Ia. 598, 137 N. W. 913; Higginbotham v. McGready, 183 Mo. 96, 81 S. W. 883, 105 Am. St. Rep. 461; Storz Brewing So. v. Skirving, 94 Neb. 215, 142 N. W. 669; Northern Nat. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794. See also Griffith v. Sears, 112 Pa. 523, 4 Atl. 492; Hurlburt v. Straub, 54 W. Va. 303, 46 S. E. 163; Stevens v. Freund, 169 Wis. 68, 171 N. W. 300.

generally on the construction of local statutes⁵⁵ have denied recovery to the innocent holder.⁵⁶ Even where a statute makes the instrument void in the hands of a holder in due course, an exception is made if the holder was induced to purchase by a representation or assurance of the maker, subsequent to the inception of the instrument.⁵⁷

§ 1677. Indorsement of negotiable instrument for gambling consideration.

If a valid negotiable instrument made by a third person is indorsed by the owner in payment of a gambling debt, or for other illegal consideration the indorsee becomes the owner and can recover from the parties on the instrument prior to the indorser.⁵⁸ The contrary has indeed been held,⁵⁹ but such a conclusion rests on a misapprehension of the nature of an indorsement which is both a contract and a conveyance. As a contract, since it is unlawful, the indorser is no more liable to the indorsee upon it than any obligor to any obligee of a gambling contract; but the indorsement transfers the ownership of the

⁵⁵ The English Statute of 9 Anne, c. 14, which was held to make such instruments totally void, has been the basis of similar legislation in the United States.

⁵⁶ *Bowyer v. Brampton*, 2 Str. 1155; *Hitchcock v. Way*, 6 Ad. & E. 943; *Cooke v. Stratford*, 13 M. & W. 379; *Manning v. Manning*, 8 Ala. 138; *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135; *Birmingham Trust, etc., Co. v. Curry*, 160 Ala. 370, 40 So. 319, 135 Am. St. Rep. 102; *Conklin v. Roberts*, 36 Conn. 461; *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. Rep. 286; *Sherfy v. Lachenmyer*, 190 Ill. App. 443; *First Nat. Bank v. Carroll*, 80 Ia. 11, 45 N. W. 304, 8 L. R. A. 275; *Holzbog v. Bakrow*, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Gray v. Robinson*, 95 Miss. 1, 48 So. 226; *Lagonda Nat.*

Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; *Unger v. Boas*, 13 Pa. St. 601; *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918; *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163, and cases cited *infra*, n. 72. See also *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Bohon's Assignee v. Brown*, 101 Ky. 354, 41 S. W. 273, 38 L. R. A. 503, 72 Am. St. Rep. 420.

⁵⁷ *Anonymous*, 2 Mod. 279; *Holzbog v. Bakrow*, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023; *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163. See also *Rodriguez v. Martinez*, 5 Philippine, 67.

⁵⁸ *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619. See also *Flower v. Sadler*, 10 Q. B. D. 572.

⁵⁹ *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693. See also 20 Cyc. 937.

instrument and, in conformity with the well-recognized rule that a court will not disturb an executed transaction on account of illegality, the indorsee becomes the owner of the instrument with all the rights of an owner against all parties to it except his immediate indorser. In jurisdictions, however, where the loser in a gaming transaction is allowed to recover what he has lost even though actually transferred, the indorser may reclaim the instrument as he might reclaim money or other property;⁶⁰ and prior parties to the instrument if they had notice of the facts would not be justified in paying the indorsee, who was a part to the illegality, though they would be liable to a holder in due course. If the primary obligor as well as the indorser and indorsee was party to the illegality, no recovery can be allowed, for in that case the obligation on which recovery is sought is illegal and the plaintiff is chargeable with participation in the illegality.⁶¹ A few statutes have gone so far as to invalidate totally any transfer for a gaming consideration. Under such a statute not even an innocent holder in due course can maintain an action upon an instrument indorsed to a previous holder for a gambling consideration.⁶² As a matter of policy the propriety of protecting one who has lost at gaming at the expense of an innocent purchaser for value of what has been lost, may well be questioned.⁶³ In the absence of so drastic a statute, the right of a holder in due course to recover on negotiable instruments previously indorsed on a gaming or other illegal consideration, would not be questioned.⁶⁴

§ 1678. Mortgages and pledges to secure illegal debts.

Where property is transferred not in satisfaction of the claim but by way of pledge or mortgage for the winnings in a gam-

⁶⁰ See *infra*, § 1679.

⁶¹ *Steers v. Lashley*, 6 T. R. 61; *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005.

⁶² *Pearce v. Rice*, 142 U. S. 28, 35 L. Ed. 925, 12 S. Ct. Rep. 130 (Illinois statute); *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15; *Pearce v. Foote*, 113 Ill. 228, 55 Am. St. Rep. 414; *Commercial Nat. Bank v. Spaid*, 8 Ill.

App. 493. And see for similar statutes, 1 Ames, Bills & Notes, 350, 352.

⁶³ Under such a statute if the maker in good faith pays the indorsee, he is not discharged, since he has paid one who has no title, and must pay over again to the indorser—a party to the illegality. See *Commercial Nat. Bank v. Spaid*, 8 Ill. App. 493.

⁶⁴ *Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749.

bling transaction, or for other illegal consideration, it seems clear that the transferee can get no aid from the law in enforcing his claim by foreclosure.⁶⁵ On the other hand, in the absence of a statute allowing him to recover what he has parted with, the mortgagor can get no aid from the court in seeking a cancellation of the mortgage;⁶⁶ and if the mortgagee or pledgee has been authorized by the mortgagor or pledgor to sell the security and apply the proceeds on the illegal debt, and does so, or if he can foreclose without the aid of the court, the mortgagor or pledgor can have no redress.⁶⁷

An intermediate case may be supposed where possession has been transferred but the mortgagee or pledgee has no power of sale, or ability to foreclose without judicial assistance, and the debtor seeks to reclaim his property without satisfying the debt. Since *potior est conditio possidentis*, he cannot do so.⁶⁸ By virtue, however, of the statutes in many jurisdictions allowing the loser to recover what he has lost and avoiding obligations given by him he may have in such states whatever relief may be appropriate for avoiding a mortgage or pledge.⁶⁹

§ 1679. Recovery of money staked.

If the loser in a wagering contract pays the winner, he is debarred at common law from recovering the payment because he is in *pari delicto*.⁷⁰ But, as has been said, in many states stat-

⁶⁵ *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 938; *Dixon v. Cuyler*, 27 Ga. 248; *Jones v. Dannenberg*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271; *Johnson v. McMillion*, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918 C. 244; *Baker v. Collins*, 9 Allen, 253; *Pearce v. Wilson*, 111 Pa. 14, 56 Am. Rep. 243; *Sanger v. Futch* (Tex. Civ. App.), 208 S. W. 681; *Pierce v. Kibbee*, 51 Vt. 559.

⁶⁶ *Rice v. Winslow*, 182 Mass. 273, 275, 65 N. E. 366; *Smith v. Kammerer*, 152 Pa. 98, 25 Atl. 165. See also *Patterson v. Donner*, 48 Cal. 369. But see *contra*, *Small v. Williams*, 87 Ga. 681, 13 S. E. 589.

⁶⁷ See *McLaughlin v. Cosgrove*, 99 Mass. 4.

⁶⁸ *Scarfe v. Morgan*, 4 M. & W. 281, 282; *King v. Green*, 6 Allen, 139; *Harris v. Woodruff*, 124 Mass. 205, 26 Am. Rep. 658.

⁶⁹ *Rice v. Winslow*, 182 Mass. 273, 65 N. E. 366. See also *Marden v. Phillips*, 103 Fed. 196; *Boatright v. Porter's Heirs*, 32 Ga. 130; *Luetchford v. Lord*, 57 Hun, 572, 11 N. Y. S. 597, 132 N. Y. 465, 30 N. E. 859; *Bond's Lessee v. Swearingen*, 1 Ohio, 395.

⁷⁰ *Vaughan v. Whitcomb*, 2 Bos. & P. N. R. 413; *Davies v. Porter*, 248 Fed. 397, 160 C. C. A. 407; *Paulk v. Jasper Land Co.*, 116 Ala. 178, 22 So. 495; *Johnson v. Collier*, 161 Ala. 204, 209, 49 So. 761; *Grant v. Owens*, 55 Ark. 49, 17 S. W. 338; *Branham v. Stallings*, 21 Colo. 211, 40 Pac. 396, 52 Am. St.

utes confer upon the loser either in all or in some specified kinds of gambling transactions the right of recovering money paid.⁷¹ It is a general rule, moreover, that while the illegal part of a contract is still executory, there is a *locus penitentiae*,⁷² and, therefore, even without a statute, money deposited in the hands of a stakeholder (and doubtless the rule would be the same if the money were intrusted to the other party) may be recovered before the determination of the wager.⁷³ In regard to money deposited with a stakeholder the doctrine goes further than this, and on the ground that the stakeholder is merely the agent of each party as to the money deposited by him, it may be recovered until it has been actually paid over.⁷⁴

Rep. 213; Funk v. Gallivan, 49 Conn. 124, 44 Am. Rep. 210; Schlosser v. Smith, 93 Ind. 83; O'Brien v. Luques, 81 Me. 48, 16 Atl. 304; Northrup v. Buffington, 171 Mass. 468, 51 N. E. 7; Gregory v. Wendell, 40 Mich. 432; Nagle v. Randall, 115 Minn. 235, 132 N. W. 266; Boon v. Gooch, 95 Neb. 678, 146 N. W. 930. Where the transaction under the English law was merely void but not illegal, recovery was allowed. Jaques v. Golightly, 2 W. Bl. 1073; Jaques v. Withy, 1 H. Bl. 65; and recovery was allowed for money paid even on an illegal wager in Lacausade v. White, 7 T. R. 535; but this case was disapproved in Aubert v. Walsh, 3 Taunt. 277.

⁷¹ Williamson v. Majors, 169 Fed. 754, 95 C. C. A. 186; Nelson v. Waters, 18 Ark. 570; Richardson v. Kelly, 85 Ill. 491; Zeller v. White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243; Wehmhoff v. Rutherford, 98 Ky. 91, 32 S. W. 288; Timmons v. Timmons, 145 Ky. 259, 140 S. W. 164; Peyret v. Coffee, 48 Me. 319; Miller v. LePiere, 136 Mass. 20; Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306; Fiske v. Doucette, 206 Mass. 275, 92 N. E. 255; Adams v. Dick, 226 Mass. 46, 115 N. E. 227; Perry v. Groes, 25 Neb. 828, 41 N. W. 799; Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180; Watts v. Lynch, 64 N. H. 96, 5 Atl. 458; Van

Pelt v. Schauble, 68 N. J. L. 638, 54 Atl. 437; Mann v. Gordon, 15 N. Mex. 652, 110 Pac. 1043; Wilkinson v. Gill, 74 N. Y. 63, 30 Am. Rep. 264; Johnson v. Clark, 23 N. Y. Misc. 346, 51 N. Y. S. 238; Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; Mitchell v. Orr, 107 Tenn. 534, 64 S. W. 476; McIntyre v. Smyth, 108 Va. 736, 62 S. E. 930; Crowley v. Taylor, 49 Wash. 511, 95 Pac. 1016. Under such a statute it was held in Auxer v. Llewellyn, 142 Ill. App. 265, that recovery was permissible although the plaintiff was a party to a conspiracy to win the money of others by arranging wagers on a "fake" fight.

⁷² See *infra*, § 1788.

⁷³ Kearney v. Webb, 278 Ill. 17, 115 N. E. 844; Davis v. Fleshman, 245 Pa. 224, 91 Atl. 489; Trebilcock v. Walsh, 21 Ont. App. 55, and cases in the following note. But where the wager is itself a statutory misdemeanor it was held that there was no *locus penitentiae* after making it. Matthews v. Lopus, 24 Calif. App. 63, 140 Pac. 306; Schenck v. Hirshfeld, 22 Calif. App. 709, 136 Pac. 725; Kelley v. Dirks (S. Dak.), 167 N. W. 724.

⁷⁴ O'Sullivan v. Thomas, [1895] 1 Q. B. 698; Burge v. Ashley, [1900]

§ 1680. Prerequisites for charging the stakeholder.

In a few States demand must be made upon the stakeholder before the wager has been decided.⁷⁵ If a stakeholder pays the winner, before receiving notice of repudiation of the wager, he is not liable,⁷⁶ unless made so by statute.⁷⁷ Repudiation must

1 Q. B. 744; *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816; *Thornhill v. O'Rear*, 108 Ala. 299, 19 So. 382, 31 L. R. A. 792; *Wheeler v. Spencer*, 15 Conn. 28; *Hale v. Sherwood*, 40 Conn. 332, 16 Am. Rep. 37; *Colson v. Meyers*, 80 Ga. 499; s. c., *sub nom.*, *Myers v. Colson*, 5 S. E. 504; *Petillon v. Hipple*, 90 Ill. 420, 32 Am. Rep. 31; *Frybarger v. Simpson*, 11 Ind. 59; *Burroughs v. Hunt*, 13 Ind. 178; *Adkins v. Flemming*, 29 Iowa, 122; *Pollock v. Agner*, 54 Kans. 618, 38 Pac. 781; *Hutchings v. Stilwell*, 18 B. Mon. 776; *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259, Ann. Cas. 1918 E. 289; *Stacey v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *McDonough v. Webster*, 68 Me. 530; *Gilmore v. Woodcock*, 69 Me. 118, 31 Am. Rep. 255, 70 Me. 494; *Fisher v. Hildreth*, 117 Mass. 558; *Morgan v. Beaumont*, 121 Mass. 7; *Whitwell v. Carter*, 4 Mich. 329; *Wilkinson v. Tousley*, 16 Minn. 299, 10 Am. Rep. 139; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275; *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Deaver v. Bennett*, 29 Neb. 812, 46 N. W. 161, 26 Am. St. Rep. 415; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104, 25 Am. Dec. 451; *Hensler v. Jennings*, 62 N. J. L. 209, 41 Atl. 918; *Stoddard v. McAuliffe*, 81 Hun, 524, *affd.*, without opinion, 151 N. Y. 671, 46 N. E. 1151; *Wood v. Wood's Exr.*, 3 Murph. 172; *Forrest v. Hart*, 3 Murph. 458; *Dunn v. Drummond*, 4 Okla. 461, 51 Pac. 656; *Willis v. Hoover*, 9 Or. 418; *Conklin v. Conway*, 18 Pa. St. 329; *Dauler v. Hartley*, 178 Pa. St. 23, 35 Atl. 857;

Davis v. Fleshman, 245 Pa. 224, 91 Atl. 489; *McGrath v. Kennedy*, 15 R. I. 209, 2 Atl. 438; *Bledsoe v. Thompson*, 6 Rich. L. 44, 57 Am. Dec. 777; *Guthman v. Parker*, 3 Head, 233; *Lillard v. Mitchell* (Tenn.), 37 S. W. 702; *Lewy v. Crawford*, 5 Tex. Civ. App. 293; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358; *West v. Holmes*, 26 Vt. 530. See also *Trenery v. Goudie*, 106 Iowa, 693, 77 N. W. 467; *Jones v. Cavanaugh*, 149 Mass. 124, 21 N. E. 306. But in *Sutphin v. Crozer*, 32 N. J. L. 462, it was held that no action could be maintained by either party against the stakeholder to recover money illegally staked; and see California cases at the end of the preceding note.

⁷⁵ *Johnston v. Russell*, 37 Cal. 670; *Davis v. Holbrook*, 1 La. Ann. 176; *Hickerson v. Benson*, 8 Mo. 8, 11, 40 Am. Dec. 115, 118; *Connor v. Black*, 132 Mo. 150, 154, 33 S. W. 783. In Missouri this doctrine has been enacted by statute. See *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Dooley v. Jackson*, 104 Mo. App. 21, 78 S. W. 330.

⁷⁶ *Colson v. Meyers*, 80 Ga. 499; s. c., *sub nom.*, *Myers v. Colson*, 5 S. E. 504; *Frybarger v. Simpson*, 11 Ind. 59; *Adkins v. Flemming*, 29 Iowa, 122; *Himmelman v. Pecaut*, 133 Iowa, 503, 110 N. W. 919; *Goldberg v. Feiga*, 170 Mass. 146, 48 N. E. 1073; *Dooley v. Jackson*, 104 Mo. App. 21, 78 S. W. 330; *Riddle v. Perry*, 19 Neb. 505, 27 N. W. 721; *Bates v. Lancaster*, 10 Humph. 134, 51 Am. Dec. 696.

⁷⁷ See *Hensler v. Jennings*, 62 N. J. L.

be absolute. A notification not to pay the winner until further notice has been held insufficient.⁷⁸ The winner cannot maintain an action against the stakeholder for the whole sum.⁷⁹ If notwithstanding notice not to do so, the stakeholder pays the money to the winner, the loser may recover his deposit not only from the stakeholder,⁸⁰ but from the winner.⁸¹ If, however, after the wager is decided against one of the parties, he, contending that he is the winner, demands the whole sum deposited by both parties and forbids its payment to the other party, he cannot, after payment of the whole deposit to the other party, recover from the stakeholder the amount deposited by himself.⁸² Some decisions, however, allow even this.⁸³

§ 1681. Collateral effects of gambling contracts.

Since aiding an unlawful purpose is itself unlawful,⁸⁴ if money is lent for the purpose of being used in gambling it cannot be recovered.⁸⁵ While (since mere knowledge that illegal

209, 41 Atl. 918; *Ruckman v. Pitcher*, 1 N. Y. 392, 20 N. Y. 9; *Kohler v. Rosenthal*, 135 N. Y. App. Div. 438, 120 N. Y. S. 325; *Columbia Bank v. Haldeman*, 7 W. & S. 233, 42 Am. Dec. 229; *Harnden v. Melby*, 90 Wis. 5, 62 N. W. 535.

⁷⁸ *Trenery v. Goudie*, 106 Iowa, 693, 77 N. W. 467. See also *Maher v. Van Horn*, 15 Colo. App. 14, 60 Pac. 949. But see *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448; and *infra*, n. 82, 83.

⁷⁹ *McLain v. Huffman*, 30 Ark. 428; *Hayden v. Little*, 35 Mo. 418; *Bunn v. Riker*, 4 Johns. 426, 4 Am. Dec. 292; *Rust v. Gott*, 9 Cow. 169, 18 Am. Dec. 497; *Doran v. Chambers*, 20 Nova Scotia, 309. Cf. *Dee v. Sears-Nattinger Automobile Co.*, 141 Iowa, 610, 118 N. W. 529.

⁸⁰ *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816.

⁸¹ *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80.

⁸² *Okerson v. Crittenden*, 62 Iowa, 297, 17 N. W. 528; *Patterson v. Clark*, 126 Mass. 531.

⁸³ *Hale v. Sherwood*, 40 Conn. 332, 16 Am. Rep. 37; *Perkins v. Hyde*, 6 Yerg. 288. See also *Shoolbred v. Roberts*, [1899] 2 Q. B. 560, [1900] 2 Q. B. 497.

⁸⁴ See *infra*, § 1750.

⁸⁵ *McKinnell v. Robinson*, 3 M. & W. 434; *Hay v. Ayling*, 16 Q. B. 423; *Saffery v. Mayer*, [1900] 1 K. B. 11; *Marden v. Phillips*, 103 Fed. 196; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Camas Prairie State Bank v. Newman*, 15 Ida. 719, 99 Pac. 833, 21 L. R. A. (N. S.) 703, 128 Am. St. Rep. 81; *Scott v. Baker*, 143 Ill. App. 151; *Blank v. Jackson*, 128 Ind. 424, 28 N. E. 568, 27 N. E. 1117; *McDevitt v. Thomas*, 130 Ky. 805, 114 S. W. 273; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *Lancaster v. Ames*, 103 Me. 87, 68 Atl. 533, 17 L. R. A. (N. S.) 229, 125 Am. St. Rep. 286; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Gibney v. Olivette*, 196 Mass. 294, 82 N. E. 41; *Cutler v. Welsh*, 43 N. H. 497; *Appleton v. Maxwell*, 10 N. Mex. 748, 65 Pac. 158,

use is to be made of money or property does not make a transfer of it unlawful at least in the United States),⁸⁶ the fact without more that the lender knew that money lent by him was to be thus used will not defeat recovery.⁸⁷ Where goods are sold to a particular person or persons, the fact that the seller knows that the buyers and others are to make the ultimate liability to pay the price, as between one another, depend upon a wager, will not preclude him from recovering from those with whom he contracted.⁸⁸ A loan of money for the purpose of discharging a gambling debt already incurred is also enforceable.⁸⁹ But

55 L. R. A. 93; *Peck v. Briggs*, 3 Denio, 107; *Ruckman v. Bryan*, 3 Denio, 340; *Freedley v. Jacoby*, 220 Pa. 609, 69 Atl. 1047; *Mordecai v. Dawkins*, 9 Rich. L. 262; *Bates v. Watson*, 1 Sneed, 376; *Jones v. Aken* (Tex. Civ. App.), 80 S. W. 385; *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387, 389. See also *Lee v. Boyd*, 86 Ala. 283, 5 So. 489. But money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English courts. *Saxby v. Fulton*, [1909] 2 K. B. 208. It is probable that in America where wagers are held illegal at common law, a different conclusion would be reached. *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005.

⁸⁶ See *infra*, § 1754.

⁸⁷ *Allen v. Caldwell*, 149 Ala. 293, 42 So. 855; *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22; *Singleton v. Monticello Bank*, 113 Ga. 527, 38 S. E. 947; *Jackson v. City Nat. Bank*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; *Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; *Cooley v. Allen*, 28 Ky. L. Rep. 982, 90 S. W. 1048; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *White v. Buss*, 3 Cush. 448; *Kipp v. Welsh* (Minn.), 170 N. W. 222, 224; *Waugh v. Beck*, 114 Pa. 422, 6 Atl. 923, 60 Am. Rep. 354; *Cleveland v. Taylor*,

49 Tex. Civ. App. 496, 108 S. W. 1037; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Kinney v. Hynds*, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081; *Venne v. Christin*, Rap. Jud. Quebec, 16 Cour Sup. 164. See also *Futch v. Sanger* (Tex. Civ. App.), 163 S. W. 597. But see *Scott v. Baker*, 143 Ill. App. 151; *Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 724, 99 Pac. 833, 128 Am. St. Rep. 81, 84.

⁸⁸ *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93.

⁸⁹ *Oulds v. Harrison*, 10 Ex. 572; *Re O'Shea*, [1911] 2 K. B. 981; *Roundtree v. Smith*, 108 U. S. 269, 276, 27 L. Ed. 722, 2 Sup. Ct. 630; *Armstrong v. American, etc., Bank*, 133 U. S. 433, 469, 33 L. Ed. 747, 10 Sup. Ct. Rep. 450; *Lehman v. Strassberger*, 2 Woods, 554, 563; *Sampson v. Camperdown Mills*, 82 Fed. 832, 837; *White v. Yarbrough*, 16 Ala. 109; *Roberts v. Blair*, 11 Colo. 64, 16 Pac. 717; *Brooks v. Brady*, 53 Ill. App. 155; *Finkel v. Springer*, 198 Ill. App. 483; *Bower v. Webber*, 69 Iowa, 286, 28 N. W. 600; *English v. Young*, 10 B. Mon. 141; *Wyman v. Fiske*, 3 Allen (Mass.) 238, 80 Am. Dec. 66; *Williams v. Carr*, 80 N. C. 294; *Ballard v. Green*, 118 N. C. 390, 24 S. E. 777; *Marshall v. Thruston*, 3 Lea, 740; *Bogges v. Lilly*, 18 Tex. 200; *Krake v. Alexander*, 86 Va. 206, 9 S. E. 991; *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163. But see *Cannan v. Bryce*, 3

one who is employed to make wagers and to pay any losses which may be incurred, and who does thus incur and pay losses on behalf of his principal cannot recover them from him.⁹⁰

Therefore, a broker who negotiates for his principal a transaction held to be a gambling contract can recover from his principal neither for commissions nor advances.⁹¹ If, however, the broker was ignorant of the facts or intent making the contract of his principal illegal, he may recover.⁹² One who has

B. & Ald. 179; *Tatam v. Reeve*, [1893] 1 Q. B. 44; *Scollans v. Flynn*, 120 Mass. 271.

⁹⁰ *Saffery v. Mayer*, [1901] 1 K. B. 11. See also *St. Croix v. Morris*, 1 Cab. & El. 485; *White v. Wilson's Adm.*, 100 Ky. 367, 38 S. W. 495, 37 L. R. A. 197; *Central Trust & C. Co. v. Respass*, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. 317; *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055. Cf. *Hill v. Fox*, 4 Hurlst. & N. 359.

⁹¹ *Irwin v. Williar*, 110 U. S. 499, 28 L. Ed. 225, 4 Sup. Ct. 160; *Embrey v. Jemison*, 131 U. S. 336, 33 L. Ed. 172, 9 Sup. Ct. 776; *Bailey v. Phillips*, 159 Fed. 535; *Phelps v. Holderness*, 56 Ark. 300, 19 S. W. 921; *Cashman v. Root*, 89 Cal. 373, 26 Pac. 583, 12 L. R. A. 511, 23 Am. St. Rep. 482; *Anderson v. Holbrook*, 128 Ga. 233, 57 S. E. 500, 11 L. R. A. (N. S.) 575; *Calumet Grain & E. Co. v. Williams*, 97 Ill. App. 36; *Orthwein-Matchette Inv. Co. v. McFarlin*, 93 Kan. 526, 144 Pac. 842; *Stewart v. Schall*, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327; *Cover v. Smith*, 82 Md. 586, 34 Atl. 465; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Beers v. Wardwell*, 198 Mass. 236, 84 N. E. 306; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Saunders v. Baker*, 122 Mo. App. 294, 99 S. W. 51; *Rogers v. Marriott*, 59 Neb. 759, 82 N. W. 21; *Sunderland v. Hibbard*, 97

Neb. 21, 149 N. W. 57; *Dows v. Glaspel*, 4 N. Dak. 251, 60 N. W. 60; *Lester v. Buel*, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939; *Kassuba Commission Co. v. Blodgett*, 155 Wis. 529, 143 N. W. 1060; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918. But see *Hawley v. Bibb*, 69 Ala. 52; *Pedt v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45; *Jones v. Ames*, 135 Mass. 431. In *Warren v. Hewitt*, 45 Ga. 501, it was held that if the principal subsequently executes his note or bill, or makes an express promise to pay the broker, or with full knowledge of the facts allows the transaction to proceed, he becomes liable. See also *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45. The notion of making enforceable by ratification a transaction originally unenforceable because obnoxious to public policy is, however, indefensible, and *Warren v. Hewitt* was overruled by *Anderson v. Holbrook*, 128 Ga. 233, 57 S. E. 500, 11 L. R. A. (N. S.) 575. See also *Pelouze v. Slaughter*, 241 Ill. 215, 89 N. E. 259; *Moore v. Blanck*, 71 N. Y. Misc. 257, 129 N. Y. S. 1105.

⁹² *Boyd v. Hanson*, 41 Fed. 174; *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 373, 40 C. C. A. 416; *Parker v. Moore*, 115 Fed. 799, 53 C. C. A. 369; *Rumsey v. Berry*, 65 Me. 570; *Jones v. Ames*, 135 Mass. 431; *Gaylord v. Duryea*, 95 Mo. App. 574, 69 S. W. 607.

made a contract in furtherance of wagering transactions is not only denied a right to enforce it, but is freed from liability for breach of it. A telegraph company though under contract to furnish market quotations to the proprietor of a bucket shop may refuse to do so.⁹³ The proprietor of a gambling house is not liable for breaking a contract of employment with one whom he has engaged as manager of it.⁹⁴

§ 1682. Usury.

Usury, which originally meant simply interest for the use of money, but which now has come to mean excessive interest, is forbidden by law in many jurisdictions. All interest was deemed contrary to the law in early times;⁹⁵ though the Jews, and subsequently the Lombards, seem to have been permitted to take it.⁹⁶ In the time of the Tudors interest at the rate of 10 per cent was legalized by statute, but the recitals of these statutes indicate that it was still regarded as opposed to morality and Christianity.⁹⁷ The rate of legal interest was gradually reduced, and by statute in the reign of Queen Anne, was made 5 per cent.⁹⁸ Excessive interest remained illegal in England subject to some statutory exceptions until 1854. If more than the legal rate was contracted for a loan the transaction was void

⁹³ *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 2 S. W. 483. *A fortiori* if there is no contract the public duty of a telegraph company does not compel it to furnish quotations to such a person. *Western Union Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153. See also *Bryant v. Western Union Tel. Co.*, 17 Fed. 825.

⁹⁴ *Britt v. Davis*, 118 La. 597, 43 So. 248, 118 Am. St. 390.

⁹⁵ 14 Encyc. of the Laws of England (2d ed.), 408. In 8 Bacon's Abr. 312, citing *Hawkins' Pleas of the Crown*, c. 82, § 4, it is said: "Anciently it was holden to be absolutely unlawful for a Christian to take any kind of usury, and that whosoever was guilty of it was liable to be punished by the censures of the church in his lifetime;

and that if after death any one was found to have been a usurer while living, all his chattels were forfeited to the king, and his lands escheated to the lord of the fee."

⁹⁶ 14 Encyc. of the Laws of England (2d ed.) 408.

⁹⁷ "The Statute 13 Elis. c. 8, which allows 10 *per cent.* interest, recites, 'that all usury being forbidden by the law of God is sin, and detestable;' and the 21 Jac. 1, reducing the rate to 8 *per cent.*, provides that 'nothing in the law shall be construed to allow the practice of usury in point of religion or conscience;' Rolle says, that this clause was introduced to satisfy the bishops, who would not pass the bill without it. *Oliver v. Oliver*, Roll. R." 8 Bacon's Abr. 313.

⁹⁸ 12 Anne, Stat. 2, c. 16.

even though in the form of a negotiable instrument which had come into the hands of a holder in due course.⁹⁹ In consequence of the theories of political economy propounded by Hume, Adam Smith, Bentham, and their successors, the hostility to contracts reserving any rate of interest for which the parties might bargain, abated. In 1830 innocent holders of securities given on usurious consideration were allowed to recover,¹ and in 1854² all usury laws were repealed. Subsequent experience has shown in England, as well as elsewhere, that it is not safe to leave all classes of the community free to make such bargains for loans as they may see fit, or as their necessities may compel them to make, and in England, as in many jurisdictions of the United States, limitations have been put on certain classes of loans by pawnbrokers, and other money lenders.³

§ 1683. Statutes in the United States.

In many of the United States statutes against usury still exist, the particular provisions of which must be sought in local enactments. It may be said of these statutes as a whole, however, that they are generally less severe than the earlier type of statute, and make a usurious contract unlawful only as to the interest or as to so much of the interest as exceeds the legal rate. This tendency towards a milder point of view is often emphasized by decisions of the courts; many of which doubtless do not regard with favor the policy of general prohibitions of usury. Usury is not regarded as so far obnoxious in itself as to prevent a loan of money for use in payment of a claim of a third person known to be usurious from being recoverable.⁴

The attitude of the courts towards the defence of usury is

⁹⁹ *Lowe v. Waller*, 2 Doug. 736; *Young v. Wright*, 1 Camp. 139; *Ackland v. Pearce*, 2 Camp. 599.

¹ See *Woolf v. Hamilton*, 14 T. L. Rep. 499.

² 17 & 18 Vict., c. 90.

³ Money Lenders Act, 63 and 64 Vict., c. 51.

⁴ *Lowe v. Walker*, 77 Ark. 103, 91 S. W. 22; *Thompson v. First State Bank*, 99 Ga. 651, 26 S. E. 79; *Trimble v. Thorson*, 80 Iowa, 246, 45 N. W.

742; *Jenkins v. Levis*, 25 Kans. 479; *Ratliffe v. Buckler*, 22 Ky. L. Rep. 1790, 61 S. W. 472; *Yeiser v. Fulton*, 36 Neb. 518, 54 N. W. 824; *King v. Lane*, (Okla.), 169 Pac. 901, L. R. A. 1918 C. 351; *Vaught v. Rider*, 83 Va. 659, 3 S. E. 293, 5 Am. St. Rep. 305. This was so held even though the new loan was from the creditor of the usurious loan in *Lott v. Peterson* (Ga. App.), 98 S. E. 361.

also indicated by the general holding in recent cases that the repeal of usury laws without a saving clause operates retrospectively so as to cut off the defence in all actions, even in those based on contracts made prior to the repeal,⁵—a rule of construction at variance with that generally prevailing in regard to contracts illegal when made;⁶ and if a borrower under a usurious loan seeks affirmative relief in equity, he is usually required as a condition of relief to pay the loan with legal interest.^{6a}

So far as usury statutes impose other penalties than invalidating wholly or partially executory contracts, they are without the scope of this book.

§ 1684. Essential elements of usury.

The elements which must concur in order to constitute usury have been thus stated:

"To constitute usury, in contemplation of law, the following essential elements must be present: (1) There must be a loan or forbearance; (2) the loan must be of money or something circulating as money; (3) it must be repayable absolutely and at all events; (4) something must be exacted for the use of the money in excess of and in addition to the interest allowed by law. Some decisions appear to imply that a fifth element should be added, consisting of the intent of the parties or at least of the lender, but it seems to us quite as accurate to say that the intention of the parties as the same appears from the facts and circumstances of the case may be considered, in connection with the other evidence, in determining whether the

⁵ *Ewell v. Daggs*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682; *Petterson v. Berry*, 125 Fed. 903, 60 C. C. A. 610; *Walker v. Arkansas Nat. Bank*, 256 Fed. 1, 4, 167, C. C. A. 273; *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777 *Mechanics', etc., Savings' Bank v. Allen*, 28 Conn. 97; *Coe v. Muller (Fla.)*, 77 So. 88; *Parmelee v. Lawrence*, 48 Ill. 331; *Johnson v. Utley*, 79 Ky. 71; *Magil v. Mercantile Trust Co.*, 81 Ky. 129; *Holmes v.*

French, 68 Me. 525; *Curtis v. Leavitt*, 15 N. Y. 9; *Hardaway v. Lilly (Tenn. Ch.)*, 48 S. W. 712; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663. *Cf. Mitchell v. Doggett*, 1 Fla. 356; *Pond v. Horne*, 65 N. C. 84; *Austin v. Burgess*, 36 Wis. 186.

⁶ See *infra*, § 1758.

^{6a} *Dalton v. Weber*, 203 Mich. 455, 169 N. W. 946; *Patterson v. Wyman (Minn.)*, 170 N. W. 928.

essential elements of usury are present in the particular case under investigation." ⁷

§ 1685. Loan or forbearance of money.

The statute of Anne ⁸ applied only to a loan or forbearance of money, and in the construction of this statute it was held that where property was sold, even though the contract provided in terms for the payment of a fixed price payable in the future with interest at a greater rate than that allowed by the statute, the transaction was, nevertheless, not usurious since everything that the buyer promised must be deemed consideration for the sale of property, not interest on a loan or forbearance of money.⁹ In the United States similar statutes have been similarly construed, so that where property is sold the parties may agree that the price, if paid after a certain time, shall be a sum greater by more than legal interest than the price payable at an earlier day;¹⁰ and though the difference between an agreed price for cash and that for credit is in terms stated in the form of interest at greater than the legal rate, the contract is not usurious.¹¹ In a few States, however, statutes drawn in broader terms than the English model, have been held to render such transactions illegal.¹² and the courts of some other states, though not resting their conclusion upon any difference of statutory wording, refuse to go to the full extent of the English precedents in upholding such bargains.¹³

⁷ *Clemens v. Crane*, 234 Ill. 215, 229, 84 N. E. 884.

⁸ 12 Anne, c. 16.

⁹ *Beete v. Bidgood*, 7 B. & C. 453.

¹⁰ *Primley v. Shirk*, 60 Ill. App. 312, 163 Ill. 389, 45 N. E. 247; *Tousey v. Robinson*, 1 Metc. (Ky.) 663; *Huber Mfg. Co. v. Ellis*, 199 Mo. App. 96, 201 S. W. 931; *West v. Belches*, 5 Munf. 187.

¹¹ *Davidson v. David*, 59 Fla. 476, 52 So. 139, 28 L. R. A. (N. S.) 102; *Cutler v. Wright*, 22 N. Y. 472; *First Nat. Bank v. Mann*, 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565; *Graeme v. Adams*, 23 Gratt. 225, 14 Am. St. Rep. 130; *Roger v. O'Neal*, 33 W. Va.

159, 10 S. E. 375, 6 L. R. A. 427. See also *Dykes v. Bottoms*, 101 Ala. 390, 13 So. 582; *Rushing v. Worsham*, 102 Ga. 825, 30 S. E. 541; *Gilmore v. Ferguson*, 28 Ia. 220; but see *infra*, § 1687.

¹² *Crawford v. Johnson*, 11 Ind. 258; *Newkirk v. Burson*, 21 Ind. 129; *Rosen v. Rosen*, 159 Mich. 72, 123 N. W. 559, 134 Am. St. Rep. 712; *Parchman v. McKinney*, 20 Miss. 631; *Thompson v. Nesbit*, 2 Rich. L. 73.

¹³ In *Hartranft v. Uhlinger*, 115 Pa. 270, 8 Atl. 244, it was held that if the price is payable whenever the buyer sees fit, with interest at more than the legal rate, the transaction is usurious. See also *Scotfield v. McNaught*, 52

§ 1686. Forbearance.

Forbearance of an existing debt may be as obnoxious to usury statutes as an original loan if a charge greater than legal interest is made for the forbearance.¹⁴ Nor is the transaction saved from illegality if the agreement provides that the creditor, as part of his forbearance, shall dismiss an action or forbear to exercise some other legal remedy for the collection of his claim.¹⁵ It should be observed, however, that it is the contract for forbearance which is usurious and that the original indebtedness is not thereby rendered illegal.^{15a}

§ 1687. Loans in substance though not in form.

The form of a sale or exchange of property may be used as a colorable method of making a usurious loan in several ways.

(1) The lender may require the borrower to purchase property of him at an excessive price as a condition of making a desired loan. The excess in the price of what is sold is in substance additional compensation for lending the money, and will make the loan usurious although no more than legal interest is in terms exacted therefor.¹⁶

Ga. 69; *Callanan v. Shaw*, 24 Ia. 441; *People's Bank v. Jackson*, 43 S. C. 86, 20 S. E. 786, 27 L. R. A. 569, 49 Am. St. 823.

¹⁴ *Pollard v. Scholy*, Cro. Eliz. 20; *Manners v. Postan*, 3 B. & P. 343; *Wade v. Wilson*, 1 East, 195; *Hogg v. Ruffner*, 1 Black (U. S.), 115, 17 L. Ed. 38; *Steward v. Cross*, 66 Ala. 22; *Meeker v. Hill*, 23 Conn. 574; *Irwin v. Mathews*, 75 Ga. 739; *Galesburg First Nat. Bank v. Davis*, 108 Ill. 633; *Craig v. Hewitt*, 7 B. Mon. 475; *Ticonic Bank v. Johnson*, 31 Me. 414; *Newman v. Williams*, 29 Miss. 212; *Hathaway v. Hagan*, 59 Vt. 75, 8 Atl. 678; *Moseley v. Brown*, 76 Va. 419. Cf. *Kimball v. Boston Athenæum*, 3 Gray, 225.

¹⁵ *Matlock v. Mallory*, 19 Ala. 694; *Patterson v. Clark*, 28 Ga. 526; *Siter v. Sheets*, 7 Ind. 132; *Rosa v. Doggett*, 8 Neb. 48; *Trine v. Williamson*, 9 Pa.

Cas. 613, 616, 13 Atl. 765; *Toole v. Stephen*, 4 Leigh, 581. But see *Alexander v. Harrodsburg First Nat. Bank*, 114 Ky. 683, 71 S. W. 883, 24 Ky. L. Rep. 1486.

^{15a} *Bernheimer v. Gray* (Ala.), 78 So. 840.

¹⁶ *Kommer v. Harrington*, 83 Minn. 114, 85 N. W. 939; *Norton v. Nathanson*, 85 N. J. Eq. 409, 97 Atl. 166; *Stockwell v. Richardson*, 101 N. Y. 643 (memorandum affirming opinion of lower court, reported in 5 N. E. 45); *Earnest v. Hoskins*, 100 Pa. St. 551. So where the borrower is required to pay a fictitious claim for damages, *Hathaway v. Hagan*, 59 Vt. 75, 8 Atl. 678; or to assume liability for the debt of an insolvent due to the lender. *Bishop v. Exchange Bank*, 114 Ga. 962, 41 S. E. 43. See also *White v. Anderson*, 164 Mo. App. 132, 147 S. W. 1122; *Dale v. Duryea*, 49 Wash. 644, 96 Pac. 223.

(2) If property is sold at much less than its true value and an option is given to the seller to repurchase it at a later day for a price not exceeding the value of the property, but greater than the original selling price by more than legal interest, the transaction is presumably a usurious mortgage, the apparent seller being in fact a borrower;¹⁷ and the same intention is evident if the agreement instead of attempting to secure usurious interest by means of a repurchase price, excessive as compared with the original selling price, does so by a provision that the seller shall hire the property prior to its repurchase at a rental greater than legal interest.

(3) Instead of making a loan in terms a seller may turn over to the buyer property, immediately and readily salable for cash, for which the buyer promises to pay in the future a sum amounting to the present cash value of the property plus an amount greater than legal interest. Such a transaction intended by the parties as a means of providing the buyer with money from the sale of the property will be regarded as usurious.¹⁸

(4) Though, as has been seen,¹⁹ it is generally held permissible to sell property for deferred payments bearing a higher rate of interest than is permissible on a loan of money, yet if such a transaction is merely a colorable device for making what is in substance a loan, it is usurious.²⁰

(5) A sale with a lease back and an option to repurchase for the price paid is presumably usurious if the rent reserved is greater than legal interest.²¹

¹⁷ *Sparks v. Robinson*, 66 Ark. 460, 51 S. W. 460; *Baggett v. Trulock*, 77 Ga. 369; 3 S. E. 162; *Delano v. Rood*, 6 Ill. 690; *Patterson v. Bonner*, 14 La. 214; *Stockwell v. Richardson*, 101 N. Y. 643 (memorandum; opinion of lower court reported in 5 N. E. 45).

¹⁸ *Lowe v. Waller*, 2 Doug. 736; *Collier v. Barr*, 64 Ala. 543; *Quackenbos v. Sayer*, 62 N. Y. 344; *Swanson v. White*, 5 Humph. 373. *Cf. Kelley v. Sprague*, 13 N. Y. S. 64 (affd., without opinion, 128 N. Y. 582, 28 N. E. 250).

¹⁹ See *supra*, § 1685.

²⁰ *Meyer v. Cook*, 85 Ala. 417, 5

So. 147; *Ford v. Hancock*, 36 Ark. 248; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 116; *Ferguson v. Sutphen*, 8 Ill. 547; *Montague v. Sewell*, 57 Md. 407; *Earnest v. Hoskins*, 100 Pa. St. 551; *Hartranft v. Uhlinger*, 115 Pa. St. 270, 8 Atl. 244.

²¹ *Banks v. Walters*, 95 Ark. 501, 130 S. W. 519; *Scofield v. McNaught*, 52 Ga. 69; *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740; *Phelps v. Bellows' Estate*, 53 Vt. 539. Compare the following cases where the lease was held to be a genuine transaction and not intended as a cover for a usurious mortgage: *Jackson v. Morris*, 16 Ky. L.

Parties may call a transaction a sale which they really intend as a usurious mortgage.²² And in all cases it is the substance not the form of a transaction which is important.²³

§ 1688. Renewal obligations.

Where an obligation originally given for a loan is tainted with usury subsequent renewals thereof will be open to the same defence;²⁴ and it is immaterial that the renewal obligation is made by a new obligor, if the original obligor still remains bound,²⁵ or if the new obligor was a party to the original usurious obligation.²⁶ Nor is it material that the renewal is made to a third person if he takes with knowledge of the usurious character of the original indebtedness,²⁷ or without value;²⁸ but an assignee for value of a usurious claim who in ignorance of the

Rep. 684, 29 S. W. 435; *Davis v. Cunningham*, 32 N. C. 156.

²² *Brown v. Fletcher*, 253 Fed. 15, 165 C. C. A. 35.

²³ *Falls v. United States Savings, etc., Co.*, 97 Ala. 417, 13 So. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884; *Hartley v. Eagle Ins. Co.*, 222 N. Y. 178, 118 N. E. 622; *Meroney v. Atlanta Bldg. & Loan Assn.*, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; *Stirling v. Gogebic Lumber Co.*, 165 Mich. 498, 131 N. W. 109, 35 L. R. A. (N. S.) 1106; *Cotton v. Cooper* (Tex. Civ. App.), 209 S. W. 135; *Hudmon v. Foster* (Tex. Civ. App.), 210 S. W. 262; and see cases in this section *passim*.

²⁴ *Tate v. Wellings*, 3 T. R. 531; *Moncure v. Dermott*, 13 Pet. 345, 10 L. Ed. 193; *Nicrosi v. Walker*, 139 Ala. 369, 37 So. 97; *Lewis v. Hickman* (Ala.), 77 So. 46; *Lockwood v. Muhlberg*, 124 Ga. 660, 53 S. E. 92; *Cobe v. Guyer*, 237 Ill. 568, 86 N. E. 1088; *Smith v. Coopers*, 9 Iowa, 376; *Stanton v. Demerritt*, 122 Mass. 495; *Johnson v. Grayson*, 230 Mo. 380, 130 S. W. 673; *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309; *Sheldon v. Haxont*, 91 N. Y. 124; *Laux v. Gildersleeve*, 23

N. Y. App. Div. 352, 48 N. Y. S. 301; *Person v. Mattson*, 33 N. Dak. 49, 156 N. W. 780, Ann. Cas. 1918 A. 747; *Reap v. Battle*, 155 Pa. St. 265, 26 Atl. 439; *First Nat. Bank v. McCarthy*, 18 S. Dak. 218, 100 N. W. 14; *Cross v. Mann*, 53 Vt. 501. See also *Bean v. Rumrill* (Okl.), 172 Pac. 452.

²⁵ *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883; *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918 A. 762; *Richardson v. Foster*, 100 Wash. 57, 170 Pac. 321.

²⁶ *Machinists' Bank v. Krum*, 15 Ia. 49; *Bolen v. Wright*, 89 Neb. 116, 131 N. W. 185; *Beals v. Lewis*, 43 Ohio St. 220, 1 N. E. 641. In these cases a partner originally liable on a usurious note of the partnership assumed the debt and gave his individual note for it.

²⁷ *Compton v. Collins*, 197 Ala. 642, 73 So. 334; *Shirley v. Stephenson*, 104 Ky. 518, 47 S. W. 581. Cf. *Stephenson v. Shirley* (Ky.), 60 S. W. 387.

²⁸ *E. g.* where the new obligee acquired his right by inheritance. *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918 A. 762; *Van Ausdal v. Potterf*, 41 Ohio St. 677.

usury takes a new promise or new security from the debtor may enforce it, though he could not have enforced the original claim,²⁹ and a stranger to a usurious obligation who assumes payment of it in good faith as part of the consideration for the purchase of property or other lawful transaction cannot set up the defence of usury.³⁰ If a renewal note is given for the amount of the debt with no more than legal interest, the taint of usury is said to be purged and the obligation may be enforced.³¹ Where, as under the early English statutes, usury makes the original debt void or unenforceable, such a result seems to involve accepting the doctrine of moral consideration;³² but under modern statutes there is less difficulty in reaching the conclusion.

§ 1689. Sale of the obligation of a third person cannot be usurious.

The obligation of a third person, as his bill or note, like any other property, may in good faith be sold by the owner for any price he can get.³³ This principle is undisputed if the seller

²⁹ *E. g.*, because under the local statute it was void even in the hands of an innocent holder, *Cuthbert v. Haley*, 8 T. R. 390; *Perdue v. Brooks*, 85 Ala. 459, 5 So. 126; *Houghton v. Payne*, 26 Conn. 396; *Dix v. Van Wyck*, 2 Hill, 522; or because purchase of a note representing the claim was after maturity and the assignee therefore was subject to personal defences. *McFarland v. State Bank*, 7 Kans. App. 722, 52 Pac. 110. See also *Call v. Palmer*, 116 U. S. 98, 29 L. Ed. 559, 6 S. Ct. 301; *Taylor v. Morris*, 22 N. J. Eq. 606; *Armstrong v. Middaugh*, 74 N. Y. Misc. 45, 133 N. Y. S. 647.

³⁰ See *supra*, § 399.

³¹ *Barnes v. Hedley*, 2 Taunt. 184; *Wright v. Wheeler*, 1 Camp. 165, n. *Masterson v. Grubbs*, 70 Ala. 406; *Kilbourn v. Bradley*, 3 Day (Conn.), 356, 3 Am. Dec. 273; *Vermeule v. Vermeule*, 95 Me. 138, 49 Atl. 608; *Clark v. Phelps*, 6 Metc. (Mass.) 296; *Coleman v. Cole*, 96 Mo. App. 22, 69

S. W. 692; *Miller v. Hull*, 4 Denio, 104; *Person v. Mattson*, 33 N. Dak. 49, 156 N. W. 780, Ann. Cas. 1918 A. 747; *Guinn v. Security State Bank (Okl.)*, 176 Pac. 898; *Bomar v. Smith (Tex.)*, 195 S. W. 964; *Marstin v. Hall*, 9 Gratt. 8; *Gerlaugh v. Bassett*, 20 Wis. 671. *Cf. Habsch v. Johnson*, 132 Ark. 374, 201 S. W. 286; *Dean v. Maxfield (Tex. Civ. App.)*, 209 S. W. 466.

³² See *supra*, § 147.

³³ *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. Ed. 385; *Orr v. Sparkman*, 120 Ala. 9, 23 So. 829; *Loan, etc., Co. v. Shaffer*, 44 Dist. Col. App. 366; *Campbell v. Morgan*, 111 Ga. 200, 36 S. E. 621; *Colehour v. State Sav. Inst.*, 90 Ill. 152; *Metcalf v. Pilcher*, 6 B. Mon. 529; *Mutual Nat. Bank v. Regan*, 40 La. Ann. 17, 3 So. 407; *Priest v. Garnett (Mo.)*, 191 S. W. 1048; *Steen v. Stretch*, 50 Neb. 572, 70 N. W. 48; *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec.

does not indorse or guarantee payment or if he gives merely an indorsement without recourse.³⁴ If, however, he gives an indorsement or guaranty that the obligation will be paid, there is a conflict of authority. It is obvious that if the instrument were indorsed as collateral for a loan for which excessive interest was bargained the transaction would be usurious, but it should be noticed that it is not the indorsement but the contract to which the indorsed obligation is collateral that is objectionable, and it would be equally objectionable whatever the nature of the collateral. Perhaps because of the possibility that the appearance of a sale may easily be given to what is in fact a loan with collateral, some courts hold that as the indorsing seller is bound for the amount of the obligation, the transaction is in substance a loan to him, and if the rate of discount is excessive, a usurious loan. If it be granted that the transaction is in effect a loan, the consequences of its being usurious will depend upon the statute locally in force. Under the early English statute the indorsement was held void so that not only no recovery against the indorser could be had, but none against the maker.³⁵ But in most jurisdictions of the United States, even though the accuracy of the reasoning be conceded, the penalty for usury is not such as totally to invalidate the indorsement, and the indorsee may recover from the maker.³⁶ According to another view the transaction is not usurious, but the indorsee can recover from the indorser only the amount paid, with legal interest, though he can recover against prior

219; *Weaver Hardware Co. v. Solomovitz*, 98 N. Y. Misc. 413, 163 N. Y. S. 121; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Maas v. Chatfield*, 90 N. Y. 303; *Bailly v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385; *Cook v. Forker*, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699; *Connor v. Donnell*, 55 Tex. 167. It may be sold to the maker at a large discount unless the transaction is intended as a cover for usury. *Kentucky Coal Min. Co. v. Mattingly*, 133 Ky. 526, 118 S. W. 350.

³⁴ *Durant v. Banta*, 3 Dutch. 624, 630.

³⁵ *Lowes v. Massaredo*, 1 Stark. 385; *Chapman v. Black*, 2 B. & Ald. 588; *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 410. See also *Lloyd v. Keach*, 2 Conn. 175, 7 Am. Dec. 256; *Whitworth v. Adams*, 5 Rand. 333, 419.

³⁶ *Knights v. Putnam*, 3 Pick. 184; *Importers, etc., Bank v. Littell*, 47 N. J. L. 233; *Collier v. Nevill*, 3 Dev. 30; *Connor v. Donnell*, 55 Tex. 167; *Bank of Radford v. Kirby*, 100 Va. 498, 42 S. E. 303; *Armstrong v. Gibson*, 31 Wis. 61, 11 Am. Rep. 599.

parties on the obligation its full face value.³⁷ The bargain, however, is in terms not a loan but a sale, and though accompanied with a guaranty of the value of the article sold, it should not be regarded as within the purview of statutes against usury, unless the parties are in fact intending a loan rather than a sale; and this is the more general rule.³⁸

§ 1690. Discount of negotiable paper which is subject to a defence.

The fact that the maker of a negotiable instrument had a personal defence against the indorser or a prior party will not render usurious a sale of the instrument for a low price to a holder in due course.³⁹ But if the instrument except the indorser's obligation is wholly void, the transaction even though intended as a sale is in effect a loan to him, and where the discount is excessive, has been held usurious.⁴⁰ The same view has been generally taken of accommodation paper indorsed by the accommodated party and discounted at an excessive rate, if the buyer of the paper is aware of the nature of the instrument.⁴¹ A number of courts deny recovery even if the purchaser supposed the instrument was enforceable in the hands of the indorser.⁴² But such decisions seem to rest upon a misapprehen-

³⁷ *Coye v. Palmer*, 16 Cal. 158; *Noble v. Walker*, 32 Ala. 456; *Stevenson v. Unkefer*, 14 Ill. 103, 105; *Metcalf v. Pilcher*, 6 B. Mon. 529; *Lane v. Steward*, 20 Me. 98, 104; *Cobb v. Titus*, 10 N. Y. 198.

³⁸ *Tuttle v. Clark*, 4 Conn. 153; *Roark v. Turner*, 29 Ga. 455; *National Bank of Michigan v. Green*, 33 Ia. 140; *Ayer v. Tilden*, 15 Gray, 178, 77 Am. Dec. 355; *Becker's Inv. Agency v. Rea*, 63 Minn. 459, 65 N. W. 928; *Newman v. Williams*, 29 Miss. 212; *Durant v. Banta*, 3 Dutch. 624, 636; *Gaul v. Willis*, 26 Pa. St. 259; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560, 74 Am. St. 699.

³⁹ *Wildsmith v. Tracy*, 80 Ala. 258; *Lay v. Wissman*, 36 Iowa, 305; *Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; *Baily v.*

Smith, 14 Ohio St. 396, 84 Am. Dec. 385.

⁴⁰ *Hall v. Wilson*, 16 Barb. 548; *Harger v. Wilson*, 63 Barb. 237, 246.

⁴¹ *Nichols v. Levins*, 15 Iowa, 362; *Tufts v. Shepherd*, 49 Me. 312; *Van Schaack v. Stafford*, 12 Pick. 565; *Kennedy v. Heyman*, 183 N. Y. App. D. 421, 170 N. Y. S. 828; *Corcoran v. Powers*, 6 Ohio St. 19; *Connor v. Donnell*, 55 Tex. 167. See also *Belden v. Lamb*, 17 Conn. 441.

⁴² *Saltmarsh v. Planters', etc., Bank*, 14 Ala. 668; *Carlisle v. Hill*, 16 Ala. 398; *Wildsmith v. Tracy*, 80 Ala. 258; *Cockney v. Forrest*, 3 Gill & J. 482; *Whitten v. Hayden*, 7 Allen, 407; *Catlin v. Gunter*, 11 N. Y. 368, 62 Am. Dec. 113; *Strickland v. Henry*, 66 N. Y. App. Div. 23, 73 N. Y. S. 12; *Simpson v. Fullenwider*, 12 Ired. (N. C.) 334.

sion of the nature of accommodation paper, which should be regarded rather as subject to the personal defence of lack of consideration while in the hands of the accommodated party, than as having no existence until negotiated by him. If the buyer knows of the accommodation, he knows that in substance the accommodated party is the principal debtor and therefore the discount may be regarded as in effect a loan to him, but in terms the accommodating maker is the principal debtor, and a purchaser for value without notice has a right to enforce it according to its terms. In accordance with this view a number of courts uphold the validity of the transaction whatever the rate of discount, if the purchaser is ignorant of the accommodation character of the instrument, and the transaction is made in good faith.⁴³

It has been assumed thus far that the accommodating party is prior on the instrument to the accommodated party who offers it for discount. If a prior party sells the instrument it is necessarily notice to the purchaser that the obligation of subsequent parties can be undertaken only for accommodation.⁴⁴

§ 1691. The loan must be of money.

As usury by its definition requires the loan or forbearance of money, the loan of chattels for a compensation measured in chattels of a similar kind is not usurious though the percentage of compensation is greater than the legal rate of interest.⁴⁵ The same is true of loans of stock or other securities.⁴⁶ Even bank notes or other currency which is not legal tender, if depreciated in value, may be dealt with in the same manner. In return for them the borrower may promise legal tender with

⁴³ *Sherman v. Blackman*, 24 Ill. 345; *Dickerman v. Day*, 31 Iowa, 444, 7 Am. Rep. 156; *Holmes v. State Bank*, 53 Minn. 350, 55 N. W. 555; *Gaul v. Willis*, 26 Pa. St. 259; *Law's Ex'rs v. Sutherland*, 5 Gratt. 357.

⁴⁴ *Wallace v. Branch Bank*, 1 Ala. 565; *Carlisle v. Hill*, 16 Ala. 398; *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251; *Salmon Falls Bank v. Leyer*, 116 Mo. 51, 22 S. W. 504; *Over-*

ton v. Hardin, 6 Coldw. 376; *Whitworth v. Adams*, 5 Rand. 333, 411.

⁴⁵ *Morrison v. McKinnon*, 12 Fla. 552; *Bull v. Rice*, 5 N. Y. 315.

⁴⁶ *Maddock v. Rumball*, 8 East, 304; *Klein v. Title Guaranty, etc., Co.*, 166 Fed. 365, 178 Fed. 689, 102 C. C. A. 189, 29 L. R. A. (N. S.) 620; *Dry Dock Bank v. American L. Ins. Co.*, 3 N. Y. 344; *Marshall v. Rice*, 85 Tenn. 502, 3 S. W. 177.

the highest rate of interest ⁴⁷ or may agree to take them at any agreed discount; ⁴⁸ and the converse principle is equally true. A loan of money, for the use of which the borrower promises property or services is not usurious, ⁴⁹ at least unless so clearly excessive in value as to indicate a wrongful intent. ⁵⁰ So a payment of specie to be repaid later in depreciated currency is not invalid though the amount of currency to be repaid exceeds by more than the legal rate of interest the specie loaned. ⁵¹ It is obvious, however, that transactions such as those under consideration may easily be used to cover an intent to make a usurious loan, and if such an intent exists, the transaction is illegal. Therefore, where property transferred is given a fixed money value by the parties, a return of similar property greater in amount by more than the legal percentage is usurious; ⁵² and if the agreement requires the return not of a specified quantity of chattels but of such a quantity of chattels as shall equal in value those lent with the addition of other chattels of a value greater than the permissible interest, the transaction will be usurious. ⁵³ Still more clearly where a loan is made in depreciated currency the intent of the parties may render the transaction usurious, and in some States it has been held that, in any event, if the rate of compensation exceeds the permissible rate of interest, taking the depreciated currency at its market value at the time of the agreement, the transaction is usurious. ⁵⁴

§ 1692. The loan must be absolutely payable.

It is not usury to advance money which is to be repayable

⁴⁷ *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Hayward v. LeBaron*, 4 Fla. 404; *Stark v. Coffin*, 105 Mass. 328. Cf. *Gates v. Hackethal*, 57 Ill. 534, 11 Am. Rep. 45.

⁴⁸ *Stockwell v. Holmes*, 33 N. Y. 53. See also *Jarrett v. Nickell*, 9 W. Va. 345.

⁴⁹ *Wright v. McAlexander*, 11 Ala. 236; *Gillette v. Ballard*, 25 N. J. Eq. 491, 27 N. J. Eq. 489.

⁵⁰ *Sapp v. Cobb*, 60 Ark. 367, 30 S. W. 349.

⁵¹ *Finley v. McCormick*, 6 Heisk. 392. So a promise to repay money in

exchange on New York is not usurious whatever the value of such exchange. *Partlow v. Williams*, 19 Ill. 132.

⁵² *Galveston, etc., Ina. Co. v. Grymes* (Tex. Civ. App.), 50 S. W. 467, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778.

⁵³ *Morrison v. McKinnon*, 12 Fla. 552, 559. See also *Barnard v. Young*, 17 Ves. 44; *Steptoe's Adm. v. Harvey*, 7 Leigh, 501.

⁵⁴ *Moore's Exec. v. Vance*, 3 Dana, 361; *Maurry v. Ingraham*, 28 Miss. 171; *Turney v. State Bank*, 5 Humph. Tenn.) 407.

only on a contingency, even though the sum that will be repaid if the contingency happens exceeds the amount loaned with legal interest,⁵⁴ if the transaction is genuine and not used as a mere cover to carry out a usurious intent.⁵⁵ It was stated in an early case that if the interest only was put at hazard, the transaction would be usurious;⁵⁶ and it is obvious that where the interest only is subjected to a contingency, there is a greater opportunity for colorable transactions; but if the transaction is a genuine business venture it is not usurious according to the better view to provide for the payment on a contingency of interest exceeding the legal rate, though the principal of the loan is absolutely repayable.⁵⁷

⁵⁴ *Gilpin v. Enderbey*, 5 B. & Ald. 954; *Fereday v. Hordern*, Jacob, 144; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884 (aff'g. 135 Ill. App. 68); *Thorn-dike v. Stone*, 11 Pick. 183; *Gilbert v. Warren*, 171 N. Y. 665, 64 N. E. 1121; *Cunningham v. Green*, 23 Oh. St. 296; *Curtze v. Iron Dyke Min. Co.*, 46 Or. 601, 81 Pac. 815; *Truby v. Mosgrove*, 118 Pa. 89, 11 Atl. 806, 4 Am. St. 575; *Duffy v. Gilmore*, 202 Pa. 444, 51 Atl. 1026; *Case v. Fish*, 58 Wis. 56, 15 N. W. 808.

⁵⁵ *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 19 S. Ct. 179, 43 L. Ed. 474.

⁵⁶ *Roberts v. Trenayne*, Cro. Jac. 507, 508, and see *Morse v. Wilson*, 4 T. R. 353; *Cooper v. Tappan*, 9 Wis. 361.

⁵⁷ *Rapier v. Gulf City Paper Co.*, 77 Ala. 126; *Potter v. Yale College*, 8 Conn. 52; *Goodrich v. Rogers*, 101 Ill. 523; *Scripps v. Crawford*, 123 Mich. 173, 81 N. W. 1098; *Duval v. Neal*, 70 Miss. 288, 12 So. 145; *Lilliendahl v. Stegmair*, 45 N. J. Eq. 648, 18 Atl. 216; *Payne v. Freer*, 91 N. Y. 43, 43 Am. Rep. 640; *Clift v. Barrow*, 108 N. Y. 187, 15 N. E. 327; *Lay v. Bouton*, 73 Wash. 372, 131 Pac. 1153.

In *Hartley v. Eagle Ins. Co.*, 222 N. Y. 178, 118 N. E. 622, 623, the court said: "The rule, as stated in the lead-

ing case of *Roberts v. Trenayne* (Cro. Jac. 507), was that, 'if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure to have the principal again.' It is difficult to see any logical reason for this rule, and in this country, while *Roberts v. Trenayne*, *supra*, has frequently been cited, the rule has quite generally been modified to the extent of holding that if the casualty goes to the entire interest an agreement to pay interest in excess of the legal rate, depending upon a reasonable contingency which may result in no interest at all being paid, is not necessarily usurious, even though there be an absolute agreement to repay the entire principal. 29 Am. & Eng. Ency. of Law (2d Ed.) 486; 39 Cyc. 952; *Potter v. Yale College*, 8 Conn. 52; *Clift v. Barrow*, 108 N. Y. 187, 15 N. E. 327.

"Such arrangements, however, will not be upheld in any case where the purposes is to evade the statutes against usury, no matter what form the transaction may take. *Meaker v. Fiero*, 145 N. Y. 165, 39 N. E. 714; *Quackenbos v. Sayer*, 62 N. Y. 344; *Birdsall v. Patterson*, 51 N. Y. 43. The question in each case is, and necessarily must be whether the agreement be fair and reasonable, or a mere device to evade the usury statutes."

If the contingency is wholly within the control of the lender, there is obviously no risk involved, and if in such an event the lender is to receive more than legal interest the transaction is usurious.⁵⁸ On the other hand, if the contingency is within the control of the borrower, as he is bound to make no excessive payment unless he so chooses, the transaction is unobjectionable on the ground of usury,⁵⁹ though it may be objectionable as imposing a penalty. If the security of a loan only is put at hazard, a transaction providing for more than legal interest is usurious.⁶⁰ Obviously also, if the principal and full legal interest is absolutely payable, a stipulation for even a chance of advantage beyond that, is usurious.⁶¹

Cf. *Blaisdell v. Steinfeld*, 15 Ariz. 155, 186, 137 Pac. 555, where the court said: "In *Weaver v. Burnett*, 110 Iowa, 567, 81 N. W. 771, the court quotes Chancellor Walworth, in *Colton v. Dunham*, 2 Paige (N. Y.), 267, as follows: 'Whenever, by the agreement of the parties, a premium or profit beyond the legal rate of interest, for a loan or advance of money, is, either directly or indirectly, secured to the lender, it is a violation of the statute, unless the loan or advance is attended with some contingent circumstances by which the principal is put in evident hazard. A contingency merely nominal, with little or no hazard to the principal or the money loaned or advanced, cannot alter the legal effect of the transaction. . . . Where there is negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; . . . and whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious.' See also the following cases: *Scott v. Fabacher*, 176 Fed. 229, 100 C. C. A. 147; *Scott v. Lloyd*, 9 Pet. 418, 460, 9 L. Ed. 178; *Buttrick*

v. Harris, 1 Biss. 442, Fed. Cas. No. 2256; *Inland Trading Co. v. Edgcombe*, 57 Wash. 257, 106 Pac. 768."

⁵⁸ *Hungerford Brass, etc., Co. v. Brigham*, 47 N. Y. Misc. 240, 95 N. Y. S. 867; *Smith v. Nicholas*, 8 Leigh (Va.), 330.

⁵⁹ *Spain v. Hamilton's Adm'r*, 1 Wall. 604, 17 L. Ed. 619; *Walton Guano Co. v. Copelan*, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; *Mutual Ben. Ins. Co. v. Davis*, 115 Ky. 404, 73 S. W. 1020, 24 Ky. L. Rep. 2291; *Taylor v. Buzard*, 114 Mo. App. 622, 90 S. W. 126; *Kilpatrick v. Germania L. Ins. Co.*, 95 N. Y. App. Div. 287, 88 N. Y. S. 628; *Diehl v. Becker*, 178 N. Y. App. Div. 12, 164 N. Y. S. 920; *Hughes Bros. Mfg. Co. v. Conyers*, 97 Tenn. 274, 36 S. W. 1093. *Cf.* *Ford v. Washington &c. Inv. Co.*, 10 Idaho, 30, 76 Pac. 1010, 109 Am. St. 92.

⁶⁰ *Chapman v. Clark*, 5 Mackey, 527; *Craig v. McMullin*, 9 Dahn, 311; *Bang v. Phelps &c. Co.*, 96 Tenn. 361, 34 S. W. 516; *Raynolds v. Carter*, 12 Leigh (Va.), 166, 37 Am. Dec. 642; *Knight v. American &c. Co.*, 73 Wash. 380, 132 Pac. 219. *Cf.* *Blohm v. Hannan*, 82 N. J. Eq. 192, 88 Atl. 622.

⁶¹ *Cleveland v. Loder*, 7 Paige, 557; *Leavitt v. DeLauny*, 4 N. Y. 364, 369.

In *Barnard v. Young*, 17 Ves. 44, the plaintiff having borrowed a sum

§ 1693. Excessive charges.

Any payment to the lender in addition to legal interest whether called by the name of bonus or commission, or by any other name is usurious.⁶² And even if anything contracted for in excess of legal interest is contingent and may prove of no value, the principle is applicable.⁶³ But a so-called commission is unobjectionable if when the agreed interest is added thereto the total is not more than legal interest.⁶⁴

If a bonus is paid by a third person for his own reasons to the lender without the borrower's knowledge, the transaction

of money of the defendant, entered into a new agreement when the money became due, stipulating at a certain day to deliver in payment, as much stock as the money would have purchased at the time the agreement was made, or the money, at the option of the lender, and, in the meantime to pay lawful interest on the principal sum. In giving judgment the court said, "the lender is at the election to have his principal and interest, or to have a given quantity of stock transferred to him. His principal never was in any hazard, as he was, at all events, sure of having that, with legal interest, and had a chance of an advantage if stock rose. It was usurious to stipulate for that chance." See also *Union Nat. Bank v. Louisville, etc., R. Co.*, 145 Ill. 208, 34 N. E. 135; *Browne v. Vredenburg*, 43 N. Y. 195, 197; *Miller v. Virginia L. Ins. Co.*, 118 N. C. 612, 24 S. E. 484, 54 Am. St. Rep. 741; *Fry v. Coleman*, 1 Grant Cas. 445.

⁶² *Madsen v. Whitman*, 8 Ida. 762; *Sanford v. Kane*, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602; *Union Nat. Bank v. Louisville, etc., R. Co.*, 145 Ill. 208, 34 N. E. 135; *Bowdoin v. Hammond*, 79 Md. 173, 28 Atl. 769; *Anderson v. Smith*, 108 Mich. 69, 65 N. W. 615; *Phelps v. Montgomery*, 60 Minn. 303, 62 N. W. 260; *Johnson v. Grayson*, 230 Mo. 380, 130 S.

W. 673; *Kniickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137; *Doster v. Engliash*, 152 N. C. 339, 341, 67 S. E. 754; *Grubb v. Brooke*, 47 Pa. St. 485; *C. C. Slaughter Co. v. Eller* (Tex. Civ. App.), 196 S. W. 704; *Hawkins v. National Life Ins. Co.*, 57 Vt. 591. *Cf. United States Mortgage Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969; *Dunlop v. Chenoweth*, 88 N. J. Eq. 496, 104 Atl. 822.

⁶³ *Supra*, n. 61.

⁶⁴ *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 S. Ct. 8, 35 L. Ed. 794; *Green v. Equitable Mortgage Co.*, 107 Ga. 536, 33 S. E. 869; *National Life Ins. Co. v. Donovan*, 238 Ill. 283, 87 N. E. 356; *Oyster v. Longnecker*, 16 Pa. St. 269. But in *Leach v. Dolge*, 186 Mich. 695, 153 N. W. 47, Ann. Cas. 1917 A. 1182, the court held that where the parties to a mortgage stipulated expressly for six per cent interest, and incorporated in the principal, a bonus which would not amount to more than one per cent of the principal for the time the loan was to run, the mortgage was usurious, in spite of the fact that seven per cent was a legal rate, and that the bonus and the interest paid for the loan would aggregate less than seven per cent interest; since it could not be said that the parties intended the interest rate to be seven and not six per cent, as there was an express contract for the latter rate.

will not be made usurious, though the bonus and the reserved interest together exceed the permissible rate of interest.⁶⁵ But if the bonus, though paid by a third party, is paid with the connivance of the borrower, the transaction is usurious.⁶⁶

§ 1694. Expenses of securing or collecting a loan.

Unless his action is colorable and a device to avoid the law, a lender may contract for payment, "for his trouble, time and expense in collecting the money for the loan;"⁶⁷ "or for the expense of procuring the money;"⁶⁸ or for expenses of examination of title and preparation of an abstract where money is lent on the security of real estate.⁶⁹ Still more clearly expenses incurred or contracted for by the borrower in securing the loan, such as a commission to an agent, do not make the contract of borrowing usurious,⁷⁰ unless the lender receives part of the

⁶⁵ *Tucker v. Fouts*, 73 Fla. 1215, 76 So. 130, L. R. A. 1917 F. 916; *Madison University v. White*, 25 Hun, 490; *Gleason v. Childs*, 52 Vt. 421; *McArthur v. Schenck*, 31 Wis. 673, 11 Am. Rep. 643.

⁶⁶ *Ahrens v. Kelly*, 88 N. J. Eq. 119, 101 Atl. 571; *Hamilton v. Brennan*, 90 Hun, 340, 35 N. Y. S. 805, *affd.* 154 N. Y. 738, 49 N. E. 1097; *Spalding v. Bank of Muskingum*, 12 Ohio, 544.

⁶⁷ *Bennett v. Ginsberg*, 141 N. Y. App. Div. 66, 67, 125 N. Y. S. 650; citing *Thurston v. Cornell*, 38 N. Y. 281. See also *Stoveld v. Eade*, 4 Bing. 81; *Houghton v. Burden*, 228 U. S. 161, 33 S. Ct. Rep. 491, 57 L. Ed. 780; *In re Wilde*, 133 Fed. 562; *In re Mesibovsky*, 200 Fed. 562, 119 C. C. A. 42; *Citizens' Bank v. Murphy*, 83 Ark. 31, 102 S. W. 697; *Iowa Savings, etc., Assoc. v. Heidt*, 107 Ia. 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197; *Barras v. Youngs*, 185 Mich. 496, 152 N. W. 219; *Swanstrom v. Balstad*, 51 Minn. 276, 53 N. W. 648; *Spain v. Talcott*, 165 N. Y. App. Div. 815, 152 N. Y. S. 611; *Portland Trust Co. v. Havelly*, 36 Oreg. 234, 59 Pac. 466, 61 Pac. 346; *Richter v. Philadelphia Ware-*

house Co., 99 Pa. St. 289; *Fisher v. Adamson*, 47 Utah, 3, 151 Pac. 351; *Myers v. Williams*, 85 Va. 621, 8 S. E. 483; *Testera v. Richardson*, 77 Wash. 377, 137 Pac. 998.

⁶⁸ *Bennett v. Ginsburg*, 141 N. Y. App. D. 66, 67, 125 N. Y. S. 650. See also *Morton v. Thurber*, 85 N. Y. 550; *Danielson v. Mixon*, 109 S. Car. 264, 95 S. E. 515.

⁶⁹ *American Freehold Land Mortgage Co. v. Whaley*, 63 Fed. 743; *Matthews v. Georgia State Sav. Assoc.*, 132 Ark. 219, 200 S. W. 130; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Cobe v. Guyer*, 237 Ill. 516, 86 N. E. 1071; *Comstock v. Wilder*, 61 Iowa, 274, 16 N. W. 108; *Daley v. Minnesota, etc., Inv. Co.*, 43 Minn. 517, 45 N. W. 1100; *White v. Dwyer*, 31 N. J. Eq. 40; *Seamen's Bank v. McCollough*, 221 N. Y. 692, 117 N. E. 1083, *affg.* 166 N. Y. App. Div. 271, 151 N. Y. S. 600; *Gault v. Thurmond*, 39 Okl. 673, 136 Pac. 742; *American Mortgage Co. v. Woodward*, 83 S. C. 521, 524, 65 S. E. 739; *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515. See also *Ellenbogen v. Griffey*, 55 Ark. 268, 272, 18 S. W. 126.

⁷⁰ *Equitable Mortgage Co. v. Craft*,

commission or is chargeable as principal within the decisions referred to in another section.⁷⁰ Nor does the added obligation imposed upon the debtor of paying necessary expenses of collection including attorney's fees.⁷¹ If money is payable at a different place from that where it was lent exchange also may lawfully be added to the debtor's payment or obligation.⁷² But this principle cannot be extended to cover cases where the transaction involves no real exchange.⁷³

§ 1695. Certain slight excessive charges allowable by custom.

Though logically it is usurious to deduct in advance the highest legal rate of interest as a discount from the nominal amount lent,⁷⁴ since the actual sum lent is less than the face of the obligation, and interest is charged on the latter amount, custom has validated the practice at least on loans for short periods in most jurisdictions.⁷⁵ In some States statutes limit

58 Fed. 613 (Ga.); *Ginn v. New England Mortgage, etc., Co.*, 92 Ala. 135, 8 So. 388; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; *Merck v. American &c. Co.*, 79 Ga. 213, 7 S. E. 265; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573; *Baldwin v. Doying*, 114 N. Y. 452, 21 N. E. 1007; *Savings L. & T. Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102; *Hudmon v. Foster* (Tex. Civ. App.), 210 S. W. 262; and see cases in note 71.

⁷⁰ *Infra*, § 1697.

⁷¹ *Williams v. Flowers*, 90 Ala. 136, 7 So. 439, 24 Am. St. Rep. 772; *Athens Nat. Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546; *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; *Churchman v. Martin*, 54 Ind. 380; *Gate City Nat. Bank v. Strother* (Mo. App.), 196 S. W. 447; *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.), 180, 21 Am. Rep. 209; *Duluth, etc., Co. v. Klov Dahl*, 55 Minn. 341, 56 N. W. 1119; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. 461; *National Bank v. Thompson*, 90 Neb. 223, 133 N. W. 199.

⁷² *Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91; *Riley v. Olin*, 82 Ga. 312, 9 S. E. 1095; *Smith v. Champion*, 102 Ga. 92, 29 S. E. 160; *Tipton v. Ellsworth*, 18 Ida. 207, 109 Pac. 134; *Griffin v. Marine Co.*, 52 Ill. 130; *Churchman v. Martin*, 54 Ind. 390; *Merchants' Bank v. Sassee*, 33 Mo. 350; *Merritt v. Benton*, 10 Wend. 116; *International Bank v. Bradley*, 19 N. Y. 245; *Stuart v. Tenison Bros. Saddlery Co.*, 21 Tex. Civ. App. 530, 53 S. W. 83.

⁷³ *Wood v. Cuthbertson*, 3 Dak. 328, 21 N. W. 3; *State Bank v. Ensminger*, 7 Blackf. 105; *Cornell v. Barnes*, 26 Wis. 473.

⁷⁴ It was so held in early cases—*Barnes v. Worledge*, Noy, 41, a. c. Cro. Jac. 25, Yelv. 30, Moor, 644, 1 Bulstr. 17; *Bank of Utica v. Wager*, 2 Cow. 712.

⁷⁵ *Marsh v. Martindale*, 3 B. & P. 154; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786; *Bank of Newport v. Cook*, 60 Ark. 288, 30 S. W. 35, 29 L. R. A. 761, 46 Am. St. Rep. 171; *First Nat. Bank of Helena v. Waddell*, 74 Ark. 241, 85 S. W. 417; *McCall v. Herring*, 1 16 Ga.

to one year the term for which interest may be taken in advance;⁷⁶ but a few cases support the right of the creditor to take a portion of the interest on long-term obligations in advance and contract for the remainder in the future.⁷⁷ Custom and convenience have similarly prevailed over strict logic in the generally accepted rule that it is not usurious to calculate interest in accordance with the usual practice on the assumption that there are only 360 days in a year, though the rate is the highest legally permissible.⁷⁸ Also, though usury statutes

235, 42 S. E. 468; *National Life Ins. Co. v. Donovan*, 238 Ill. 283, 87 N. E. 356; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Tholen v. Duffy*, 7 Kan. 405; *Bramblett v. Carlisle Deposit Bank*, 122 Ky. 324, 92 S. W. 283, 6 L. R. A. (N. S.) 612; *Lichtenstein v. Lyons*, 115 La. 1051, 40 So. 454; *Ticonic Bank v. Johnson*, 31 Me. 414; *Agricultural Bank v. Bissell*, 12 Pick. 586; *Sandford v. Lundquist*, 80 Neb. 414, 118 N. W. 129, 18 L. R. A. (N. S.) 633; *International Bank v. Bradley*, 19 N. Y. 245; *Crowell v. Jones*, 167 N. C. 386, 83 S. E. 551; *Newton v. Woodley*, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1; *Geisburg v. Mutual Bldg., etc., Assoc.* (Tex. Civ. App.), 60 S. W. 478; *Brown v. Johnson*, 43 Utah, 1, 134 Pac. 590, Ann. Cas. 1916 C. 321, 46 L. R. A. (N. S.) 1157; *Parker v. Cousins*, 2 Gratt. 372, 44 Am. Dec. 388. But see *Timberlake v. First Nat. Bank*, 43 Fed. 231; *McCurry v. Hartwell Bank*, 236 Fed. 556 (Ga.); *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023; *Loganville Banking Co. v. Forrester*, 143 Ga. 302, 84 S. E. 961, L. R. A. 1915 D. 1195; *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311; *Insurance Co. v. Carpenter*, 40 Ohio St. 260.

⁷⁶ See *Smith v. Parsons*, 55 Minn. 520, 527, 57 N. W. 311; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680; *Sundahl v. First State Bank*, 32 N. Dak. 373, 155 N. W. 794; *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615; *Garland v. Union Trust Co. (Okla.)*, 165 Pac. 197,

and the same period is suggested (though not named in the local statute) in *Tallman v. Truesdell*, 3 Wis. 443, 452.

In Oklahoma the court has sanctioned a method of partially defeating such a statute as that referred to in the text. Though the statute forbids the present taking of interest for more than a year in advance, it has been held permissible to take a large part of the interest on a mortgage payable in ten years in the form of notes payable in one year from the time when the money was lent. *Metz v. Winne*, 15 Okl. 1, 79 Pac. 223. See also *Garland v. Union Trust Co.*, 49 Okl. 654, 165 Pac. 197; *Baker v. Pittsburg Mortgage Co. (Okla.)*, 171 Pac. 23.

⁷⁷ *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786; *Brown v. Scottish-American Mtge. Co.*, 110 Ill. 235; *Swanson v. Realization &c. Corp.*, 70 Minn. 380, 73 N. W. 165; *Pierce v. Davey*, 43 Neb. 45, 61 N. W. 92; and see Oklahoma decisions cited in the preceding note. But see *contra*—*McCall v. Herring*, 116 Ga. 235, 42 S. E. 468; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680 (statutory).

⁷⁸ *Camp v. Bates*, 11 Conn. 487, 495; *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592; *Planters' Bank v. Bass*, 2 La. Ann. 430; *Agricultural Bank v. Bissell*, 12 Pick. 586; *Planters' Bank Snodgrass*, 5 Miss. (4 How.) 573 *Merchants', etc., Bank v. Sarratt*, 77 S. C. 141, 57

generally state what yearly rate of interest is permissible, it is not illegal to contract for interest at that rate, payable semi-annually,⁷⁹ or quarterly,⁸⁰ prior to the maturity of the obligation. Where the debtor has the right to pay the whole debt at the expiration of any interest period, there is no objection to making the interest payable at shorter periods, as one month,⁸¹ and in one case at least, a reservation of interest at monthly intervals has been held permissible though the principal of the obligation was not due for a year.⁸² Whether this would be universally followed is possibly open to question.⁸³

§ 1696. Damages for default may be greater than legal interest.

The provision in a pecuniary obligation that on default of the debtor in payment of either principal or interest the entire indebtedness including interest for the full term, or a greater sum than legal interest to the time of default, shall thereupon become immediately payable, is not usurious, though recovery of any excess over legal interest is generally disallowed as penal.⁸⁴ Similarly, a provision that on default by the maker

S. E. 621, 122 Am. St. Rep. 562; *Bank of Burlington v. Durkee*, 1 Vt. 399. But see *contra*—*Utica Bank v. Smalley*, 2 Cow. 770, 14 Am. Dec. 526; *Bank of Utica v. Wagar*, 8 Cow. 398. In *Neal v. Brockhan*, 87 Ga. 130, 13 S. E. 283, a reservation as interest of one-twelfth of the legal annual rate for the month of February was held not usurious.

⁷⁹ *Myer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Varn v. White*, 68 Fla. 329, 67 So. 142; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199; *Radford v. Southern Mutual Life Ins. Co.*, 12 Bush, 434; *Monnett v. Sturges*, 25 Ohio St. 384; *Taylor v. Hiestand*, 46 Ohio St. 345, 20 N. E. 345.

⁸⁰ *Mowry v. Bishop*, 5 Paige, 98.

⁸¹ *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Neal v. Brockhan*, 87 Ga. 130, 13 S. E. 283; *Goodale v. Wallace*, 19 S. Dak. 405, 103 N. W. 651, 117 Am. St. Rep. 962.

⁸² *Crowell v. Jones*, 167 N. C. 386, 83 S. E. 551.

⁸³ See *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154. In *Brown v. Johnson*, 43 Utah, 1, 134 Pac. 590, Ann. Cas. 1916 C. 321, 46 L. R. A. (N. S.) 1157, under a statute permitting any rate of interest not exceeding 12 per cent per annum, the discount of a note for three months by deducting 3 per cent, was held not usurious.

⁸⁴ *Wells v. Girling*, 4 Moo. C. Pl. 78; *Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co.*, 94 Ga. 306, 21 S. E. 701, 47 Am. St. 153, 32 L. R. A. 208; *Taylor v. Buzard*, 114 Mo. App. 622, 90 S. W. 126; *Moore v. Cameron*, 93 N. C. 51; *Garland v. Union Trust Co. (Okla.)*, 165 Pac. 197; *Law Guarantee, etc., Soc. v. Hogue*, 37 Or. 544, 62 Pac. 380, 63 Pac. 690; *Goodale v. Wallace*, 19 S. Dak. 405, 103 N. W. 651, 117 Am. Rep. 962, 9 Ann. Cas. 545; *Stuart v. Tenison Bros. Saddlery*

an obligation shall thereafter bear a rate of interest higher than the legal rate, though it may be objectionable as penal if the rate is excessive, is not usurious.⁸⁵ The principle applicable to these cases has been thus stated: "Wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier date, the contract is not usurious but additional, and the larger sum becomes a mere penalty."⁸⁶ The same principle should render valid a stipulation in the original contract of the borrower for compounding interest if not paid when due though the rate reserved was the full legal rate, and such is the more general rule;⁸⁷ but in many States the provision is held, if not usurious, at least penal and unenforceable.⁸⁸ After lawful interest has once become due, there seems no doubt of the validity of a contract express or implied from custom to pay interest thereafter upon the interest already matured.⁸⁹

Co., 21 Tex. Civ. App. 530, 53 S. W. 83; *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332; *Cissna Loan Co. v. Gawley*, 87 Wash. 438, 151 Pac. 792, L. R. A. 1916 B. 807, Ann. Cas. 1917 D. 722. See also *Deming Investment Co. v. Reed* (Okla.), 179 Pac. 35, and see *supra*, § 787. But see *contra* *Miller v. Furgerson*, 20 Ky. L. Rep., 801, 47 S. W. 1081.

⁸⁵ *Lang v. Storie*, 9 Hare, 542; *Union Mortgage, etc., Co. v. Hagood*, 97 Fed. 360; *Carney v. Matthewson*, 86 Ark. 25, 109 S. W. 1024; *Walker v. Abt*, 83 Ill. 226; *Conrad v. Gibbon*, 29 Ia. 120; *Taylor v. Buzard*, 114 Mo. App. 622, 90 S. W. 126; *Union Estates Co. v. Adlow Const. Co.*, 221 N. Y. 183, 116 N. E. 984; *Green v. Brown*, 22 N. Y. Misc. 279, 49 N. Y. S. 163; *Ward's Adm'r v. Cornett*, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 550; *Blake v. Yount*, 42 Wash. 101, 84 Pac. 625, 114 Am. St. Rep. 106, 7 Ann. Cas. 487. See also *Cissna Loan Co. v. Gawley*, 87 Wash. 438, 151 Pac. 792, Ann. Cas. 1917 D. 722, L. R. A. 1916 B. 807. But see *Yndart*

v. Den, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200.

⁸⁶ *Blake v. Yount*, 42 Wash. 101, 84 Pac. 625, 114 Am. St. Rep. 106, 7 Ann. Cas. 487.

⁸⁷ *Carney v. Matthewson*, 86 Ark. 25, 109 S. W. 1034; *Graham v. Fitta*, 53 Fla. 1046, 43 So. 512; *Union Savings Bank, etc., Co. v. Dottenheim*, 107 Ga. 606, 614, 34 S. E. 217; *Palm v. Fancher*, 93 Miss. 785, 48 So. 818, 33 L. R. A. (N. S.) 295; *Merchants', etc., Bank v. Caston*, 97 Miss. 309, 52 So. 633; *Western Storage, etc., Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642; *Covington v. Fisher*, 22 Okl. 207, 97 Pac. 615; *Newton v. Woodley*, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1; *Hale v. Hale*, 1 Coldw. (Tenn.) 233, 78 Am. Dec. 490; *Roane v. Ross*, 84 Tex. 46, 19 S. W. 339; *Crider v. San Antonio Real Estate Bldg., etc., Assoc.*, 89 Tex. 597, 35 S. W. 1047. See also *Yndart v. Den*, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200.

⁸⁸ See *supra*, § 1417.

⁸⁹ *Ossulston v. Yarmouth*, 2 Salk.

§ 1697. Effect of exactions by lender's agent.

Even though an agent is acting for the lender, the latter is not affected by usury, taken or contracted for without his knowledge or authority, by the agent.⁹⁰ On the other hand, where the principal authorizes, ratifies, or knowingly takes the benefit of an exaction of his agent, which makes the charge for the use of money exceed the legal rate of interest, the transaction is usurious.⁹¹ And where the principal, as a reasonable man must have known that his agent would make an illegal exaction he is held in effect to have authorized it. Thus where the prin-

449; *Eaton v. Bell*, 5 B. & Ald. 34; *Ealava v. Lepretre*, 21 Ala. 504, 530, 56 Am. Dec. 266; *Timberlake v. First Nat. Bank*, 43 Fed. 231; *First Nat. Bank of Helena v. Waddel*, 74 Ark. 241, 85 S. W. 417; *Ellard v. Scottish-American Mtge. Co.*, 97 Ga. 329, 22 S. E. 893; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573; *Quimby v. Cook*, 10 Allen, 32; *Gay v. Berkey*, 137 Mich. 658, 100 N. W. 920; *Gunn v. Head*, 21 Mo. 432; *Sanford v. Lundquist*, 80 Neb. 414, 118 N. W. 129, 18 L. R. A. (N. S.) 633; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Taylor v. Hiestand*, 46 Ohio St. 345, 20 N. E. 345; *Craig v. McCulloch*, 20 W. Va. 148. *Cf. Spain v. Talcott*, 165 N. Y. App. D. 815, 152 N. Y. S. 611.

⁹⁰ *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559, affirming 7 Fed. 737; *Pearson v. Bailey*, 23 Ala. 537; *Sherwood v. Swift*, 64 Ark. 662, 43 S. W. 507; *Wacasia v. Radford*, 142 Ga. 113, 82 S. E. 442; *Hoyt v. Pawtucket Inst. for Sav.*, 110 Ill. 390; *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 481, 32 N. E. 534; *Richards v. Purdy*, 90 Iowa, 502, 58 N. W. 886, 48 Am. St. Rep. 458; *Lusk v. Smith*, 71 Kans. 550, 81 Pac. 173; *Commonwealth Title Ins. & T. Co. v. Dakko*, 89 Minn. 386, 94 N. W. 1088; *Lane v. Washington L. Ins. Co.*, 46 N. J. Eq. 316, 19 Atl. 618; *Brown v. Jones*, 89 N. Y. Misc. 538, 546, 152

N. Y. S. 571; *Flanagan v. Shaw*, 174 N. Y. 530, 66 N. E. 1108, affg. without opinion 74 N. Y. App. Div. 508, 77 N. Y. S. 1070; *Barger v. Taylor*, 30 Or. 228, 42 Pac. 615, 47 Pac. 618; *Williams v. Bryan*, 68 Tex. 593, 5 S. W. 401; *Brown v. Johnson*, 43 Utah, 1, 134 Pac. 590, Ann. Cas. 1916 C. 321; *Fransen v. Hammond*, 136 Wis. 239, 116 N. W. 169, 19 L. R. A. (N. S.) 399, 128 Am. St. Rep. 1079.

⁹¹ *Dryfus v. Burnes*, 53 Fed. 410 (Ark.); *In re Kellogg*, 113 Fed. 120, affd. 121 Fed. 333, 57 C. C. A. 547; *Banks v. Flint*, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; *Richards v. Bippus*, 18 D. C. App. Cas. 293; *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468; *Meers v. Stevens*, 106 Ill. 549; *Manchester Nat. Bank v. Herndon*, 181 Ky. 117, 203 S. W. 1055; *Robinson v. Blaker*, 85 Minn. 242, 88 N. W. 845, 89 Am. St. Rep. 541; *Knoup v. Carver*, 74 N. J. Eq. 449, 70 Atl. 660; *Bliven v. Lydecker*, 130 N. Y. 102, 28 N. E. 625; *Schwarz v. Sweitzer*, 202 N. Y. 8, 94 N. E. 1090; *Bean v. Rumrill* (Ok.), 172 Pac. 452; *American Mtge. Co. v. Woodward*, 83 S. C. 521, 65 S. E. 739; *Fransen v. Hammond*, 136 Wis. 239, 116 N. W. 169, 19 L. R. A. (N. S.) 399, 128 Am. St. Rep. 1079, and see cases cited in the preceding note.

cial expressly or impliedly authorizes his agent to get his compensation from the borrower for making a loan at the highest legal rate, and the agent does so the transaction is usurious;⁹² and clearly one who in reality advances money, cannot by making the loan in the name of one who acts as a mere dummy, avoid the imputation of usury where he exacts a bonus or commission which with the interest charged as such amounts to more than the legal percentage of the loan.^{92a}

§ 1698. How far intent is essential.

Ignorance of the law is generally no excuse, and where a transaction unmistakably a loan is made for a rate of interest exceeding that permitted by the law, the transaction is necessarily usurious.⁹³ In some jurisdictions, however, it seems that a wilful purpose to transgress the law is essential;⁹⁴ and a number of decisions sustain the conclusion that if by a mistake of

⁹² *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; *Vahlberg v. Keaton*, 51 Ark. 534, 545, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; *Payne v. Henderson*, 106 Ky. 135, 50 S. W. 34, 20 Ky. L. Rep. 1739; *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985, 49 Am. St. Rep. 492; *Carpenter v. Lamphere*, 70 Minn. 542, 73 N. W. 514; *Kaufman v. Schwartz*, 183 N. Y. App. D. 510, 170 N. Y. S. 318. In Nebraska the court lays down the rule broadly: "that where an agent of the lender exacts for the use of money a bonus or commission from the borrower in addition to the highest lawful rate of interest, the transaction is usurious." *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544. See also *Ridgeway v. Davenport*, 37 Wash. 134, 79 Pac. 606.

^{92a} *Dalton v. Weber*, 203 Mich. 455, 169 N. W. 946.

⁹³ *Brown v. Grundy*, 111 Fed. 15; *Blaisdell v. Steinfeld*, 15 Ariz. 155, 186, 137 Pac. 555; *German Bank v. De Shon*, 41 Ark. 331; *Drury v. Wolfe*, 34 Ill. App. 23, affd. 134 Ill. 294, 25 N. E. 626; *Sylvester v. Swan*, 5 Allen, 134, 81

Am. Dec. 734; *Vandervelde v. Wilson*, 176 Mich. 185, 188, 142 N. W. 1069; *Hagan v. Barnes*, 92 Minn. 128, 99 N. W. 415; *Hebron Bank v. Gambrell* (Miss.), 77 So. 148; *Bank of Willow Springs v. Utterman* (Mo. App.), 184 S. W. 1171, 1172; *Fiedler v. Darrin*, 50 N. Y. 437; *MacRackan v. Bank of Columbus*, 164 N. C. 24, 80 S. E. 184, 49 L. R. A. (N. S.) 1043; *Gold Stabeck Loan & C. Co. v. Kinney*, 33 N. Dak. 495, 157 N. W. 482; *Craig v. Pleiss*, 26 Pa. St. 271; *Carolina Savings Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199; *Washington Fire Ins. Co. v. Maple Valley Lumber Co.*, 77 Wash. 686, 138 Pac. 553.

⁹⁴ *Scheuer v. New York Life Ins. Co.* (Ala.), 82 So. 157; *Anderson v. Creamery Package Co.*, 8 Ida. 200, 67 Pac. 493, 56 L. R. A. 554, 101 Am. St. Rep. 188; *Washington, etc., Investment Assoc. v. Stanley*, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793. See also *Patterson v. Wyman* (Minn.), 170 N. W. 928; *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027; *Hartley v. Eagle Ins. Co.*, 222 N. Y. 178, 118 N. E. 622.

fact as to the amount of interest charged, due to miscalculation or other cause, the lender innocently bargains for more than the legal rate, the transaction is not usurious.⁶⁶ In New York at least such a mistake of fact on the part of the borrower prevents the transaction from being usurious though the lender had a corrupt purpose, and what was actually bargained for exceeds what the law permits.⁶⁶ But generally it is held that so far as intent is important, it is only that of the lender which is determinative.⁶⁷ Intent is chiefly important as characterizing transactions not in the form of loans. The law does not permit parties to evade usury statutes by giving the form of a sale or exchange or bailment to what is really intended as a loan of money, and the validity of such transactions depends on whether the parties were using an apparently legal form as a mere device, or in good faith intended to make such a bargain in reality as they did in appearance.⁶⁸

§ 1699. Parol evidence of usury.

Where an agreement in writing purporting to contain the whole contract of the parties is unobjectionable, it has been urged that a collateral oral agreement for usury cannot ren-

⁶⁶ *Brown v. Grundy*, 111 Fed. 15; *Aldrich v. McClay*, 75 Ark. 387, 87 S. W. 813; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Rushing v. Willingham*, 105 Ga. 166, 31 S. E. 154; *Cooper v. Nock*, 27 Ill. 301; *Brown v. Cass County Bank*, 86 Iowa, 527, 53 N. W. 410; *Flax v. Mutual &c. Loan Assoc.*, 198 Mich. 676, 165 N. W. 835; *Ward v. Anderberg*, 31 Minn. 304, 17 N. W. 630; *Smythe v. Allen*, 67 Miss. 146, 6 So. 627; *Dodds v. McCormick Harvesting Mach. Co.*, 62 Neb. 759, 87 N. W. 911; *Bevier v. Covell*, 87 N. Y. 50; *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615; *McElfatrick v. Hicks*, 21 Pa. St. 402; *American Bank v. Sublett*, 104 S. C. 366, 89 S. E. 319.

⁶⁷ In *Morton v. Thurber*, 85 N. Y. 550, the lender exacted legal interest and a further sum which he falsely represented to be for expenses incurred

in securing the money. It was held that the borrower's ignorance of the falsity of this statement prevented the transaction from being usurious. See also *Von Haus v. Soule*, 146 N. Y. App. Div. 731, 131 N. Y. S. 512; *Smythe v. Allen*, 67 Miss. 146, 6 So. 627.

⁶⁸ *Brown v. Grundy*, 111 Fed. 15 (Ark.); *Wright v. Elliott*, 1 Stew. (Ala.) 391; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Lukens v. Haslett*, 37 Minn. 441, 35 N. W. 265; *Craig v. Pleiss*, 26 Pa. 271; *First Nat. Bank v. Plankington*, 27 Wis. 177, 9 Am. Rep. 453.

⁶⁹ *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Cooper v. Nock*, 27 Ill. 301; *Gould v. St. Anthony Falls Bank*, 98 Minn. 420, 108 N. W. 951; *Hamilton v. Moore*, 7 Humph. (Tenn.) 35. See also *Lynn v. McCue*, 94 Kans. 761, 773, 147 Pac. 808.

der the written contract invalid since the parol evidence rule will deprive the collateral agreement of validity, and, therefore, make the writing the whole contract between the parties.⁹⁹ But this argument is unsound. Here, as generally, in dealing with illegal contracts, it is the wrongful nature of the plaintiff's endeavor which deprives him of the right to enforce the contract;¹ and it is generally held that the parol evidence rule will not save the written agreement from the defence of usury.²

§ 1700. Contracts made or to be performed on Sunday.

The prohibition of certain employments or undertakings on Sunday is purely statutory. Aside from such statutes, all contracts legal in themselves, are valid, though made on that day.³ Statutes have, however, been passed prohibiting certain transactions on Sunday. These go back for their original to 1677^{3a} but the terms of modern American statutes vary and, though generally including all contracts and sales not of necessity or charity, are not always so wide. A statute forbidding secular labor and business does indeed make all sales and contracts to sell, as well as other bargains, illegal.⁴ But if, as in the

⁹⁹ *Allen v. Turnham*, 83 Ala. 323, 3 So. 854; *Butterfield v. Kidder*, 8 Pick. 512.

¹ See *supra*, § 1630.

² *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288; *McDaniel v. Bank of Bethlehem*, 22 Ga. App. 223, 95 S. E. 724; *McGuire v. Campbell*, 58 Ill. App. 188; *France v. Munro*, 138 Iowa, 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391; *Union Nat. Bank v. Fraser*, 63 Miss. 231; *Koehler v. Dodge*, 31 Neb. 328, 47 N. W. 913, 28 Am. St. Rep. 518; *Macomber v. Dunham*, 8 Wend. 550; *Cousins v. Gray*, 60 Tex. 346.

³ *Drury v. Defontaine*, 1 Taunt. 131; *Richardson v. Goddard*, 23 How. (U.S.) 28, 42, 16 L. Ed. 412; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Prout v. Hoy Oil Co.*, 263 Ill. 54, 105 N. E. 26; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965; *McKee v. Jones*, 67 Miss. 405, 7 So. 348; *Rodman v.*

Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; *Bloom v. Richards*, 2 Ohio St. 387; *State v. Thomas*, 61 Ohio St. 444, 465, 56 N. E. 276, 48 L. R. A. 459; *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908; *Adams v. Gay*, 19 Vt. 358.

^{3a} 20 Charles II, c. 27.

⁴ *Street v. Browning* (Ala. App.), 80 So. 150; *Towle v. Larrabee*, 26 Me. 464; *Pattes v. Greely*, 13 Metc. 284; *Cranson v. Goss*, 107 Mass. 439, 441, 9 Am. Rep. 45; *Durant v. Rhener*, 26 Minn. 362, 4 N. W. 610; *Varney v. French*, 19 N. H. 233; *Jameson v. Carpenter*, 68 N. H. 62, 36 Atl. 554; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Northrup v. Foot* 14 Wend. 248; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. The appointment on Sunday of an agent to sign a contract for the sale of real estate was, therefore, held to confer no power

early English statute, only business within a person's "ordinary calling" is forbidden a contract, or sale which is outside of such calling is not forbidden.⁵ So in some States only public sales and publicly offering to sell are forbidden.⁶ And still other statutes are directed merely against labor.⁷ So far, then, as the making of a particular contract on Sunday is within the local statutory prohibition it is unlawful, and moreover a contract made on a secular day to do an act on Sunday which the law forbids to be done on that day is equally unlawful, and no recovery can be had for such performance.⁸

§ 1701. Preliminary negotiations on Sunday do not invalidate a contract.

The fact that the parties discussed on Sunday the terms of a proposed bargain will not invalidate it if afterwards entered into on a secular day, and what took place on Sunday may be

upon the agent. *Kryzminski v. Callahan*, 213 Mass. 207, 100 N. E. 335, 43 L. R. A. (N. S.) 140. But in *McKee v. Verner*, 239 Pa. 69, 86 Atl. 646, 44 L. R. A. (N. S.) 727, the court refused to open a judgment entered under a warrant of attorney given on Sunday.

⁵ *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, 3 B. & C. 232; *Smith v. Sparrow*, 4 Bing. 84; *Scarfe v. Morgan*, 4 M. & W. 270; *Swann v. Swann* (C. C.), 21 Fed. 299; *Sanders v. Johnson*, 29 Ga. 526; *Hazard v. Day*, 14 Allen, 487, 92 Am. Dec. 790; *Allen v. Gardiner*, 7 R. I. 22; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Mills v. Williams*, 16 S. C. 593; *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Sec. 463. "Labor or work of their callings" were the words of the earliest statute. 29 Charles II, c. 27.

⁶ *Moore v. Murdock*, 26 Cal. 514; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965; *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531; *Boynnton v. Page*, 13 Wend. 425; *Batsford v. Every*, 44 Barb. 618. Such a law was held con-

stitutional in *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127.

⁷ In *Reynolds v. Stevenson*, 4 Ind. 619, this was held broad enough to include sales. See also *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756. But though in a broad sense of the words "labor or work," a sale or contract to sell may be included, it seems that a statute making illegal what was not illegal at common law should be strictly construed. Accordingly sales and contracts to sell generally have been held not within such a statute. *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Eden v. People*, 161 Ill. 296, 300, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; *Birks v. French*, 21 Kans. 238; *Roberts v. Barnes*, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; *Horacek v. Keebler*, 5 Neb. 355; *Bloom v. Richards*, 2 Ohio St. 387.

⁸ *Carson v. Calhoun*, 101 Me. 456, 64 Atl. 838; *Barney v. Spangler*, 131 Mo. App. 58, 109 S. W. 855; *Knight v. Press Co.*, 227 Pa. 185, 75 Atl. 1083; and see *infra*, § 1710.

shown as explaining the meaning of what took place later.⁹ Within this principle, an offer made on Sunday, but accepted on a secular day, creates a valid contract.¹⁰ So a formal instrument as a bond or deed,¹¹ or negotiable instrument,¹² though signed on Sunday is valid if delivered on a secular day, since until delivery the transaction is incomplete.

§ 1702. Ownership may be transferred by agreement on Sunday.

If it be assumed that a given conveyance, contract or sale made on Sunday is forbidden by the local law, it then becomes important to determine what is the effect, if any, of the transaction. A contract thus forbidden, which is wholly executory on both sides, clearly can be enforced by neither party.¹³ But

* *McKinnis v. Estes*, 81 Ia. 749, 46 N. W. 987; *Tuckerman v. Hinkley*, 9 Allen, 452; *Miles v. Janvrin*, 200 Mass. 514, 518, 86 N. E. 785; *Silver v. Graves*, 210 Mass. 26, 31, 95 N. E. 948; *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132, 62 N. W. 149; *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552; *Burr v. Nivison*, 75 N. J. Eq. 241, 72 Atl. 72, 138 Am. St. Rep. 554, 20 Ann. Cas. 35; *Berry v. O'Neill (N. J. L.)*, 104 Atl. 25; *Curtin v. People's Nat. Gas Co.*, 233 Pa. 397, 82 Atl. 503. But where an agreement provided that it should not be valid until ratified by a third person, and this ratification was given on Sunday, there was no valid contract. *County Engineering Co. v. West*, 88 N. J. Eq. 109, 102 Atl. 668.

¹⁰ *Dickinson v. Richmond*, 97 Mass. 45; *Stackpole v. Symonds*, 23 N. H. 229; *McDonald v. Fernald*, 68 N. H. 171. But see *contra* *International Text Book Co. v. Ohl*, 150 Mich. 131, 111 N. W. 768, 13 L. R. A. (N. S.) 1157, 121 Am. St. Rep. 612.

¹¹ *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *Schwab v. Rigby*, 38 Minn. 395, 38 N. W. 101; *Duggan v. Champlin*, 75 Miss. 441, 23 So. 179;

Beitenman's Appeal, 55 Pa. 183; *Farwell v. Webster*, 71 Wis. 485, 37 N. W. 437; *O'Day v. Meyers*, 147 Wis. 549, 556, 133 N. W. 605. See also the application of the same rule to contracts, apparently informal, in *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U. S. 597, 602, 28 L. Ed. 534, 4 S. Ct. 572; *Harris v. Morse*, 49 Me. 432, 77 Am. Dec. 269. On principle the question in the case of such contracts depends (1) upon whether a contract was made on Sunday, though the writing was not delivered (see *supra*, § 28), and (2) if so, was this contract subsequently adopted on a secular day.

¹² *Flanagan v. Meyer*, 41 Ala. 132; *Young v. Dublin Fertilizer Works*, 16 Ga. App. 651; *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131; *Conrad v. Kinzie*, 105 Ind. 281, 4 N. E. 863; *Hill v. Dunham*, 7 Gray, 543; *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281; *Clough v. Davis*, 9 N. H. 500; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *O'Day v. Meyers*, 147 Wis. 549, 133 N. W. 605.

¹³ *County Engineering Co. v. West*, 88 N. J. Eq. 109, 102 Atl. 668; *Chestnut v. Harbaugh*, 78 Pa. St. 473, and cases in this section *passim*.

it may be supposed that the bargain has been executed on one side or the other, at least in part. By far the most common case is where goods have been sold and the property in them passed so far as it is possible for the parties to bring about that result on Sunday. If the effect of the transaction is completely nullified by its illegality, no property can pass and, consequently, the seller, even though the goods have been delivered, may sue in trover or replevin to recover them. This result has been reached in some States.¹⁴ But the criticisms which have been previously made upon the theory that illegal contracts are wholly void¹⁵ apply here with peculiar force. If it were held that such a sale was absolutely void, a *bona fide* purchaser of one who bought on Sunday would get no title—a result which is to be deprecated.¹⁶ In fact the law seems to recognize the validity of the transaction except as between the parties themselves the transaction is not effectual.¹⁷

§ 1703. Effect of transfer of ownership.

A sale of chattels on Sunday is followed by the same legal consequences as if entered into upon a secular day except that the remedy is denied to either of the wrongdoers.¹⁸ Accord-

¹⁴ *Dodson v. Harris*, 10 Ala. 569; *Ladd v. Rogers*, 11 Allen, 209 (practically overruled on this point by *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368); *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *Adams v. Gay*, 19 Vt. 358. In most of these decisions the court seems not so much to hold the transaction void as voidable on return of the consideration.

¹⁵ See *supra*, § 1630.

¹⁶ Sunday laws cannot be successfully invoked against such a purchaser. *Mann v. United Motor Boston Co.*, 226 Mass. 495, 116 N. E. 239.

¹⁷ Thus one who claims ownership of goods bought on Sunday by the defendant must establish a title superior to that of him of whom the defendant bought. *Moore v. Kendall*, 2 Pinn. 99, 52 Am. Dec. 145.

¹⁸ *Mann v. United Motor Co.*, 226 Mass. 495, 116 N. E. 239. This was well explained in *Stearns v. Bean*, 15 N. H. 577, 578, Parke saying: "It is generally said of an illegal contract that it is void." *v. Defontaine*, 1 Taunt. 131; *Deming*, 14 N. H. 133, 137, 1 Am. Dec. 179, and cases there. *Lewis v. Welch*, 14 N. H. 294, if this were so, and the contract, in the broad sense of the term, were void, the property would pass by it; the defendant might reclaim the property at will, being his property it would be subject to attachment and levy by his creditor in the same manner as if the attachment had never been made. But the law is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal act.

a buyer becomes the owner of the goods sold and delivered to him on Sunday and may retain them, though the consequence of so holding ^{18a} is to permit him to obtain the benefit of the transaction without liability for the price;¹⁹ since no action for the price,²⁰ or for the value of the goods,²¹ can be maintained. Nor can a payment made on Sunday be recovered.²²

contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it. See *Fennell v. Ridler*, 5 B. & C. 406, opinion of Bayley, J."

^{18a} *Bertram v. Morgan*, 173 Ky. 655, 191 S. W. 317, L. R. A. 1917 D. 445; *Rickards v. Rickards*, 98 Md. 136, 56 Atl. 397, 63 L. R. A. 724, 103 Am. St. 393, and see cases in the following notes.

¹⁹ *Kinney v. McDermot*, 55 Iowa, 674, 39 Am. Rep. 191; *Kelley v. Cosgrove*, 83 Iowa, 229; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Smith v. Bean*, 15 N. H. 577; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. In Maine this rule

was altered by statute in 1880, which enacted that one who receives a valuable consideration for a contract made on Sunday shall not defend against it on that ground until he restores the consideration. See *Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827. Such a statute sets up a different rule from that applicable to illegal bargains generally. Under it executory contracts cannot be enforced, but partially executed ones become enforceable unless rescinded by the restoration of the consideration received. Such a rule may be appropriate in a community where a sale on Sunday is not regarded as so wrongful in its nature as to justify the application of the ordinary rule that parties to illegal bargains are left by the law without remedy, whatever their position may be. A result somewhat similar to that reached in Maine by statute seems to have been reached in some other States without the aid of a statute like the Maine act of 1880. *Dodson v. Harris*, 10 Ala. 586; *Tucker v. Mowrey*, 12 Mich. 378; *Adams v. Gay*, 19 Vt. 358.

²⁰ *Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699; *Pike v. King*, 16 Iowa, 49; *Thompson v. Williams*, 58 N. H. 248; *Foreman v. Ahl*, 55 Pa. St. 325.

²¹ *Ladd v. Rogers*, 11 Allen, 209; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. The Maine statute referred to *supra*, n. 19 changes this result, and the decisions which are cited in the same note as reaching a result like that produced by the statute are also opposed.

²² *Calkins v. Seabury-Calkins*, etc.,

§ 1704. Importance of delivery.

If the property in the goods has passed but possession has not been delivered, it seems that the buyer would be unable to enforce any right to the property, for in order to show the seller's obligation to deliver the buyer would be obliged to rely upon the illegal bargain. If, however, the seller delivered the property on Sunday and afterward retook it, the buyer could sue for the wrong, for he would then be relying on a violation of a right to the continuance of his possession.²³ Where a seller has partially performed the bargain, as by delivering part of the goods, the same principle seems applicable. The property in the goods delivered and the possession are in the buyer, but he is under no obligation to pay for what he has received, nor can he enforce any obligation of the seller to deliver the remainder.²⁴ Creditors of one who has sold and delivered property on Sunday cannot seize it as his, either in the hands of the buyer²⁵ or of a purchaser from the buyer.²⁶ If the price were paid in whole or in part, but the property not delivered, the same principles would have to be applied as control a case where the seller has performed and the buyer has not.²⁷

§ 1705. Sales of land and choses in action.

It seems that a deed of conveyance made on Sunday transfers title, but if possession has not been delivered to the grantee, he cannot have the aid of the court and his theoretical title is worthless;²⁸ but if possession is delivered, the grantee's right

Min. Co., 5 S. Dak. 299, 58 N. W. 797; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

²³ *Kinney v. McDermot*, 55 Iowa, 674, N. W. 656, 39 Am. Rep. 191. In this case the defendant had, in the absence of the plaintiff, on a week day, returned to the plaintiff's stable a horse which he had received on a Sunday in exchange for a horse of his own. This latter horse the defendant took from the plaintiff's stable when he returned the horse he had received. The plaintiff was allowed to maintain replevin for the horse taken, leaving the plaintiff in possession of both horses.

See also *Thompson v. Williams*, 58 N. H. 248.

²⁴ See *Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; *Foreman v. Ahl*, 55 Pa. St. 325.

²⁵ *Blass v. Anderson*, 57 Ark. 483, 22 S. W. 94; *Greene v. Godfrey*, 44 Me. 25; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501; *Chestnut v. Harbaugh*, 78 Pa. St. 473.

²⁶ *Horton v. Buffinton*, 105 Mass. 399.

²⁷ See *Tucker v. West*, 29 Ark. 386.

²⁸ See *Williams v. Armstrong*, 130

cannot be disturbed.²⁹ In either case, the executory covenants in the deed are ineffectual.

The validity of an assignment of a chose in action, made on Sunday depends on the same principles.³⁰ A release of damages for personal injury delivered on Sunday for which consideration was paid on that day discharges the right of action.^{30a} An indorsement is both a transfer and an obligation. If made on Sunday, it seems that the transfer is effectual, so that the indorsee can sue parties prior to the illegal indorser,³¹ but as an obligation, the indorsement is unenforceable by a party having guilty knowledge.³²

§ 1706. Persons ignorant of fact that contract was made on Sunday are not affected by illegality.

An action may be maintained on a negotiable note made on Sunday, but dated on a secular day by one who purchased it in good faith.³³ And though one who took the instrument with

Ala. 389, 39 So. 553; *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; *Schiffer v. Douglass*, 74 Kan. 231, 86 Pac. 132. Under the Illinois statute such a deed is valid. *Prout v. Hoy Oil Co.*, 233 Ill. 54, 105 N. E. 26; as it is in West Virginia; *Wooldridge v. Wooldridge*, 69 W. Va. 554, 72 S. E. 654, Ann. Cas., 1913 B. 563.

²⁹ *Ellis v. Hammond*, 57 Ga. 179; *Swisher v. Williams*, *Wright* (Ohio), 754; *Shuman v. Shuman*, 27 Pa. 90. Even though title has not been transferred, a seller who has transferred possession cannot have the aid of a court of equity to cancel, because of the buyer's default, a contract made on Sunday. *Beirston v. Gilbert*, 180 Mich. 638, 147 N. W. 496.

³⁰ In *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 739, 36 C. C. A. 455, it was held that a debtor when sued by an assignee of his creditor could not set up that the assignment was made on Sunday. In *Richardson v. Kimball*, 28 Me. 463, the defendant when sued in trover was not allowed the de-

fence that the plaintiff's title was obtained on Sunday.

^{30a} *Williams v. Philadelphia Rapid Transit Co.*, 257 Pa. 354, 101 Atl. 748.

³¹ 1 Ames' Cas. Bills & Notes, 352.

³² *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794.

³³ *Begbie v. Levi*, 1 Cr. & Jerv. 180; *Myers v. Kessler*, 142 Fed. 730, 74 C. C. A. 82; *Saltmarsh v. Tuthill*, 13 Ala. 390, 406; *Moseley v. Selma Nat. Bank*, 3 Ala. App. 614, 57 So. 91; *Heise v. Bumpass*, 40 Ark. 545; *Greathead v. Walton*, 40 Conn. 226; *Collins v. Collins*, 139 Ia. 703, 117 N. W. 1089, 18 L. R. A. (N. S.) 1176; *Gooch v. Gooch*, 178 Ia. 902, 160 N. W. 333, L. R. A. 1917 C. 582; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Cranston v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Gordon v. Levine*, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361; *Vinton v. Peck*, 14 Mich. 287; *State Capitol Bank v. Thompson*, 42 N. H. 369; *Clark v. Barthold*, 87 N. J. L. 255, 93 Atl. 699; *Crombie v. Overholtzer*, 11 U. C. (Q. B.) 55.

knowledge of the illegality of its execution cannot recover upon it,³⁴ neither the fact that the holder purchased after maturity,³⁵ nor that the holder was a donee³⁶ has been held a reason for denying relief to one who acquired innocently an instrument bearing a secular date. Similarly, the grantor under a deed executed on Sunday, but bearing a secular date, cannot set up the illegality against an innocent purchaser of the property.³⁷ Though the fact that a note or other instrument is dated on a Sunday is not conclusive proof that it was in fact executed on that day, since it takes effect only from delivery,³⁸ yet the dating should put a purchaser on inquiry, and if in fact the instrument was made on Sunday, he cannot be regarded as taking without notice.³⁹

§ 1707. Ratification and adoption of contracts made on Sunday.

Frequently an agreement made on Sunday is subsequently recognized, adopted, or ratified by the parties either expressly or by necessary implication, as for instance by carrying out on a secular day some portion of the contract made on a previous Sunday. The effect of such subsequent recognition has not been regarded in the same way in all jurisdictions but much of the difference of opinion is due to various views on other matters than on the fundamental principles of ratification of an illegal contract. The great weight of authority supports the proposition that a contract made on Sunday in violation of law like other illegal contracts is incapable of ratification in the proper sense of that word.⁴⁰ There is no objection, however, to making on a secular day a contract the terms of which had previously been arranged on Sunday, and the fact that the parties

³⁴ *Stevens v. Wood*, 127 Mass. 123; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

³⁵ *Harrison v. Powers*, 76 Ga. 218, 240; *Leightman v. Kadetska*, 58 Iowa, 676, 12 N. W. 736, 43 Am. Rep. 129; *Gordon v. Levine*, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

³⁶ *Gooch v. Gooch*, 178 Ia. 902, 160 N. W. 333, L. R. A. 1917 C. 582.

³⁷ *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; *Duggan v. Champlin*, 75 Miss. 441, 23 So. 179; *Greene v. Godfrey*, 44 Me. 25.

³⁸ See *supra*, §§ 210, 1142; *Hilton v. Haughton*, 35 Me. 143.

³⁹ See cases cited *supra*, n. 33.

⁴⁰ *Jones v. Belle Isle*, 13 Ga. App. 437, 79 S. E. 357; *Pope v. Linn*, 50 Me. 83; *Plaisted v. Palmer*, 63 Me. 576; *Day v. McAllister*, 15 Gray, 433; *Hin-*

purported to come to a binding agreement on Sunday cannot lessen the validity of their subsequent renewal of assent to the bargain; and this assent may clearly be found in acts as well as in words.⁴¹ The assent of both parties, however, is necessary, and there must be sufficient consideration for any executory undertaking. In other words, the terms of an agreement originally made on Sunday may subsequently be adopted by the parties on a secular day as the terms of a contract then made. In most, though not all of the cases supporting the proposition that a Sunday contract may be ratified, it will be found that these conditions existed.⁴²

§ 1708. Application of the principles of adoption.

If goods have been sold and delivered on Sunday in a jurisdiction which holds that the property thereby passes to the buyer and that his obligation to pay the price cannot be enforced, there seems no consideration to support an express promise or other subsequent recognition of the contract by the buyer.⁴³

denlang v. Mahon, 225 Mass. 445, 114 N. E. 684; *Skinner Irrigation Co. v. Burke*, 231 Mass. 555, 121 N. E. 427; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *Acme Electrical, etc., Co. v. Van Derbeck*, 127 Mich. 341, 86 N. W. 786, 89 Am. St. Rep. 476; *Berston v. Gilbert*, 180 Mich. 638, 147 N. W. 496; *Kounts v. Price*, 40 Miss. 341; *Gwinn v. Simes*, 61 Mo. 335; *Brewster v. Banta*, 66 N. J. L. 367, 49 Atl. 718; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Burr v. Nivison*, 75 N. J. Eq. 241, 72 Atl. 72, 138 Am. St. Rep. 554; *Jacobson v. Bentsler*, 127 Wis. 566, 107 N. W. 7, 4 L. R. A. (N. S.) 1151, 115 Am. St. Rep. 1052; *King v. Graef*, 136 Wis. 548, 117 N. W. 1058, 20 L. R. A. (N. S.) 86, 128 Am. St. 1101; *Gist v. Johnson-Carey Co.*, 158 Wis. 188, 147 N. W. 1079, Ann. Cas. 1916 E. 460.

⁴¹ See *supra*, § 22a; *Skinner Irrigation Co. v. Burke*, 231 Mass. 555, 121 N. E. 427.

⁴² In the following cases, however,

Sunday agreements were held binding because of ratification, though the elements of a new contract were lacking. *Hoyt v. Western Union Tel. Co.*, 85 Ark. 473, 108 S. W. 1056; *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. 237, 18 Am. St. Rep. 348; *Geoch v. Geoch*, 178 La. 902, 160 N. W. 233, 14 L. R. A. 1917 C. 582; *Helm v. Bailey*, 17 Okl. 314, 87 Pac. 595; *Corey v. Dymnion*, 82 Vt. 257, 72 Atl. 987. See also *infra*, n. 46, 47.

⁴³ *Parke, B.*, therefore, in *Simpson v. Nicholls*, 3 M. & W. 1240, 1841, criticized the case of *Williams v. Real*, 6 Bing. 653, in which it had been held that a subsequent promise of the buyer to pay for the goods was enforceable. *Parke* argued that the property in the goods had passed by the original transaction and that, therefore, the subsequent promise was without consideration. See also *Shipp v. Easton*, 9 Ala. 198; *Grant v. McGee*, 55 Conn. 333, 15 Atl. 370; *Pope v. Lane*, 50 Me. 83; *Tillock v. Webb*, 53 Me. 100; *Day*

If the contract has not been fully executed on either side on Sunday, the situation is simpler. Although property which was the subject of the bargain may have passed to the buyer, he cannot successfully assert his right to possession of the goods because the bargain is unenforceable. Therefore, subsequent delivery of the goods by the seller is sufficient consideration for a promise at the time by the buyer, and in the absence of an express promise of payment one is implied. As the later performance is entirely legal it is no objection to the creation of a new obligation then that there was formerly an illegal contract relating to the same matter.⁴⁴ And the same principle holds good of contracts of service, and other contracts than those relating to sales.⁴⁵ In jurisdictions where a sale on Sunday is held to be so completely void that a seller may recover in trover or replevin from the buyer, there seems sufficient consideration for a subsequent promise to pay on the part of the buyer even though the property has been delivered. The buyer's promise is supported by the surrender on the part of the seller of his right to reclaim the property. Whether on this ground or not, some courts allow a recovery where a contract made on Sunday is ratified, though the consideration for the defendant's promise was received by him on that day.⁴⁶ On the ground of

v. McAllister, 15 Gray, 433; *Stewart v. Thayer*, 168 Mass. 519, 120, 47 N. E. 420, 60 Am. St. Rep. 407; *Mann v. United Motor Boston Co.*, 226 Mass. 495, 116 N. E. 239; *Acme Electrical Illustrating, etc., Co. v. Van Derbeck*, 127 Mich. 341, 86 N. W. 786; *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Vins v. Beatty*, 61 Wis. 645, 21 N. W. 787. But see *Rosenblum v. Schachner*, 84 N. J. L. 525; 87 Atl. 99; *Melchoir v. McCarthy*, 31 Wis. 252, 256, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152, 158, 58 N. W. 77.

⁴⁴ *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Bradley v. Rea*, 14 Allen, 20; 103 Mass. 188, 4 Am. Rep. 524; *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27; *Pillen v. Erickson*, 125 Mich. 68, 83 N. W. 1023; *Bollin v. Hooper*, 127

Mich. 287, 86 N. W. 795; *Foreman v. Ahl*, 55 Pa. St. 325; *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. 676. See also *Stebbins v. Peck*, 8 Gray, 553; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Ainsworth v. Williams*, 111 Wis. 17, 86 N. W. 551.

⁴⁵ *Spahn v. Willman*, 1 Penn. (Del.) 125, 39 Atl. 787; *Meriwether v. Smith*, 44 Ga. 541; *Skinner Irrigation Co. v. Burke*, 231 Mass. 555, 121 N. E. 427; *St. Louis & S. F. R. Co. v. Swearingen*, 31 Okl. 785, 123 Pac. 1122. An agreement fixing the terms for a settlement of a trespass is binding if performed on a secular day. *Taylor v. Young*, 61 Wis. 314, 21 N. W. 408; *O'Day v. Meyers*, 147 Wis. 549, 556, 133 N. W. 605.

⁴⁶ *Tucker v. West*, 29 Ark. 386;

moral consideration, arising from the moral duty to pay for the property of which the defendant has had the benefit, a subsequent promise by him has been enforced in a few jurisdictions;⁴⁷ but this ground of recovery would not find general acceptance.⁴⁸ Unless actual consideration at the time of the subsequent promise can be found, on principle, a new promise is unenforceable.

§ 1709. Works of necessity or charity.

The English statute excepted from its operation works of necessity and charity;⁴⁹ and in the United States similar exceptions are ordinarily made. What cases come within the exception cannot be marked by definite boundaries since each case is dependent on its own particular facts. The saving of property may make it necessary to do work of a kind which would ordinarily be within the prohibition of the statute.⁵⁰ The work of healing the sick and of the ministry obviously falls within the exception, as may ordinary household work. Even a promissory note may be binding though made on Sunday, if circumstances make it essential.⁵¹ A contract made on Sunday with a telegraph company for the transmission of a despatch is binding, if the nature of the message, either because of its intrinsic character or because of an emergency, rendered it proper for transmission on that day.⁵² The distribution and

Banks v. Werts, 13 Ind. 203; *Gwinn v. Simes*, 61 Mo. 335; *Rosenblum v. Schachner*, 84 N. J. L. 525, 87 Atl. 99 (only by an express promise); *Smith v. Case*, 2 Or. 190; *Sayles v. Wellman*, 10 R. I. 465; *Adams v. Gay*, 19 Vt. 358; *Flinn v. St. John*, 51 Vt. 334, 345. See also cases cited *supra*, n. 42.

⁴⁹ *Campbell v. Young*, 9 Bush, 240; *Cook v. Forker*, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

⁵⁰ See *supra*, § 148.

⁵¹ See comment on the vagueness of these words in *King v. Younger*, 5 T. R. 449, 452, where the defendant was held not criminally liable for baking meat and pastry on Sunday for a customer.

⁵² *Johnson v. People*, 42 Ill. App. 594; *Wilkinson v. State*, 59 Ind. 416, 26

Am. Rep. 84; *McGatrick v. Wason*, 4 Ohio St. 566; *Whitcomb v. Gilman*, 35 Vt. 297. See also *Edgerton v. State*, 67 Ind. 588, 33 Am. St. Rep. 110; *Unge-richt v. State*, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; *Armstrong v. State*, 170 Ind. 188, 193, 84 N. E. 3, 15 L. R. A. (N. S.) 646.

⁵¹ *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332; *Few v. Gunter*, 10 Ga. App. 100, 72 S. E. 720; *Sayre v. Wheeler*, 32 Iowa, 559, 561.

⁵² *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Western Union Tel. Co. v. Fulling*, 49 Ind. App. 172, 96 N. E. 967; *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Gulf, etc., R. Co. v. Levy*, 59

sale of newspapers on Sunday has been held not within the permitted exceptions.⁵² The duty of a carrier, and to some extent the duty of other public service corporations, is so far dependent on obligations imposed by law without reference to contract, that the propriety of dealing with such corporations on Sunday depends on other principles than those of contractual liability.

§ 1710. Collateral effects of illegal Sunday agreements.

Not only when the whole performance of a contractor's promise is in violation of a Sunday law, but where any material portion of it is, there can be no recovery upon the contract for any portion of the price or promised counter performance,⁵⁴ unless a divisible compensation is fixed for the legal portion of the work. Nor can there be recovery upon a *quantum meruit* for the value of even the legal portion of the work.⁵⁵

Similarly, where money is lent on Sunday the lender cannot recover either on an express or implied contract.⁵⁶ If it is illegal to make a bargain on Sunday, no redress can be granted for fraud in inducing a party to enter into such a bargain.⁵⁷

Tex. 542, 5 Ky. L. Rep. 66, 46 Am. Rep. 269.

⁵² Knight v. Press Co., 227 Pa. 185, 75 Atl. 1083.

⁵⁴ Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; Albers v. Sciarretti, 72 N. Y. Misc. 496, 131 N. Y. S. 889.

⁵⁵ Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020. See also Cole v. Brown-Hurley Hardware Co., 139 Ia. 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846, 850; Chapman v. Haley, 117 Ky. 1004, 80 S. W. 190, 4 Ann. Cas. 714; Handy v. St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; Foley v. Speir, 100 N. Y. 552, 3 N. E. 477; Norbeck & Nicholson Co. v. State, 32 N. Dak. 189, 142 N. W. 847, 849; Sullivan v. Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110.

⁵⁶ Finn v. Donahue, 35 Conn. 216; Meader v. White, 66 Me. 90, 22 Am.

Rep. 551; Rickards v. Rickards, 98 Md. 136, 137, 56 Atl. 397, 63 L. R. A. 724, 103 Am. St. 393, 394; Troewert v. Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

⁵⁷ Grant v. McGrath, 56 Conn. 333, 15 Atl. 370; Gunderson v. Richardson, 56 Iowa, 56, 8 N. W. 683, 41 Am. Rep. 81; Robeson v. French, 12 Metc. 24, 45 Am. Dec. 236. The contrary decision of Adams v. Gay, 19 Vt. 358, must be defended, if at all, on the ground that bargains made on Sunday, though unenforceable, are not so far in violation of public policy as to require the application of the ordinary rules governing illegal contracts. Certainly a burglar could not be allowed to sue a companion for fraud in inducing him to enter into a house-breaking enterprise by his fraudulent misrepresentations of the spoil that could be obtained. See further *infra*, § 1791.

CHAPTER XLVI

ILLEGAL AGREEMENTS: CONTRACTS OBSTRUCTING THE ADMINISTRATION OF JUSTICE

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§ 1711. Maintenance and champerty.

Maintenance means maintaining or supporting the litigation of another.¹ Champerty is a bargain to divide the proceeds of a litigation between the plaintiff and the party supporting the litigation. Champerty is said to be a species of aggravated maintenance.² It seems entirely possible, however, to have an agreement to divide the proceeds of a litigation without any agreement to pay its expenses. The early law was extremely severe, not only upon champerty but upon maintenance, and statutes were passed subjecting those guilty of the offence to severe punishment.³ It is not necessary, however, to consider the history of the subject in detail; it is enough to consider how

¹ Coke Litt. 368b; 4 Black. Comm. 135.

² 2 Rolle Abr. 119 R; 4 Black Comm. 135; *Sprye v. Porter*, 7 E. & B. 58, per Bovill, Arg.; *Sampliner v. Motion Picture Patents Co.*, 255 Fed. 242, 168 C. C. A. 202; *Merchants' Protective Assoc. v. Jacobsen*, 22 Ida. 636, 127

Pac. 315; *Smith v. Hartsell*, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203; *In re Evans*, 42 Utah, 282, 130 Pac. 217; *Gelo v. Pfister & Vogel Leather Co.*, 132 Wis. 575, 113 N. W. 69.

³ Wald's *Pollock Contracts* (3d ed.), 450; 4 Black Comm. 135, 136.

far the principles of the early law still involve the invalidity of agreements having maintenance or champerty for their object.

§ 1712. What are invalid champertous agreements.

Blackstone says that a man may "maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity."⁴ And there seems no doubt that not only the actual payment but a contract for the payment of the expense of another's litigation, is lawful, if the motive is merely charitable.⁵ Champerty is still, however, obnoxious to the laws of many jurisdictions. It is not confined to attorneys,⁶ but generally such contracts are made between attorney and client. In England and a few of the United States any contract by an attorney to take as his compensation a share of the proceeds of litigation as such is illegal.⁶ In most jurisdictions, however, it is allowable for an attorney to make such a contract, unless he also undertakes to carry on the litigation at his own

⁴ 4 Bl. Comm. 135.

⁵ *Harris v. Brisco*, 17 Q. B. D. 504; *Stotsenburg v. Marks*, 79 Ind. 193, 196. See also *Alabaster v. Harness*, [1895] 1 Q. B. 339; *Breay v. Royal Assoc.*, [1897] 2 Ch. 272; *Champagne Lumber Co. v. Jahn*, 168 Fed. 510, 93 C. C. A. 532. Legal aid societies, the object of which is to enforce the legal rights of others, are tacitly recognized as proper forms of charity.

⁶ *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Munday v. Whissenhunt*, 90 N. C. 458. A contract between the executor and trustee named in a will to contest its probate was held void as champertous in *Cochran v. Zachery*, 137 Iowa, 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307. See also *Lancaster Township v. Graves*, 48 Ind. App. 499, 96 N. E. 172; *Kelley v. Blanchard*, 34 R. I. 57, 82 Atl. 728. Cf. *O'Driscoll v. Doyle*, 31 Colo. 193, 73 Pac. 27; *Finlen v. Heinse*, 28 Mont. 548, 73 Pac. 123; and *infra*, § 1715.

⁶ *In re Attorneys & Solicitors' Act*, 1 Ch. D. 573; *McConnell v. McConnell*,

98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074 (alimony); *Ackert v. Barker*, 131 Mass. 436; *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; *Joy v. Metcalf*, 161 Mass. 514, 37 N. E. 671; *Davis v. Commonwealth*, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743; *Gargano v. Pope*, 184 Mass. 571, 69 N. E. 343, 100 Am. St. Rep. 575 (cf. *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009; *Taylor v. Rosenberg*, 219 Mass. 113, 106 N. E. 603); *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573. The technical character of this rule is illustrated by the decision in *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681, where a contract between attorney and client contained a provision that in view of the uncertainty of the result, the attorneys should be entitled "to very large and liberal fees, in no event to exceed 50% of the amount collected." This contract was upheld although a contract to pay 50% of the amount collected would have been invalid.

expense. If this additional undertaking is made the whole agreement is unlawful.⁷ It has been held in some cases that if

⁷ *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *Jeffries Admr. v. Mutual Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156, 4 Sup. Ct. 8; *Peck v. Heurich*, 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927; *Muller v. Kelly*, 116 Fed. 545 (rev'd in 125 Fed. 212, 60 C. C. A. 170, on the ground that under the circumstances the question whether there was any contract, and if so whether it was unconscionable should have been submitted to the jury); *Swanston v. Morning Star Mining Co.*, 13 Fed. 215; *Northwestern S. S. Co. v. Cochran*, 191 Fed. 146, 111 C. C. A. 626 (Alaska); *Wheeler v. Pounds*, 24 Ala. 472; *Stanton v. Haskin*, 1 Mo-Arthur (D. C.), 558, 29 Am. Rep. 612; *Johnson v. Van Wyck*, 4 D. C. App. 294; *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Ga. 263; *Taylor v. Hinton*, 66 Ga. 743; *Johnson v. Hilton*, 96 Ga. 577, 23 S. E. 841; *Coleman v. Billings*, 89 Ill. 183; *Phillips v. South Park Ins. Com'rs*, 119 Ill. 626, 10 N. E. 230; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110; *Coquillard's Adm'r v. Bears*, 21 Ind. 479, 83 Am. Dec. 362; *Hart v. State*, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; *Jewel v. Neidy*, 61 Ia. 299, 16 N. W. 141; *Wallace v. Chicago, etc., Ry. Co.*, 112 Ia. 565, 84 N. W. 662; *Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 14 L. R. A. (N. S.) 1168, 125 Am. St. 275 (but even an agreement by the attorney to pay court costs and advance witnesses' fees was held not to make an agreement champertous if the arrangement was necessary. *Clancy v. Kelly*, 182 Ia. 1207, 166 N. W. 583); *Atchison, etc., Railroad Co. v. Johnson*, 29 Kan. 218, 227; *Aultman v. Waddle*, 40 Kans. 195, 19 Pac. 730; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Holloway v. Dickinson*, 137 Minn. 410, 163 N. W. 791; *Gray v. Bemis*, 128 Minn. 392,

151 N. W. 135; *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537; *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122; *Behnke v. Rathsam* (Mo. App.), 209 S. W. 976; *Mytton v. Missouri Pac. R. Co.* (Mo. App.), 211 S. W. 111; *Coughlin v. N. Y. Cent. & Hud. Riv. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Begly v. Weddigen*, 86 N. Y. App. D. 629, 83 N. Y. S. 805; *McCoy v. Gas Engine & Co.*, 152 N. Y. App. D. 642, 137 N. Y. S. 591, aff'd. 208 N. Y. 631, 102 N. E. 1106 (cf. *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169); *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123; *Chester County v. Barber*, 97 Pa. 455; *Perry v. Dicken*, 105 Pa. 83, 51 Am. Rep. 181; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Hayney v. Coyne*, 10 Heisk. 339; *Fort Worth & Co. Ry. Co. v. Carlock*, 33 Tex. Civ. App. 202, 75 S. W. 931; *Nelson v. Evans*, 21 Utah, 202, 60 Pac. 557; *In re Evans*, 42 Utah, 282, 130 Pac. 217; *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811; *In re Aldrich*, 86 Vt. 531, 86 Atl. 801; *Nickels v. Kane's Adm.*, 82 Va. 309; *Roller v. Murray*, 107 Va. 527, 59 S. E. 421; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Wis. 502; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733; *Sparling v. United States Sugar Co.*, 136 Wis. 509, 117 N. W. 1055. See also *Cassereigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212. But a provision that the costs of litigation shall be deducted from the attorney's share of the gross recovery does not make an agreement illegal. *Whilite v. Roberts*, 4 Dana, 172; *Wood-Heck v. Roll* (Ky.), 208 S. W. 768. Cf. also cases cited *infra*, § 1714, n. 18.

the agreement provides that the plaintiff shall not compromise or settle the claim the contract, though it otherwise would be valid, is thereby made illegal.⁸ The technicality of these rules has led some courts, including the Supreme Court of the United States, to refuse to apply the common-law tests of champerty and maintenance, and to consider merely whether the particular contract in question is oppressive in character, and, if not, to uphold it, though the attorney agreed to bear the expenses of the litigation and contracted for a share of the proceeds.⁹

In New York, though it is held that a contract by an attorney to advance the expense of litigation renders an agreement for contingent compensation illegal,¹⁰ yet if the attorney does

⁸ *Foster v. Jack*, 4 Watts, 334; *North Chicago R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 771; *Ellwood v. Wilson*, 21 Iowa, 523; *Boardman v. Thompson*, 25 Iowa, 487; *Kauffman v. Phillips*, 154 Ia. 542, 134 N. W. 575; *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806; *Burho v. Carmichael*, 117 Minn. 211, 135 N. W. 386; *Davy v. Fidelity, etc., Ins. Co.*, 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694. But see *Hoffman v. Vallejo*, 45 Cal. 564; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042; *Pittsburg, C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924; *Oklahoma Coal Co. v. Hays (Okla.)*, 176 Pac. 931; *Ryan v. Martin*, 16 Wis. 57; *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725. In *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760, it was held that the provision denying the right of settlement was void, but did not vitiate the rest of the contract. See also *Nichols v. Waters*, 201 Mich. 27, 167 N. W. 1. *In re Snyder*, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Ann. St. 533, 13 Ann. Cas. 441; *Greenleaf v. Minneapolis &c. R.*, 30 N. Dak. 112, 151 N. W. 879, Ann. Cas. 1917 D. 908.

⁹ *Ram Coomar Coondoo v. Chanter Canto Mookerjee*, 2 App. Cas. 186, 210 (India); *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64, 3 Sup. Ct. Rep. 441; *Hoffman v. Vallejo*, 45 Cal. 564; *Richardson v. Rowland*, 40 Conn. 565; *Metropolitan Life Ins. Co. v. Fuller*, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196; *Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767 (see also *Slade v. Zeitfuss*, 77 Conn. 457, 59 Atl. 406); *Merchants' Protective Assoc. v. Jacobsen*, 22 Ida. 636, 127 Pac. 315; *Lehman v. Detroit &c. R.*, 180 Mich. 362, 147 N. W. 628; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169; *Browne v. West*, 9 N. Y. App. Div. 135, 41 N. Y. S. 146; *Brown v. Bigne*, 21 Oreg. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752; *Bentinck v. Franklin*, 38 Tex. 458, 468; *Stewart v. H. & T. C. Ry. Co.*, 62 Tex. 246. See also *Bayard v. McLane*, 3 Har. (Del.), 139; *Vandegrift v. Lanyon Zinc Co.*, 87 Kan. 376, 124 Pac. 534; *Schomp v. Schenck*, 40 N. J. L. 195. *Cf. Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806; *Van Vleck v. Van Vleck*, 21 N. Y. App. Div. 272, 47 N. Y. S. 470; *Badger v. Celler*, 41 N. Y. App. Div. 599, 58 N. Y. S. 653.

¹⁰ See New York cases cited *supra*, n. 7, 8, 9.

not promise to advance the expense he may bargain that if he does in fact pay it, he shall be entitled for his services and expenses to the contingent compensation of a specified fractional share of the amount recovered.¹¹

§ 1713. Collateral effects of champertous contracts.

That champerty is no longer deemed so serious in effect as formerly, and probably also that the owner of the right of action is not regarded as *in pari delicto* with the attorney with whom he contracts, is shown by the fact that it is no defence to an action for the defendant to assert, allege or prove, that it is being prosecuted under a champertous agreement between the plaintiff and his attorney.¹² Nor is it a defence to a con-

¹¹ *Weeks v. Gattell*, 125 N. Y. App. Div. 402, 109 N. Y. S. 977, *affd.* 193 N. Y. 681, 87 N. E. 1129. In *Dennin v. Powers*, 96 N. Y. Misc. 252, 160 N. Y. S. 636, 642, the court upholding an agreement for a contingent compensation for services and expenses, said: "The common-law doctrine relating to champerty and maintenance no longer exists in this state (*Sedgwick v. Stanton*, 14 N. Y. 289), and the subject is now regulated by section 274 of the Penal Law, formerly sections 73, 74, and 75 of the Code of Civil Procedure (*Irwin v. Curie*, 171 N. Y. 409, 411, 64 N. E. 161, 58 L. R. A. 830; *In re Fitzsimons*, 174 N. Y. 15, 21, 66 N. E. 554). As these provisions have been construed, the attorney's agreement is not champertous. *Browning v. Marvin*, 100 N. Y. 144, 2 N. E. 635; *In re Clark*, 184 N. Y. 222, 77 N. E. 1; *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324; *Weeks v. Gattell*, 125 N. Y. App. Div. 402, 109 N. Y. S. 977. According to these cases an attorney may agree to receive as his compensation and for expenses incurred a percentage of the recovery in an action. He may not offer or give any valuable consideration for his retainer, and his contract of employment must not tend to encourage,

instigate, or promote ill feeling and strife, by securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon. *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324; *Fowler v. Callan*, 102 N. Y. 395, 398, 7 N. E. 169."

¹² *Hilton v. Woods*, L. R. 4 Eq. 432; *Burnes v. Scott, Exr.*, 117 U. S. 582, 29 L. Ed. 991, 6 Sup. Ct. Rep. 865; *Courtright v. Burnes*, 3 McCrary, 60; *Globe Works v. United States*, 45 Ct. Cl. 497; *Sibley v. Alba*, 95 Ala. 191, 10 So. 831; *Missouri Pac. Ry. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855; *Robison v. Beall*, 26 Ga. 17; *Ellis v. Smith*, 112 Ga. 480, 37 S. E. 739; *Torrence v. Shedd*, 112 Ill. 406; *Stearns v. Reidy*, 135 Ill. 119, 25 N. E. 762; *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Allen v. Frasee*, 85 Ind. 283; *Zeigler v. Mize*, 132 Ind. 403, 31 N. E. 945; *Small v. Chicago &c. R. Co.*, 55 Ia. 582, 8 N. W. 437; *Gilkeson Co. v. Bond*, 44 La. Ann. 481, 11 So. 220; *Brinley v. Whiting*, 5 Pick. 348; *Foley v. Grand Rapids &c. R.*, 157 Mich. 67, 121 N. W. 257; *Morgan v. Blewett*, 71 Miss. 409, 14 So. 33; *Bent v. Priest*, 86 Mo. 475; *Bick v. Overfelt*, 88 Mo. App. 139; *Chamber-*

tract, not itself champertous, of an attorney to pay a portion of his fee to another, that the contract under which the fee was obtained was champertous.¹³ Some decisions even go so far as to allow a recovery under a *quantum meruit* by an attorney who has rendered services under a champertous agreement.¹⁴ Such decisions certainly indicate a very lenient attitude towards champerty, for it is anomalous to allow recovery for the value of services or property furnished under an illegal contract.¹⁵ To allow such recovery is in effect treating champerty as making a contract merely unenforceable.

Iain v. Grimes, 42 Neb. 701, 60 N. W. 948; *Prosky v. Clark*, 32 Nev. 441, 109 Pac. 793, 35 L. R. A. (N. S.) 512; *Taylor v. Gilman*, 58 N. H. 417; *Connecticut Ins. Co. v. Way*, 62 N. H. 622; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Hall v. Gird*, 7 Hill, 586; *Schwabe v. Herzog*, 161 N. Y. App. D. 712, 146 N. Y. S. 644; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785; *Potter v. Ajax Mining Co.*, 22 Utah, 273, 61 Pac. 999; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. See also *Elser v. Gross Point*, 223 Ill. 230, 79 N. E. 27, 114 Am. St. 326; *Caldwell v. Board*, 41 Ind. Ap. 40, 83 N. E. 355; *Bowser v. Patrick*, 23 Ky. L. 1578, 65 S. W. 824, 24 Ky. L. 228, 68 S. W. 1097; *Euneau v. Rieger*, 105 Mo. 659, 682, 16 S. W. 854; *Cooke v. Pool*, 25 S. Car. 593. But see *Keiper v. Miller*, 68 Fed. 627, 70 Fed. 128; *Greenman v. Cohee*, 61 Ind. 201; *Stewart v. Welch*, 41 Ohio St. 483; *Davy v. Aetna L. Ins. Co.*, 78 Ohio St. 256, 441, 85 N. E. 504, 1123, 17 L. R. A. (N. S.) 443; *Hudson v. Sheafe* (S. Dak.), 125 Am. St. 694, 171 N. W. 320; *Webb v. Armstrong*, 5 Humph. 379; *Barker v. Barker*, 14 Wis. 131; *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637. See also *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123.

¹³ *Kelerher v. Henderson*, 203 Mo. 498, 101 S. W. 1083. See also *Bowser v. Patrick*, 23 Ky. L. Rep. 1578, 65

S. W. 824, 24 Ky. L. Rep. 228, 68 S. W. 1097.

¹⁴ *Holloway v. Lowe*, 1 Ala. 246; *Elliott v. McClelland*, 17 Ala. 206; *Goodman v. Walker*, 30 Ala. 482, 500, 68 Am. Dec. 134; *Farrell v. Betts* (Ala. App.), 81 So. 188; *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121; *Rochester v. Campbell*, 184 Ind. 421, 111 N. E. 420; *Rust v. Larue*, 4 Litt. 411, 14 Am. Dec. 172; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *In re Snyder*, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. 533; *Stearns v. Felker*, 28 Wis. 594. See also *Merritt v. Lambert*, 10 Paige, 352, affd. *sub nom.* *Wallis v. Loubat*, 2 Denio, 607.

¹⁵ The following cases hold, or seem to indicate that the courts deciding them would not allow quasi-contractual recovery: *Ackert v. Barker*, 131 Mass. 436; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; *Munday v. Whisenhunt*, 90 N. C. 458; *Arlington Hotel Co. v. Ewing*, 124 Tenn. 536, 138 S. W. 954, 38 L. R. A. (N. S.) 842, Ann. Cas. 1913 A. 121; *Roller v. Murray*, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913 B. 1088. See also *Pince v. Beattie*, 32 L. J. Ch. 734; *Grell v. Levy*, 16 C. B. (N. S.) 73; *Willemijn v. Bateson*, 63 Mich. 309, 29 N. W. 734.

§ 1714. Agreement to encourage litigation.

Although maintenance in its simple form and even champerty is looked upon by the courts with less disfavor than formerly, schemes to promote litigation for the benefit of the promoter rather than for the benefit of the litigant are regarded as contrary to public policy, and will not be enforced. Contracts of "ambulance chasers" and others who make for themselves a business or profit by promoting litigation are unenforceable.¹⁶ It is equally unlawful to bargain for reward for securing an attorney.¹⁷ But where a person is pecuniarily interested in the enforcement of a right of action belonging wholly or partly to another, he may lawfully undertake to pay the expenses of litigation and to share in the recovery.¹⁸ No doubt relationship

¹⁶ *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. 17; *Chreste v. Louisville Ry. Co.*, 167 Ky. 75, 180 S. W. 49, L. R. A. 1917 B. 1123, Ann. Cas. 1917 C. 867; *Holland v. Sheehan*, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510; *Anker v. Chicago &c. R. Co.*, 140 Minn. 63, 167 N. W. 278; *Langdon v. Conlin*, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. 543; *In re Welch*, 156 N. Y. App. Div. 470, 141 N. Y. S. 381 (statutory) *Moore v. Hyde*, 39 S. Dak. 196, 163 N. W. 707, 708; *Ford v. Munroe* (Tex. Civ. App.), 144 S. W. 349. A scheme of an attorney to work up a large number of cases against a railroad company for its failure to fence, and to take in payment for services a share of the proceeds of the litigation was held illegal in *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, and *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779, though a similar agreement with a single litigant would not have been held champertous. See also *Hirschbach v. Ketchum*, 5 N. Y. App. Div. 324, 39 N. Y. S. 291. Cf. *Metropolitan Ins. Co. v. Fuller*, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196; *Voecke v. Peters*, 58 Ill. App. 338; *Wheeler v. Harrison*, 94 Md. 147, 50

Atl. 523; *Ellis v. Frawley*, 165 Wis. 381, 161 N. W. 364.

¹⁷ *Moore v. Hyde*, 39 S. Dak. 196, 163 N. W. 707, 708. "The attorneys employed could not, without violating professional ethics and public policy, have contracted to pay plaintiff for his services in securing defendant as their client. . . . No more can plaintiff recover from defendant for services in bringing an attorney to him. The one case is as contrary to good morals and public policy as the other. The alleged contract is one to pay for the services of an intermeddler in litigation. It savors of the business of brokerage in the relation of attorney and client. It detracts from the essential dignity of the profession. It is the capitalization of the influence of a layman over a lawyer. The sanctioning of such a contract would tend to commercialize the practice of law and to make legitimate the business of furnishing lawyers to clients."

¹⁸ *Mexican Nat. &c. Co. v. Frank*, 154 Fed. 217; *Davis v. A. H. Reid &c. Co.*, 195 Fed. 80, 115 C. C. A. 112; *Coffman v. Louisville &c. R.*, 184 Ala. 474, 63 So. 527; *Hotmire v. O'Brien*, 44 Ind. App. 694, 90 N. E. 33; *Breedon v. Frankfort &c. Ins. Co.*, 220 Mo. 327,

justifies supporting the expense of litigation,¹⁹ but whether it affords support for a speculative bargain to share the proceeds, which would be unlawful except for the relationship, may be doubted.^{19a}

§ 1715. Champertous assignments.

The early common law was very reluctant to permit the assignment of rights of action. Objection was indeed raised on the ground of maintenance to the assignment of any choses in action,²⁰ and for the same reason the law forbade the transfer of title to real estate which was in the possession of a third person and for which, therefore, an action must be brought. So far as concerns the assignment of ordinary choses in action, for any other consideration than a share of the proceeds, or to any one other than an attorney, the law has outgrown its former attitude, even though the claim is litigious.²¹ But the transfer of a claim in litigation or for the collection of which litigation is necessary, in consideration of a promised share of the proceeds of the litigation, is generally held invalid.²² And a speculative purchase of a right of action by an attorney, especially if made from a client will be closely scrutinized, and certainly if unfair in its terms is invalid.²³ The law concern-

119 S. W. 576; *Bigelow v. Old Dominion &c. Co.*, 74 N. J. Eq. 457, 71 Atl. 153; *Smith v. Hartsell*, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203; *Joseph Mazzini Soc. v. Corgiat*, 63 Wash. 273, 115 Pac. 93.

¹⁹ *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272.

^{19a} The interest of relationship was held sufficient in *Anderson v. Anderson*, 12 Ga. App. 706, 78 S. E. 271. But see *Meloche v. Dequire*, 34 Can. Sup. Ct. 24.

²⁰ See *supra*, § 405.

²¹ *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467, 6 S. Ct. Rep. 155; *Edmunds v. Illinois Central R.*, 80 Fed. 78; *Mud Valley Oil & Gas Co. v. Hitchcock*, 40 Ind. App. 105, 81 N. E. 111; *Rogers v. Hendrick*, 85 Conn. 260, 271, 82 Atl. 586, 590; *Clark v. Grosh*, 81 N. Y. Misc. 40, 142 N. Y. S.

966; *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933; *Weed v. Foster*, 58 Wash. 675, 109 Pac. 123. For the limitations in Louisiana on the effect of a transfer of litigious claims, see *Bluefields S. S. Co. v. Lala Ferreras &c. Co.*, 133 La. 424, 63 So. 96.

²² *Glegg v. Bromley*, [1912] 3 K. B. 474; *Keiper v. Miller*, 68 Fed. 627; *The Clara A. McIntyre*, 94 Fed. 552; *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *Hudson v. Sheafe (S. Dak.)*, 171 N. W. 320; *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811; *Colville v. Small*, 22 Ont. L. Rep. 33, 426, 19 Ann. Cas. 515, and see *supra*, § 1712. But see *Guy v. Churchill*, 40 Ch. D. 481; *Mud Valley Oil & Gas Co. v. Hitchcock*, 40 Ind. App. 105, 81 N. E. 111.

²³ In *Sampliner v. Motion Picture*

ing the right to make a conveyance of land held adversely varies widely at the present day in the different States. In many of them the old law forbidding such a conveyance has been abrogated but in others it still persists.²⁴

§ 1716. Extra compensation for witnesses.

As it is the duty of a citizen, when required to do so, to testify in court concerning facts within his knowledge for the compensation allowed him by law, a contract to pay one who is amenable to process a further sum for his attendance as a witness is invalid, both on grounds of public policy and for lack of consideration.²⁵ Expert witnesses, however, are held not to be subject to this rule, and a contract to pay for a statement by them of their opinions on the witness stand is upheld.²⁶ It seems more obviously objectionable to bargain to pay a witness compensation contingent upon the success of the party to the litigation for whom the witness is expected to testify, than to contract to give additional compensation in any event, and the

Patents Co., 243 Fed. 277, aff'd 255 Fed. 242, 168 C. C. A. 202 (see also *General Film Co. v. Sampliner*, 252 Fed. 443, 164 C. C. A. 367), the court held that while a claim for treble damages by a person injured by a violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209) is assignable, yet where a lawyer, for services that he was willing to settle for \$5,000 cash, took an assignment of a claim which he thought was worth at least \$75,000, the transaction was champertous, and he could maintain no action on the assigned claim, as it was taken for purposes of speculation. Cf. *Rogers v. Hendrick*, 85 Conn. 260, 271, 82 Atl. 586, 590.

²⁴ See note to *Huston v. Scott*, 35 L. R. A. (N. S.) 729; *Second American Dec. Digest*, Vol. 4, p. 856. So in Alabama an attempted transfer of chattel property adversely held is invalid. *Pope v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

²⁵ *Willis v. Peckham*, 1 Brod. & B. 515; *Dawkins v. Gill*, 10 Ala. 206;

Dodge v. Stiles, 26 Conn. 463; *Wright v. Somers*, 125 Ill. App. 256; *Haines v. Lewis*, 54 Iowa, 301, 6 N. W. 495, 37 Am. Rep. 202; *Hagan v. Wellington*, 7 Kans. App. 74, 52 Pac. 909; *Clifford v. Hughes*, 139 N. Y. App. Div. 730, 124 N. Y. S. 478; *Smith v. Hartsell*, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203; *Ramschasel's Est.*, 24 Pa. Super. 262.

²⁶ *Severn v. Olive*, 3 Br. & Bing. 72; *Yeatman v. Dempsey*, 7 C. B. (N. S.) 628; *Lincoln Mountain Gold Min. Co. v. Williams*, 37 Colo. 193, 85 Pac. 844; *Lewis v. Blye*, 79 Ill. App. 256; *Johnson v. Pietsch*, 94 Ill. App. 459; *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619; *People v. Jefferson County*, 35 N. Y. App. Div. 239, 54 N. Y. S. 782; *Hough v. State*, 68 N. Y. Misc. 26, 124 N. H. S. 878. In many of these cases the expert was to render services in examining the facts, or otherwise informing himself prior to the trial. Cf. *Burnett v. Freeman*, 125 Mo. App. 683, 103 S. W. 121, 134 Mo. App. 709, 115 S. W. 488; *Walker v. Cook*, 33 Ill. App. 561.

authorities clearly hold invalid such contingent contracts to compensate witnesses.²⁷ Even an expert may not bargain for such contingent compensation.²⁸ So contracts to pay for evidence of a certain nature desired for purposes of litigation have been similarly denounced.²⁹ But contracts of employment by which the employee undertakes to render services in ascertaining facts to be used in litigation are valid.³⁰ There is a class of cases not often referred to in this connection, where contracts somewhat analogous to contracts of contingent compensation for evidence have been upheld, generally without discussion of their legality. Offers of reward for evidence leading to the arrest and conviction of criminals are common and when complied with are enforceable.³¹ It is quite as objection-

²⁷ *Dawkins v. Gill*, 10 Ala. 206; *Henderson v. Hall*, 87 Ark. 1, 112 S. W. 171, 25 L. R. A. (N. S.) 70; *Bowling v. Blum* (Tex. Civ. App.), 52 S. W. 97. Cf. *Wedgerfield v. De Bernardy*, 24 T. L. R. 497.

²⁸ *Sherman v. Burton*, 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87; *Laffin v. Billington*, 86 N. Y. S. 267; *In re Certain Lands*, 144 N. Y. App. Div. 107, 128 N. Y. S. 999, *affd. without opinion*, 204 N. Y. 625, 97 N. E. 1103; *In re Schapiro*, 144 N. Y. App. D. 1, 128 N. Y. S. 852; *Hough v. State*, 145 N. Y. App. D. 718, 130 N. Y. S. 407; *Davis v. Smoot* (N. C.), 97 S. E. 488.

²⁹ *Rees v. De Bernardy*, [1896] 2 Ch. 437; *Wallis v. Portland*, 3 Ves. 494; *Neece v. Joseph*, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912 A. 655; *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136, 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916 E. 741; *Patterson v. Donner*, 48 Cal. 369; *Hare v. McGue* (Cal.), 174 Pac. 663, L. R. A. 1918 F. 1099; *Gillett v. Logan County*, 67 Ill. 256; *Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459; *Phelps v. Manecke*, 119 Mo. App. 139, 96 S. W. 221; *Quirk v. Muller*, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A.

87, 43 Am. St. 647; *Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758; *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. S. 281; *In re Schapiro*, 144 N. Y. App. D. 1, 128 N. Y. S. 852; *Manufacturers' &c. Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847, Ann. Cas. 1914 C. 449. Cf. *Lucas v. Pico*, 55 Cal. 126; *J. J. Case &c. Co. v. Fisher*, 144 Ia. 45, 122 N. W. 575; *Smith v. Hartsell*, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203; *Chandler v. Mason*, 2 Vt. 193; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

³⁰ *Hare v. McGue* (Cal.), 174 Pac. 663, L. R. A., 1918 F. 1099; *Wood v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138; *J. I. Case Threshing Mach. Co. v. Fisher*, 144 Iowa, 45, 122 N. W. 575; *Singer Mfg. Co. v. City Nat. Bank*, 145 N. C. 319, 59 S. E. 72; *Manufacturers, etc., Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847, Ann. Cas. 1914 C. 449. Such a contract was upheld though the compensation was contingent on the success of the litigation in *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459.

³¹ See *supra*, § 33. The question of public policy was discussed in *Furman v. Parke*, 21 N. J. L. (1 Zab.) 310, and

able to bargain for the suppression of evidence by paying witnesses to leave the State or otherwise than to bargain for its production; and any agreement having this for its object is invalid.³²

§ 1717. Contracts to indemnify sureties on bail bonds.

It is held in England that a contract by the principal of a bail bond to indemnify sureties against liability for the principal's default is invalid.³³ The reason for such decisions is that the object of the law in requiring a surety is to retain his personal responsibility and that his motive for vigilance would be removed if he were secured by the principal. This reason obviously has little application where local statutes permit the accused to give cash bail, and in such jurisdictions a contract of indemnity has been upheld,³⁴ and influential decisions sup-

the agreement held unobjectionable. In *Plating Co. v. Farquharson*, 17 Ch. Div. 49, the court in considering an advertisement of £100 reward to anyone who could "produce documentary evidence that nickel plating was done prior to 1869," intimated that the same method of securing evidence in civil cases was both common and proper, saying: "Advertisements of a similar nature are very common. You advertise for a lost deed or a lost will, or you advertise for a certificate of marriage or of baptism, to prove heirship or kinship. That is done as a matter of course. . . . And I have never heard it suggested that those advertisements were illegal, or were not a proper mode of obtaining evidence."

³² *Bierbauer v. Wirth*, 5 Fed. 336; *Valentine v. Stewart*, 15 Cal. 387; *Hoyt v. Macon*, 2 Colo. 502; *Lazenby v. Lazenby*, 132 Ga. 336, 65 S. E. 120; *Haines v. Lewis*, 54 Ia. 301, 6 N. W. 495, 37 Am. Rep. 202; *Feltner v. Feltner*, 132 Ky. 705, 116 S. W. 1196; *Johnson v. McMillon*, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918 C. 244; *Crisup v. Grosslight*, 79 Mich. 380, 44

N. W. 621; *Thompson v. Whitman*, 4 Jones (N. C.), 47; *Bostick v. M'Claren*, 2 Brev. (S. C.) 275. In *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136, the court held that a contract to get possession of letters to prevent them from being used in a criminal prosecution against the writer for unlawfully using the mail was illegal, but that it would be valid if the contract was merely to enable the writer to get the letters to prevent them from being unlawfully mailed to another.

³³ *Consolidated Finance Co. v. Musgrave*, [1900] 1 Ch. 37. See also *United States v. Simmons*, 47 Fed. 575, 14 L. R. A. 78; *United States v. Greene*, 163 Fed. 442. *Cf. Jones v. Orchard*, 16 C. B. 614. If the purpose of the transaction is to enable the principal to flee and the surety participates in this purpose the illegality is obvious. *Baehr v. Wolff*, 59 Ill. 470. The deposit of money as security with the surety is likewise illegal in England and as the law in such a case leaves the parties where it finds them, the money cannot be reclaimed by the depositor. *Herman v. Jeuchner*, 15 Q. B. D. 561.

³⁴ *Maloney v. Nelson*, 12 N. Y. App.

port such a contract even apart from such statutes.³⁵ There seems less reason for objection to the contract of a third person to indemnify the bail, and such contracts are generally enforced.³⁶ For the same reason that validity has been denied to a contract by the accused to indemnify bail, if the bail bond is forfeited and the surety pays, he can have no subrogation to the government's right against the principal,³⁷ nor has he any quasi-contractual right to recover from the principal what he has paid.³⁸

§ 1718. Agreements to compound crime.

Any agreement having for its purpose or consideration the concealment or compounding of a crime is unlawful.³⁹ This is

Div. 545, 42 N. Y. S. 418, 158 N. Y. 351, 53 N. E. 31; *Badolato v. Molinari*, 174 N. Y. S. 512; *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998.

³⁵ *Leary v. United States*, 224 U. S. 567, 32 S. Ct. 599, 56 L. Ed. 889; *Carr v. Davis*, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58 (two judges diss.). *Holmes, J.*, in the former case said (p. 575): "If as in this case, the bond was for \$40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss so long as it had the obligation it was content to take." *Cf. United States v. Ryder*, 110 U. S. 729, 28 L. Ed. 308, 4 S. Ct. 196.

³⁶ *Stevens v. Hay*, 61 Ill. 399; *Harp v. Osgood*, 2 Hill (N. Y.), 216. In the following cases such contracts were enforced, but the question of public policy was not discussed. *Anderson v. Spence*, 72 Ind. 315; *Aldrich v. Ames*, 9 Gray, 76; *Holmes v. Knights*, 10 N. H. 175. They were held unlawful in *Dunkin v. Hodge*, 46 Ala. 525, and see *Mayne v. Fidelity & Co.*, 198 Pa. 490, 48 Atl. 469.

³⁷ *United States v. Ryder*, 110 U. S. 729, 28 L. Ed. 308, 4 S. Ct. Rep. 196.

³⁸ *Fisher v. Fallows*, 5 Esp. 171; *Jones v. Orchard*, 16 C. B. 614; *Cripps*

v. Hartnoll, 4 B. & S. 414; *United States v. Greeme*, 163 Fed. 442. But see *contra*, *Reynolds v. Harrol*, 2 Strobb. 87. An express contract by the principal to repay the surety would not seem to help the matter, but see *Simpson v. Roberts*, 35 Ga. 180. *Cf. diss. opinion of Miller, J.*, in *Carr v. Davis*, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58.

³⁹ *Williams v. Bayley*, L. R. 1 H. L. 200; *Lound v. Grimwade*, 39 Ch. D. 605; *Windhill Board of Health v. Vint*, 45 Ch. D. 351; *Jones v. Merionethshire Building Soc.*, [1891] 2 Ch. 587; [1892] 1 Ch. 173; *In re Lawrence*, 166 Fed. 239, 92 C. C. A. 251; *United States Fidelity Co. v. Charles*, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212; *Hartsell v. Roberts*, 185 Ala. 201, 64 So. 90; *Berry v. Dunn* (Ala., 1918), 78 So. 51, L. R. A. 1918 D. 939; *Kirkland v. Benjamin*, 67 Ark. 480, 55 S. W. 840; *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914 A. 511; *Shearer v. Farmers', etc., Bank*, 121 Ark. 599, 182 S. W. 262; *Winter v. Lewis* (Ark.), 200 S. W. 981; *Ogden v. Ford* (Cal.), 176 Pac. 165; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Chandler v. Johnson*, 39 Ga. 85; *Godwin v. Crowell*, 56 Ga. 566; *Jones v. Dannenberg*

true though no crime in fact had been committed, if prosecution has been begun;⁴⁰ but if neither a crime has been committed, nor prosecution begun the agreement is not unlawful.⁴¹ The fact that the same act creates a criminal liability as well as a civil obligation will not invalidate an agreement for the

Co., 112 Ga. 426, 37 S. E. 729; Deen v. Williams, 128 Ga. 265, 57 S. E. 427; Jordan v. Beecher, 143 Ga. 143, 84 S. E. 549, L. R. A. 1915 D. 1122; William-Hester Marble Co. v. Walton (Ga. App.), 96 S. E. 269; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; Peed v. McKee, 42 Iowa, 689; Smith v. Steely, 80 Iowa, 738, 45 N. W. 912; Rosenbaum v. Levitt, 109 Iowa, 292, 80 N. W. 393; Friend v. Miller, 52 Kans. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Kimbrough v. Lane, 11 Bush, 556; American Nat. Bank v. Madison, 144 Ky. 152, 137 S. W. 1076, 38 L. R. A. (N. S.) 597; Shaw v. Reed, 30 Me. 105; Taylor v. Jaques, 106 Mass. 291; Gorham v. Keyes, 137 Mass. 583; Snider v. Willey, 33 Mich. 483; Case v. Smith, 107 Mich. 416, 65 N. W. 279, 31 L. R. A. 282, 61 Am. St. Rep. 341; Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438; Sumner v. Summers, 54 Mo. 340; Baker v. Farris, 61 Mo. 389; Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 N. W. 696; Shafer v. Beatrice State Bank, 99 Neb. 317 (*sub nom.* Shafer v. Harden), 156 N. W. 632; Shaw v. Spooner, 9 N. H. 197, 32 Am. Dec. 348; Bisbee v. Pulpit Farm Dairy (N. H.), 100 Atl. 672; Jourdan v. Burstow, 76 N. J. Eq. 55, 74 Atl. 124, 139 Am. St. Rep. 741; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Buffalo Press Club v. Greene, 86 Hun, 20, 28 N. Y. S. 525, 5 N. Y. Misc. 501, 33 N. Y. S. 286; Strauss Linotyping Co. v. Schwalbe, 159 N. Y. App. Div. 347, 144 N. Y. S. 549; Catskill Nat. Bank v. Lasher, 165 N. Y. App. Div. 548, 151 N. Y. S. 191; Lindsay v. Smith, 78 N. C. 328, 24 Am. Rep. 463; Cor-

bett v. Clute, 137 N. C. 546, 50 S. E. 216; Alston v. Hill, 165 N. C. 255, 81 S. E. 291; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. Dak. 222, 130 N. W. 228; Roll v. Raguet, 4 Ohio, 400, 22 Am. Dec. 759; Raguet v. Roll, 7 Ohio (pt. 1), 76; Springfield Fire, etc., Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. Rep. 571; Riddle v. Hall, 99 Pa. St. 116; Bankhead v. Shed, 80 S. C. 253, 61 S. E. 425, 16 L. R. A. (N. S.) 971; Western Union Tel. Co. v. Smith (Tex. Civ. App.), 179 S. W. 548; Wight v. Rindskopf, 43 Wis. 344. See also Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L. R. A. 230, 60 Am. St. Rep. 473; City National Bank v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848. *Cf.* Allen v. Dunham, 92 Tenn. 257, 269, 21 S. W. 898; Loud v. Hamilton (Tenn.), 45 L. R. A. 400.

⁴⁰ W. T. Joyce Co. v. Rohan, 134 Ia. 12, 111 N. W. 319, 120 Am. St. Rep. 410; Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438; Manning v. Columbian Lodge, 57 N. J. Eq. 338, 340, 38 Atl. 444, 45 Atl. 1092.

⁴¹ Woodham v. Allen, 130 Cal. 194, 62 Pac. 398; Rieman v. Morrison, 264 Ill. 279, 106 N. E. 215; Baker v. Farris, 61 Mo. 389; Manning v. Columbian Lodge, 57 N. J. Eq. 338, 38 Atl. 444, 45 Atl. 1092; Steuben County Bank v. Mathewson, 5 Hill (N. Y.), 249; Swope v. Jefferson Fire Ins. Co., 93 Pa. St. 251; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946. But see *contra* Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438.

settlement of the civil obligation,⁴² even though prosecution has already been begun and is pending.⁴³ Nor will the fact that the settlement is made in the apprehension of criminal proceedings, and with the hope that no such proceedings will be taken if the civil liability is settled, make the agreement unlawful, so long as there is no promise either express or implied to compound the criminal offence.⁴⁴ An agreement also may be made by a prosecuting officer to recommend a *nol. pros.* to the court in consideration of an accused criminal turning State's evidence.⁴⁵ Settlement of certain misdemeanors also which are primarily important because of the injury inflicted on particular individuals have been sustained. This principle has been most commonly applied to settlements of prosecutions for bastardy,⁴⁶ but in several cases has been held to apply to

⁴² *Keir v. Leeman*, 9 Q. B. 371, 375; *Flower v. Sadler*, 10 Q. B. D. 572; *McClatchie v. Haslam*, 65 L. T. 691; *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S. W. 198; *Lomax v. Colorado Nat. Bank*, 46 Col. 229, 104 Pac. 85; *Godding v. Hall*, 56 Colo. 579, 140 Pac. 165; *Paige v. Hieronymus*, 192 Ill. 546, 61 N. E. 832; *Rieman v. Morrison*, 264 Ill. 279, 106 N. E. 215; *Sloan v. Davis*, 105 Iowa, 97, 74 N. W. 922; *Powell v. Flanary*, 109 Ky. 342, 22 Ky. L. Rep. 908, 59 S. W. 5; *Higgins v. Sowards*, 159 Ky. 783, 169 S. W. 554; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. 335; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; *Cass County Bank v. Bricker*, 34 Neb. 516, 52 N. W. 575, 33 Am. St. Rep. 649; *Barrett v. Weber*, 125 N. Y. 18, 25 N. E. 1068; *Portner v. Kirschner*, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925.

⁴³ In *Board of Education v. Angel*, 75 W. Va. 747, 84 S. E. 747, 748, L. R. A. 1915 E. 139, the court said: "It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property

has been embezzled, or fraudulently procured, may contract with such wrongdoer for repayment or satisfaction of the loss, and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed. 9 Cyc. 506, and notes citing cases; *Johnston v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180; *Portner v. Kirschner*, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925, 1 Page on Cont., Sec. 418; *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931."

⁴⁴ *Higgins v. Sowards*, 159 Ky. 783, 169 S. W. 554; and see cases cited in the preceding note.

⁴⁵ *Nickelson v. Wilson*, 60 N. Y. 362; *Rogers v. Hill*, 22 R. I. 496, 48 Atl. 670.

⁴⁶ *Robinson v. Crenshaw*, 2 Stew. & Porter, 276; *Martin v. State*, 62 Ala. 119; *Breathwit v. Rogers*, 32 Ark. 758; *McMahon v. Smith*, 47 Conn. 221, 223, 36 Am. Rep. 67; *Davis v. Moody*, 15 Ga. 175; *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417; *Coleman v. Frum*, 4 Ill. 378; *Allyn v. Allyn*, 108 Ind. 327, 9

other misdemeanors, as assault,⁴⁷ non-support,^{47a} trespass,⁴⁸ and obtaining property by false pretences.⁴⁹

§ 1719. Agreements to arbitrate.

An agreement to arbitrate, whether constituting the whole contract between the parties or merely forming part of a larger contract, met with some jealousy on the part of the courts as tending to oust them of their jurisdiction. It has been asserted and never denied that this hostility probably originated "in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."⁵⁰ It has been said,⁵¹ "A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason."⁵² Such an agreement, however, will support an action at law.⁵³ Yet as it will not be specifically enforced,⁵⁴ and as only nominal damages can be recovered,⁵⁵

N. E. 279; *Griffin v. Chriswisher*, 84 Neb. 196, 120 N. W. 909; *Burton v. Belvin*, 142 N. C. 151, 55 S. E. 71; *Maxwell v. Campbell*, 8 Ohio St. 265; *Maurer v. Mitchell*, 9 W. & S. 69; *Wyant v. Leshar*, 23 Pa. St. 338; *Jangraw v. Perkins*, 77 Vt. 375, 60 Atl. 385. In some of these cases bastardy proceedings were held to be civil in their character rather than criminal. Cf. *Berry v. Dunn* (Ala., 1918), 78 So. 51, L. R. A. 1918 D. 939, where the court held a promise to pay for forbearing to prosecute for seduction was illegal.

⁴⁷ *Price v. Summers*, 2 South. 578.

^{47a} *Archie v. Brown* (Ky.), 209 S. W. 522. (The agreement in this case was expressly made subject to the consent of the prosecuting attorney and the court.)

⁴⁸ *Soule v. Bonney*, 37 Me. 128, 129.

⁴⁹ *Geier v. Shade*, 109 Pa. 180; *Commonwealth v. Carr*, 28 Pa. Super. 122.

⁵⁰ Lord Campbell in *Scott v. Avery*, 5 H. L. Cas. 811.

⁵¹ *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, *per Hough, J.*

⁵² "It is not necessary now to say how this point ought to have been determined if it were *res integra*—it having been decided again and again," etc. *Per Kenyon, J.*, in *Thompson v. Charnock*, 8 T. R. 139. See also *Kill v. Hollister*, 1 Wils. 129. Cf. *Dimsdale v. Robertson*, 2 Jones & Lat. 58, 90.

⁵³ *Livingston v. Ralli*, 5 E. & B. 132; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385, 34 L. Ed. 708, 11 S. Ct. Rep. 133; *Hill v. More*, 40 Me. 515, 523; *Donegal v. Verner*, 6 Ir. Rep. C. L. 504. See also *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, 181; *Union Insurance Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227; *Gray v. Wilson*, 4 Watts, 39, 41. The authority of the arbitrators is revocable (*infra*, § 1927), but it is a breach of contract to revoke it.

⁵⁴ See *supra*, § 1421.

⁵⁵ *Munson v. Straits of Dover Steam-*

the agreement is of little value unless it can be used as a bar to an action in the courts on the claim which it was agreed to arbitrate; and it is its validity in this respect which will be here considered.

§ 1720. Arbitration may be made a condition precedent in England.

In England the parties apparently may make all rights under a contract conditional on arbitration, by using language appropriate for the purpose.⁵⁶ The principle has thus been stated: "If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover."⁵⁷ But when there is a repudiation going to the substance of the whole contract it has been held the repudiating party when sued and seeking to justify the repudiation cannot insist on the enforcement of a subordinate term of the contract making arbitration a condition precedent to liability.⁵⁸

ship Co., 99 Fed. 787, 102 Fed. 926, 43 C. C. A. 57.

⁵⁶ The leading case is *Scott v. Avery*, 5 H. L. C. 811.

⁵⁷ *Viney v. Bignold*, 20 Q. B. D. 172. See also *Elliott v. Royal Ex. Ass.*, L. R. 2 Exch. 237; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Collins v. Locke*, 4 A. C. 674; *Babbage v. Coulburn*, 9 Q. B. D. 235; *Caledonian Ins. Co. v. Gilmour*, [1893] A. C. 85; *Trainor v. Phoenix Fire Ins. Co.*, 85 L. T. 825; *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q. B. 606; *Spurrier v. LaCloche*, [1902] A. C. 446; *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593. Cf. *Edwards v. Aberayron Ins. Soc.*, 1 Q. B. D. 563.

⁵⁸ In *Jureidini v. National British, etc., Ins. Co.*, [1915] A. C. 499, an action was brought on a policy of fire insurance "which provided (1) that

if the claim were fraudulent or if the loss were occasioned by the wilful act or with the connivance of the insured all benefit under the policy should be forfeited, and (2) that if any difference arose as to the amount of any loss such difference should, independently of all other questions, be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss if disputed should be first obtained. The insurance company repudiated the claim in toto on the ground of fraud and arson." It was held "that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim."

The distinction so taken, however, is unsound. A person who repudiates a contract wrongfully can not sue upon it himself, but if he is sued upon it he can be held liable only according to the terms of the contract. If, therefore, an arbitration clause amounts to a condition precedent to the defendant's promise to pay any insurance money, and such conditions are lawful, the defendant can be held liable only if that condition is performed, prevented, or waived.⁵⁹

§ 1721. Decisions in the United States.

In many of the United States a doctrine similar to that adopted by the English courts seems to prevail,⁶⁰ and in this

⁵⁹ Cf. *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593.

⁶⁰ *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 34 L. Ed. 708, 11 S. Ct. 133; *Crossley v. Connecticut Ins. Co.*, 27 Fed. 30; *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483, 14 C. C. A. 485, rev'g 57 Fed. 582; *Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. 258, 8 C. C. A. 114; *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752, 9 C. C. A. 623; *Old Saucelito Co. v. Commercial Assn. Co.*, 66 Cal. 253, 5 Pac. 232; *Adams v. South British Ins. Co.*, 70 Cal. 198, 11 Pac. 627; *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Davisson v. East Whittier Land &c. Co.*, 153 Cal. 81, 96 Pac. 88; *Denver, etc., R. Co. v. Riley*, 7 Col. 494, 4 Pac. 785; *Denver, etc., Co. v. Stout*, 8 Col. 61, 5 Pac. 627; *Union Pacific Co. v. Anderson*, 11 Col. 293, 18 Pac. 24; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Liverpool Ins. Co. v. Creighton*, 51 Ga. 95; *Southern Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975; *Birmingham Ins. Co. v. Pulver*, 126 Ill. 329, 338, 18 N. E. 804, 9 Am. St. Rep. 598; *Leisure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; *Dee v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1056; *Guthat v. Gow*, 95 Mich. 527, 55 N. W. 442; *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Weggner v. Greenstine*, 114 Mich. 310, 72 N. W. 170; *Gässer v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; *Mcartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Wolff v. Liverpool Ins. Co.*, 50 N. J. L. 453, 14 Atl. 561; *Anderson v. Odd Fellows Hall*, 86 N. J. L. 271, 90 Atl. 1007; *President, etc., Delaware & H. C. Co. v. Penn. Coal Co.*, 50 N. Y. 250; *Uhrig v. Williamsburg Ins. Co.*, 106 N. Y. 362, 4 N. E. 745; *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *National Contracting Co. v. Hudson River Water Power Co.*, 170 N. Y. 439, 63 N. E. 450; *Keeffe v. National Soc.*, 4 N. Y. App. Div. 392, 38 N. Y. S. 854; *Spink v. Coöperative Fire Ins. Co.*, 25 N. Y. App. Div. 484, 49 N. Y. S. 730; *Van Note v. Cook*, 55 N. Y. App. Div. 55, 66 N. Y. S. 1003; *Pioneer Mfg. Co. v. Phenix Assn. Co.*, 106 N. C. 28, 10 S. E. 1057 (see, however,

connection should be considered the numerous cases where the certificate of an architect or engineer is made a condition precedent to any right to recover for building or other work.⁶¹ In many States, however, the distinction is taken between an agreement to arbitrate the whole question of liability which is held ineffectual even though expressed in the form of a condition precedent, and an agreement which merely provides for the determination of a particular fact as for the valuation of a loss or injury.⁶²

Pioneer Mfg. Co. v. Phoenix Assn. Co., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673; *Pretafelder v. Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. 205; *Reynolds v. Caldwell*, 51 Pa. 298; *Gowen v. Pierson*, 166 Pa. 258, 31 Atl. 83; *Chandley v. Borough of Cambridge Springs*, 200 Pa. 230, 232, 49 Atl. 772; *Jones v. Enoree Power Co.*, 92 S. C. 263, 75 S. E. 452, Ann. Cas. 1914 B. 293; *Scottish Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. 630; *American Ins. Co. v. Bass*, 90 Tex. 380, 382, 38 S. W. 1119; [*cf. Queiroli v. Whitesides* (Tex. Civ. App.), 206 S. W. 122]; *VanHorne v. Watrous*, 10 Wash. 525, 39 Pac. 136; *Zindorf Co. v. Western Co.*, 27 Wash. 31, 67 Pac. 374; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, 81 Wash. 592, 142 Pac. 1153, 86 Wash. 694, 150 Pac. 1162; *Calhoun v. Pederson*, 85 Wash. 630, 149 Pac. 25 (*cf. Winsor v. German Soc.*, 31 Wash. 365, 72 Pac. 66); *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S. E. 258; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. See also *Randall v. Phoenix Ins. Co.*, 10 Mont. 362, 25 Pac. 960; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. In a number of these cases, however, the court also laid stress on the fact that the agreement for arbitration related not to the whole question of liability under the contract, but merely to the amount of damages.

⁶¹ See *supra*, §§ 794-798, and especially *Keachie v. Starkweather Drainage Dist.* (Wis.), 170 N. W. 236.

⁶² *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 488; *Jefferson Fire Ins. Co. v. Bierce*, 183 Fed. 588; *United States Asphalt Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006; *Aktieselskabet &c. Kompagniet v. Rederiaktiebolaget Atlanten*, 232 Fed. 403, 250 Fed. 935, 163 C. C. A. 185 (cert. granted 248 U. S. 553, 39 S. Ct. 8); *The Eros*, 241 Fed. 186, 251 Fed. 45, 163 C. C. A. 295; *Western Assoc. Co. v. Hall*, 112 Ala. 318, 20 So. 447, 120 Ala. 547, 24 So. 936; *Headley v. Aetna Ins. Co.* (Ala.), 80 So. 466; *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Supreme Council v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; *Louisville, etc., Ry. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153; *Supreme Council v. Forsinger*, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Ison v. Wright*, 21 Ky. L. Rep. 1368, 55 S. W. 202; *Robinson v. Georges Ins. Co.*, 17 Me. 131, 35 Am. Dec. 239; *Stephenson v. Piscataqua Ins. Co.*, 54 Me. 55 (but see *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; *White v. Middlesex R. Co.*, 135 Mass. 216; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115 (*cf. Lamson Co. v. Prudential Ins. Co.*, 171 Mass. 433, 50 N. E. 943, and see also *Marsch v. Southern New Eng. R. Corp.*, 230 Mass. 483,

Whatever disagreement between the decisions there may be it is at least generally held that a stipulation in form collateral to refer all matters in dispute under a contract to arbitrators is no bar to an action at law for breach of the contract.⁶³

Even though the provision for arbitration be in the form of a condition precedent, and the validity of the condition be recognized, it may be excused by waiver or prevention, like any other condition.⁶⁴

120 N. E. 120); *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N. W. 736; *Hartford Ins. Co. v. Hon*, 66 Neb. 555, 92 N. W. 746, 103 Am. St. Rep. 725; *Leach v. Republic Ins. Co.*, 58 N. H. 245; *Wyckoff v. Woarms*, 118 N. Y. App. Div. 699, 103 N. Y. S. 650; *Baltimore, etc., R. Co. v. Stankard*, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745; *Myers v. Jenkins*, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; *Ball v. Doud*, 26 Oreg. 14, 37 Pac. 70; *Gray v. Wilson*, 4 Watts, 39; *Commercial Union Assoc. v. Hocking*, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; *Yost v. Dwelling House Ins. Co.*, 179 Pa. 381, 36 Atl. 317; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. 255, 42 Atl. 138; *Needy v. German-American Ins. Co.*, 197 Pa. 460, 47 Atl. 739; *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, 49 Atl. 387, 91 Am. St. Rep. 620; *Daniher v. Grand Lodge*, 10 Utah, 110, 37 Pac. 245; *Kinney v. Baltimore, etc., Assoc.*, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142 (conf. *Baer's Sons Grocer Co. v. Cutting Fruit Packing Co.*, 42 W. Va. 359, 26 S. E. 191). See also *Edwards v. Aberayron Ins. Soc.*, 1 Q. B. D. 563, and the Michigan, Minnesota, and New York decisions cited in the preceding note.

⁶³ *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398, 93 C. C. A. 162, cert. denied 214 U. S. 515, 53 L. Ed. 1064, 29 S. Ct. 697; *Lawrence v. White*, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097; *Crilly v. Philip Rinn Co.*, 135

Ill. App. 198; *Anderson v. Odd Fellows Hall*, 86 N. J. L. 271, 90 Atl. 1007; *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S. E. 258. See also cases in previous notes to this section.

In *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646, 649, the court said: "The stipulation as to arbitration is not made a condition precedent to a right to recover upon the contract. It is distinct and severable from the agreement to pay a *pro rata* share of the amount received by the defendant. The phrase of the contract in this respect is markedly different, for example, from that of the standard form of insurance. St. 1907, c. 576, § 59 (page 886); *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 525, 526, 109 N. E. 384. It is in legal effect like those found in *Reed v. Washington Insurance Co.*, 138 Mass. 572; *Norcross Bros. v. Vose*, 199 Mass. 81, 94, 85 N. E. 468; and *Derby Desk Co. v. Connors Bros. Const. Co.*, 204 Mass. 461, 467, 90 N. E. 543. See *Hanley v. Aetna Ins. Co.*, 215 Mass. 425, 429, 102 N. E. 641.

"The contract in this respect is plainly distinguishable from those before the court in *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89, and *Old Colony St. Ry. v. Brockton & Plymouth St. Ry.*, 218 Mass. 84, 105 N. E. 866." But see *Pacaud v. Waite*, 218 Ill. 138, 75 N. E. 779, 2 L. R. A. (N. S.) 672; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915 A. 241.

⁶⁴ *Tubbs v. Delillo*, 19 Cal. App. 612,

§ 1722. Technical character of distinctions.

The lines of distinction drawn by the decisions are not very clear and turn often upon matters of form rather than of substance, which is objectionable where the question is one of policy. In New York it is said that a distinction is to be made "between the provisions of a contract providing that before a right of action shall accrue certain facts shall be determined, or amounts or values ascertained, and an independent covenant or agreement to provide for the adjustment and settlement of all disputes and differences by arbitration to the exclusion of the courts;" ⁶⁵ and in a concurring opinion in the same case from which this quotation is taken it is said of an attempt to bestow exclusive jurisdiction on private arbitrators that whether it "takes the form of a condition precedent or a covenant, it is equally ineffective." Probably these expressions as nearly represent the prevailing American judicial opinion, as any that could be selected.

§ 1723. Illustration of difficulty in applying distinctions.

These cases may be put as illustrations of the practical difficulty of applying such a test and as indicating that the test is little more than a matter of pure form:

1. In return for a promise of A to build according to specifications, B promises to pay what C thinks just, not exceeding \$10,000, taking into account not only the value of the work, but any default of either party in the performance of the contract. It seems hard to believe that a court would or should hold such a contract so illegal as to preclude all recovery upon it, and if any recovery is to be had upon it, clearly C's decision which involves not only a valuation of the work, but a decision

127 Pac. 514; *Crilly v. Philip Rinn Co.*, 135 Ill. App. 198; *Lamson Consolidated Store Service Co. v. Prudential F. Ins. Co.*, 171 Mass. 433, 50 N. E. 943; *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646; *Grant v. Pratt*, 110 N. Y. App. Div. 867, 97 N. Y. S. 29, 186 N. Y. 611, 79 N. E. 1106; *Symms Powers Co. v. Kennedy*, 33 S. Dak. 355, 146 N. W. 570.

⁶⁵ *Meacham v. Jamestown & C. R.*, 211

N. Y. 346, 105 N. E. 653, Ann. Cas. 1915 C. 851, citing *President, etc., Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276; *National Contracting Co. v. Hudson River Power Co.*, 170 N. Y. 439, 63 N. E. 450, 192 N. Y. 209, 84 N. E. 965.

as to defaults which may depend on matters of law as well as of fact. How far in substance does the case differ from the following:

2. In return for a promise of A to build according to specifications, B promises to pay \$10,000 if C thinks A entitled to so much, in view of any default of either party in the performance of the contract.

3. For the same promise by A, B promises to pay \$10,000, and C's determination of any question in dispute shall be final and a condition precedent to any right of action.

4. For the same promise by A, B promises to pay \$10,000, and it is mutually agreed that all matters in dispute shall be left to C's determination which shall be final.

§ 1724. Agreements to arbitrate should be enforced.

One who examines the cases will probably reach the conclusion that the criticism of the law concerning agreements to arbitrate made by Judge Hough,⁶⁶ is well founded except where the agreement is oppressive or unfair to one of the parties, as where an arbitrator is agreed upon who is either a party or so identified with one of the parties as to be unlikely to render an unbiased judgment.⁶⁷ The statutes with reference to arbi-

⁶⁶ See *supra*, § 1719, and *infra*, n. 68.

⁶⁷ In *White v. Middlesex R. Co.*, 135 Mass. 216, the plaintiff brought action to recover \$65 deposited by him with the defendant corporation under a written agreement providing, among other things, that the plaintiff, who was about to enter the defendant's employ as a conductor, should, upon entering such employ, deposit the sum of \$65 to be retained by the defendant, together with interest accrued thereon and all wages that might be due him, as security for the proper discharge of his duties; that, in case of a breach by the plaintiff, the defendant's president "shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole or any part of said \$65 and interest, and all wages that may at

any time be due him, as liquidated damages." The action was held maintainable though the president adjudged that the railroad was entitled to retain the whole deposit. The court held the provision of the contract invalid.

See, however, the almost identical case of *London Tramways Co. v. Bailey*, L. R. 3 Q. B. D. 217, where the judgment was for the company. See also *Wilson v. Glasgow Tramways & Omnibus Co.*, 5 Sc. Sess. Cas. (4th ser.), 981, and *Glasgow Tramway & Omnibus Co. v. Dempsey*, 3 Coup. Just. 440, and consider also decisions upholding contracts whereby an architect or engineer of one of the parties is given authority to decide questions in dispute between them, *supra*, §§ 794-798; also cases of contracts to pay for

tration in many jurisdictions certainly preclude the idea that the settlement of disputes in that way is undesirable.⁶⁸ Even the requirement of the form of a condition precedent as a requisite for denying relief by legal proceedings until arbitration has been had, savors of excessive technicality; for the nature of the provision necessarily indicates that the intention of the parties can be effectuated only by regarding the stipulation as a condition. A promise in a contract to give a bond for the securing performance of other promises in the contract is held to create a condition precedent to liability on the other promises, because otherwise the stipulation would be ineffective.

goods or services if satisfactory to the purchaser or employee, *supra*, § 44. In *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 783, 786, 107 N. W. 1005, 111 N. W. 598, 10 L. R. A. (N. S.) 198, 124 Am. St. Rep. 830, the plaintiff's intestate was employed by a railroad company and had entered into a contract that if he should accept certain benefits provided in a relief department of the company, he would forfeit all right to sue for damages. His widow accepted benefits from the relief department but, nevertheless, was allowed to sue as administratrix.

⁶⁸ In *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1011, Hough, J., said: "The English Arbitration Act has compelled the courts of that country to abandon the doctrine that it is wrong or wicked to agree to stay away from the courts when disputes arise. It is highly characteristic of lawyers that, when thus coerced by the Legislature, the wisdom of previous decisions begins to be doubted. In *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202, Lord Watson said: 'The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest on any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely

trenched upon by the legislation of the last 50 years . . . that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.'"

In *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646, the court said: "There is doubt about the validity of any arbitration clause which would constitute one party to a dispute a member of a board of arbitration to pass upon his own claims. Arbitration implies the exercise of the judicial function. An arbitrator ought to be free from prejudice and able to maintain a fair attitude of mind toward the subject of controversy. It would be a travesty upon all ideas of judicial propriety or of judicial work for a man to be an arbitrator to settle the amount of his own liability. It is contrary to natural right and fundamental principles of the common law for one to judge his own cause. *Pearce v. Atwood*, 13 Mass. 324; *Strong v. Strong*, 9 Cush. 560, 570; *McGregor v. Crane*, 98 Mass. 530. See in this connection *Hickman v. Roberts*, [1913] A. C. 229; *Bristol Corp. v. Aird*, [1913] A. C. 241, 247, 248, 254, 255. There is nothing in *Fox v. Hazelton*, 10 Pick. 275, which gives countenance to the contention that an agreement to submit a controversy to the decision of a party can be sustained."

It is a condition implied in fact.⁶⁹ Somewhat similarly it may fairly be argued a provision for arbitration of disputes under a contract can only be effective if the arbitration precedes litigation rather than follows it.⁷⁰

§ 1725. Limiting parties to particular courts or procedure.

The right of a party to legal redress if he is injured is jealously guarded by the courts, and generally no agreement purporting to deprive a party of the right to sue in a Federal court,⁷¹ or in-

⁶⁹ See *supra*, § 893.

⁷⁰ Two Massachusetts decisions illustrate the importance attached to stating in terms that the provision for arbitration is a condition precedent.

In *Reed v. Washington Ins. Co.*, 138 Mass. 572, the action was brought upon an insurance policy in the form prescribed by the Massachusetts statute. The policy contained the following provision: "In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, provided that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties." At the conclusion of the plaintiff's evidence, the judge declined to rule, as requested by the defendant, that the plaintiff could not recover without evidence of a reference to arbitration. This ruling was sustained by the full court on the ground that the clause was not expressed as a condition precedent. See also *Clement v. British American Ass. Co.*, 141 Mass. 298, 5 N. E. 847.

In *Lamson Store Service Co. v.*

Prudential Ins. Co., 171 Mass. 433, 50 N. E. 943, the action was brought upon a policy in the form prescribed by a later Massachusetts statute (St. 1887, c. 214, § 60). The policy contained a clause similar to that quoted above, except for the following added words, "and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss." The court held that the words constituted a valid condition precedent to the plaintiff's right of action.

⁷¹ "It was held in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, that a statute making it a condition precedent to the granting of the privilege to a foreign corporation to do business within a State, that it would not remove suits from State to Federal courts, was unconstitutional and a contract to that effect was invalid. . . . This point was reaffirmed expressly in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148. This principle has been followed in numerous decisions of Circuit and District Federal courts. *Prince Steam-Shipping Co. v. Lehman*, 39 Fed. 704; *Slocum v. Western Assur. Co.*, 42 Fed. 235; *The Etona*, 64 Fed. 880; *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 Fed. 174; *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006." *Nashua River Paper Co. v. Hammer-*

deed in any way confining the right of a party to bringing action in a particular court, or in the courts of a certain jurisdiction,⁷² will be enforced. For the same reason a provision in a mortgage that a mode of sale therein set forth should "be exclusive of all others" was held ineffectual;⁷³ and perhaps somewhat unnecessarily a provision of a by-law adopted as part of

mill Paper Co., 223 Mass. 8, 15, 111 N. E. 678, L. R. A. 1916 D. 691. See also *David Lupton's Sons Co. v. Automobile Co.*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711; *Dunlop v. Mercer*, 156 Fed. 545, 551, 86 C. C. A. 435.

⁷² In *Nashua River Paper Co. v. Hammervill Paper Co.*, 223 Mass. 8, 15, 111 N. E. 678, L. R. A. 1916 D. 691, the court said: "It was held in *Benson v. Eastern Building & Loan Assoc.*, 174 N. Y. 83, 86, 66 N. E. 627, in substance that parties cannot in the ordinary case by contract deprive courts of competent jurisdiction of their power to adjudicate causes on the ground that that jurisdiction is prescribed by law and it cannot be increased or diminished by agreement of parties.

"In *Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A., 212, 214, it was said by Lurton, J.: 'The policy [of insurance]. . . contained a stipulation that no suit in law or equity should be brought upon it except in the Circuit Court of the United States. This provision, intended to oust the jurisdiction of all State courts, is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy, and should not be enforced.'

"To the same effect see—*Savage v. People's Building, Loan, etc., Assoc.*, 45 W. Va. 275, 282, 31 S. E. 991; *Owsley v. Yerkes*, 187 Fed. 580, 109 C. C. A. 250; *Shuttleworth & Co. v. Marx & Co.*, 159 Ala. 418, 428, 49 So. 83; *Matt*

v. Iowa Mutual Aid Association, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Bartlett v. Union Mutual Fire Ins. Co.*, 46 Me. 500; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *First Nat. Bank of Kansas City v. White*, 220 Mo. 717, 737, 120 S. W. 36; *Baltimore & Ohio R. R. v. Stankard*, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745; *Healy v. Eastern Building, etc., Assoc.*, 17 Penn. Super. 385, 392, 393." See also *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006; *Kuhnhold v. Compagnie Générale*, 251 Fed. 387; *Blair v. National Shirt and Overalls Co.*, 137 Ill. App. 413; *Nute v. Hamilton Ins. Co.*, 6 Gray, 174; *Buel v. Baltimore, etc., R. Co.*, 24 N. Y. Misc. 646, 53 N. Y. S. 749; *McLean v. Tobin*, 58 N. Y. Misc. 528, 109 N. Y. S. 926; *Darling v. Protective Assur. Soc.*, 71 N. Y. Misc. 113, 127 N. Y. S. 186; *Savage v. People's, etc., Sav. Assn.*, 45 W. Va. 275, 31 S. E. 991. In *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, however, the court refused to allow an action in Massachusetts on a contract made in Italy for a service of fifteen weeks in the United States, where the contract provided that suit should be brought in Italy, if any dispute upon the contract arose between the parties. See also *Daley v. People's Building &c. Assoc.*, 178 Mass. 13, 59 N. E. 452.

⁷³ *Guaranty Trust &c. Co. v. Green Cove Springs &c. R.*, 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

an insurance contract to the effect that seven years' absence should raise no presumption of death was also held invalid, the court denying the right of parties to fix by contract rules of evidence.⁷⁴

⁷⁴ *Gaffney v. Royal Neighbors of America*, 31 Idaho, 549, 174 Pac. 1014.

CHAPTER XLVII

ILLEGAL AGREEMENTS: AGREEMENTS TENDING TO CORRUPTION OR IMMORALITY

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§ 1726. Agreements tending to official or personal corruption.

Any bargain, the tendency of which is to lead a public official, or one subject to a private duty to violate his duty for money or favor, is opposed to public policy. Bargains of this sort may concern legislators, public officers, officers or stockholders of corporations, trustees, agents, and servants, and even private individuals.

§ 1727. Lobbying contracts.

An agreement by a legislator to exercise his judgment in a particular way is not binding at law. His promise, if without consideration, is not binding for that reason, and if he bargains for consideration it is illegal. A contract with one who is not

a legislator, to induce legislators to vote in a particular way is open to similar objection if the methods of inducing legislative action are improper. It has been said by the Supreme Court of the United States, in regard to the presentation to Congress of a claim against the United States: "We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable."¹ On the other hand, personal solicitation of individual members is a method which cannot lawfully be made the subject of contract.²

¹ *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623. See also *Knut v. Nutt*, 83 Miss. 365, 35 So. 686, 102 Am. St. 452, aff'd, 200 U. S. 12 50 L. Ed. 348, 26 S. Ct. 216; *Salinas v. Stillman*, 66 Fed. 677, 14 C. C. A. 50; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883; *Pennebaker v. Williams*, 136 Ky. 120, 143, 120 S. W. 321, 123 S. W. 672; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808; *Davis v. Commonwealth*, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 4 L. R. A. (N. S.) 212, 121 Am. St. Rep. 713; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633; *Dunham v. Hastings Paving Co.*, 56 N. Y. App. D. 244, 67 N. Y. S. 632, 57 N. Y. App. D. 426, 68 N. Y. S. 221; *Yates v. Robertson*, 80 Va. 475; *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. 928.

² *Marshall v. Baltimore & Ohio R.*

Co., 16 How. 314, 14 L. Ed. 953; *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Findlay v. Perts*, 66 Fed. 427, 13 C. C. A. 559; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 29 C. C. A. 438; *Burke v. Wood*, 162 Fed. 533; *Winton's Est. v. Amos*, 52 Ct. Cl. 90; *Hunt v. Test*, 8 Ala. 713; *Buchanan v. Farmer*, 122 Ark. 562, 184 S. W. 33; *Miller County &c. Dist. v. Cook (Ark.)*, 204 S. W. 420; *Colusa County v. Welch*, 122 Cal. 428, 55 Pac. 243; *Weed v. Black*, 2 McArthur (D.C.), 268, 29 Am. Rep. 618; *Owens v. Wilkinson*, 20 App. D. C. 51; *Doane v. Chicago City R. Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; *Bermudez Asphalt, etc., Co. v. Critchfield*, 62 Ill. App. 221, 174 Ill. 466; *Elkart County Lodge v. Crary*, 98 Ind. 328, 49 Am. Rep. 746; *Kansas, etc., Ry. Co. v. McCoy*, 8 Kans. 538; *McBratney v. Chandler*, 22 Kans. 692, 31 Am. Rep. 213; *Deering v. Cunningham*, 63 Kans. 174, 65 Pac. 263; *Wood v. McCann*, 6 Dana,

§ 1728. Application of principle.

The general principle is clearer than the application of it in some instances. Some method of promoting in a lawful way desired legislation must be permissible; and an unskilled person must have the right to employ a lawyer or other agent to act for him in the matter. Contracts to draft a bill and have it introduced in a legislature can afford no ground for criticism. If the legislature then affords an opportunity for those interested in the proposed legislation to appear before a committee, a contract for the payment for services in presenting the matter to the committee is everywhere valid; but a contract requiring argument with individual legislators even though it was stated that no improper means should be used to influence them would generally be held invalid. In attempting to urge National legislation, however, no opportunity is afforded those interested to appear before Congressional committees on a large majority of bills which are introduced. The enormous number of such bills precludes the possibility of giving such an opportunity in most cases. It is certainly the practice for individual congressmen to receive in their offices persons interested in promoting legislation, and to hear argument thereon. On these arguments the question whether a committee will even give a hearing on a bill may depend. It should also be observed that the evil

366; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 698, 30 L. R. A. 737, 51 Am. St. 493; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Veazey v. Allen*, 173 N. Y. 359, 66 N. E. 103, 62 L. R. A. 362; *Winpenny v. French*, 18 Ohio St. 469; *Obenchain v. Ransome-Crummey Co.*, 69 Ore. 547, 138 Pac. 1078; *Sweeney v. McLeod*, 15 Ore. 330, 15 Pac. 275; *Hyland v. Oregon Hassam Paving Co.*, 74 Or. 1, 144 Pac. 1160, L. R. A., 1915 C. 823, Ann. Cas., 1916 E. 941; *Clippinger v. Hepbaugh*, 5 W. & S. 315; *Spalding v. Ewing*, 149 Pa. 375, 24 Atl. 219, 15

L. R. A. 727, 34 Am. St. Rep. 608; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Chippewa Valley R. Co. v. Chicago, etc., R. Co.*, 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601; *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928. See also *Washington Irrigation Co. v. Krutz*, 119 Fed. 279, 56 C. C. A. 1; *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; *Thompson v. Wharton*, 7 Bush, 563, 3 Am. Rep. 306; *Buck v. First Bank*, 27 Mich. 293, 15 Am. Rep. 189; *McDonald v. Buckstaff*, 56 Neb. 88, 76 N. W. 476. Cf. *Knut v. Nutt*, 83 Miss. 365, 35 So. 686, 102 Am. St. 452, 200 U. S. 12, 50 L. Ed. 348, 28 S. Ct. 216.

guarded against in lobbying contracts is not so much the individual solicitation of legislators as the agreement to pay for it. In matters of public moment individual citizens are often requested to urge upon their individual representatives the propriety of voting for or against particular legislation, and reputable citizens do not hesitate to do so.

§ 1729. Contingent compensation.

The fact that the compensation bargained for is contingent on the procurement of legislation is frequently held a strong and sometimes a conclusive circumstance in determining the invalidity of an agreement to promote legislation, because even though no improper means of such promotion are bargained for, there is inevitable temptation to use such means.³ But generally where no improper means are contemplated or bargained for the contract is not invalidated merely because the compensation is to be contingent on the enactment of legislation.⁴

§ 1729a. Contracts to pay for procuring public contracts.

Closely analogous to lobbying contracts are bargains which have for their object obtaining a contract with the National Government or with a State or municipality, where no legislation is required. There is no doubt that a bargain is illegal

³ *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953; *Hazelton v. Sheckels*, 202 U. S. 71, 50 L. Ed. 939, 26 Sup. Ct. 567; *Crocker v. United States*, 240 U. S. 74, 78, 60 L. Ed. 533, 36 S. Ct. 245; *Globe Works v. United States*, 45 Ct. Cl. 497; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Bermudes Asphalt Pav. Co. v. Critchfield*, 62 Ill. App. 221; *Coquillard's Adm. v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Richardson v. Scott's Bluff*, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682; *Spalding v. Ewing*, 149 Pa. St. 753, 24 Atl. 219, 34 Am. St. Rep. 608. See also *Flynn v. Bank of Mineral Wells*, 53 Tex. Civ. App. 481, 118 S. W. 848.

⁴ *Denison v. Crawford Co.*, 48 Iowa, 211; *Barber Asphalt Pav. Co. v. Botsford*, 56 Kans. 532, 44 Pac. 3; *Kansas City Paper House v. Foley Ry. Printing Co.*, 85 Kans. 678, 118 Pac. 1056, 39 L. R. A. (N. S.) 747, Ann. Cas. 1913 A. 294; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L. R. A. (N. S.) 212, 121 Am. St. 713. See also *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64, 3 S. Ct. 441; *Pennebaker v. William*, 136 Ky. 120, 120 S. W. 321, 123 S. W. 672; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. 454; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633.

which contemplates bringing improper influence to bear upon the official or body having power to enter into the public contract in question.⁵ But is the employment of an agent to solicit the contract upon a promise of payment contingent on success obnoxious to policy as it is in lobbying contracts? The Supreme Court of the United States has answered this question in the affirmative, saying that "there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments;" and holding broadly that a contract to give any agent compensation dependent on his success in procuring a public contract was necessarily illegal.⁶ But the same court later somewhat modified its previous sweeping statements,⁷ and it is probable that most courts would agree with the argument in a New York decision:⁸

"A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ an agent, upon commission, where the government is the prospective buyer, is to take away

⁵ *Crocker v. United States*, 240 U. S. 74, 60 L. Ed. 533, 36 Sup. Ct. 245; *Anderson v. Blair* (Ala.), 80 So. 31; *Russell v. Currier Printing, etc., Co.*, 43 Colo. 321, 95 Pac. 936; *Dunlap v. Lebus*, 112 Ky. 237, 23 Ky. L. 1481, 65 S. W. 441; *Ward v. Hartley*, 178 Mo. 135, 77 S. W. 302; *Drake v. Lauer*, 93 N. Y. App. Div. 86, 86 N. Y. S. 986, *affd.* 182 N. Y. 533, 75 N. E. 1129; *McCallum v. Corn Products Co.*, 131 N. Y. App. Div. 617, 116 N. Y. S. 118; *Beck v. Bauman*, 173 N. Y. S. 772; *Hyland v. Oregon Hassam Paving Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C. 823; *Flynn v. Bank of Mineral Wells*, 53 Tex. Civ. App. 481, 118 S. W. 848. See also *Washington Irrigation Co. v. Krutz*, 119 Fed. 279, 56 C. C. A. 1.

⁶ *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868. See also *Hovey v. Storer*, 63 Me. 486; *Glenn v. Southwestern Gravel Co. (Ok.)*, 177 Pac. 586; *Hyland v. Oregon Hassam Paving Co.*,

74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C. 823.

⁷ In *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, the court said (page 276):—"And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business." See also *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Valdes v. Larrinaga*, 233 U. S. 705, 34 S. Ct. 750, 58 L. Ed. 1163.

⁸ *Swift v. Aspell*, 40 N. Y. Misc. 453, 82 N. Y. S. 659, 660.

what is ordinarily one of the elements of the enjoyment of ownership—the unrestricted right to sell. Upon this line of reasoning, commission agreements for a sale to the government have been upheld and enforced in this State where the agreement did not actively require corruption in its performance. Treated as a matter distinct in its nature from agreements to procure legislation, an agreement to compensate an agent for his successful efforts in traffic with the government has been held binding, where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts.”⁹

§ 1730. Agreements for appointment and compensation of officials.

As it is the duty of a public official charged with making appointments to make the best appointments possible without reference to private interests, and as it is expedient that those occupying public office shall have such inducements as its emoluments afford for the faithful performance of their duties, a contract to make a certain appointment or to influence the making of an appointment by such an official, or for an official to share the emoluments of his office with another, is invalid.¹⁰ For the same reason, a contract of one who holds

⁹ Citing *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Southard v. Boyd*, 51 N. Y. 177. See also *Hegness v. Chilberg*, 224 Fed. 28, 139 C. C. A. 492; *Bush v. Russell*, 180 Ala. 590, 61 So. 373; *Anderson v. Blair* (Ala.), 80 So. 31; *Kansas City Paper House v. Foley Ry. Printing Co.*, 85 Kan. 678, 118 Pac. 1056, 39 L. R. A. (N. S.) 747, 751; *Beck v. Bauman*, 187 N. Y. App. D. 774, 175 N. Y. S. 881; *Winpenny v. French*, 18 Ohio St. 469.

¹⁰ *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 899; *Schloss v. Hewlett*, 81 Ala. 266, 1 So. 263; *Edwards v. Randle*, 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. Rep. 108; *Martin v. Wade*, 37 Calif. 168; *Conner v. Canter*, 15 Ind. App. 690, 44 N. E. 656; *Aughey v. Windrem*, 137 Iowa, 315, 114 N. W. 1047; *Eversole v. Holli-*

day, 131 Ky. 202, 114 S. W. 1195; *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259, L. R. A. 1918 F. 966; *Ann. Cas.* 1918 E. 289; *Glover v. Taylor*, 38 La. Ann. 634; *Schneider v. Local Union No. 60*, 116 La. 270, 40 So. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. 549; *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728; *Anderson v. Branstrom*, 173 Mich. 157, 139 N. W. 40, 43 L. R. A. (N. S.) 422; *Ann. Cas.* 1914 D. 817; *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; *Keating v. Hyde*, 23 Mo. App. 555; *Hand v. Willard F. Bailey Co.* (Neb.), 172 N. W. 356; *Water Commissioners v. Cramer*, 61 N. J. L. 270, 39 Atl. 671, 68 Am. St. Rep. 705; *Gray v. Hook*, 4 N. Y. 449; *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463;

a public office or of one who is a candidate for such an office, the emoluments of which are fixed by law, to take less than legal compensation is invalid.¹¹ If the agreement is executed by the payment of the diminished emoluments, there are decisions, holding that no further claim can be made.¹² But the opposite view, also supported by authority, seems better.¹³ A debt has accrued which cannot be surrendered by parol without consideration.¹⁴

A bargain for greater compensation than the law permits is even more clearly invalid.¹⁵

Wishek v. Hammond, 10 N. Dak. 72, 84 N. W. 587; *Serrill v. Wilder*, 77 Oh. St. 343, 83 N. E. 486, 14 L. R. A. (N. S.) 983; *Hunter v. Nolf*, 71 Pa. 282; *Whitman v. Ervin* (Tenn. Ch.), 39 S. W. 742; *Willis v. Weatherford Compress Co.* (Tex. Civ. App.), 66 S. W. 472; *McCall v. Whaley*, 52 Tex. Civ. App. 646, 115 S. W. 658; *Meacham v. Dow*, 32 Vt. 721; *Livingston v. Page*, 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901; *White v. Cook*, 51 W. Va. 201, 41 S. E. 410, 57 L. R. A. 417, 90 Am. St. Rep. 775; *Stephenson v. Salisbury*, 53 W. Va. 366, 44 S. E. 217; *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 398. But see, *Shinn v. Shinn*, 78 W. Va. 44, 88 S. E. 610, L. R. A. 1916 E. 618. An agreement of a public officer having for its object the performance by another of duties which he himself was bound by his office to do is also obviously against public policy. *Twiggs v. Wingfield*, 147 Ga. 790, 95 S. E. 711, L. R. A. 1918 E. 757.

¹¹ *Miller v. United States*, 103 Fed. 413; *Ohio Nat. Bank v. Hopkins*, 8 App. D. C. 146; *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713, L. R. A. 1917 B. 176; *City School Corp. of Evansville v. Hickman*, 47 Ind. App. 500, 94 N. E. 828; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603; *Dodson v. McCurnin*, 178 Ia. 1211, 160 N. W. 927, L. R. A. 1917 C. 1084; *Second*

Nat. Bank v. Ferguson, 114 Ky. 516, 71 S. W. 429; *In re Irwin's Estate*, 123 Mo. App. 508, 100 S. W. 565; *Galagher v. Lincoln*, 63 Neb. 339, 88 N. W. 505; *Abbott v. Hayes County*, 78 Neb. 729, 111 N. W. 780; *People v. Board of Police*, 75 N. Y. 38; *Pitt v. Board of Education*, 216 N. Y. 304, 110 N. E. 612; *Pittsburg v. Goshorn*, 230 Pa. 212, 79 Atl. 505; *State v. Mayor*, 15 Lea, 697, 54 Am. Rep. 427; *Hoffman v. Chippewa County*, 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781. See also *Lukens v. Nye*, 156 Calif. 498, 105 Pac. 593, 36 L. R. A. (N. S.) 244.

¹² *Second Nat. Bank v. Ferguson*, 114 Ky. 516, 71 S. W. 429; *O'Hara v. Park River*, 1 N. Dak. 279, 47 N. W. 380; *De Boest v. Gambell*, 35 Oreg. 368, 58 Pac. 72, 353; *Kay v. Moncton*, 36 N. Bruns. 377. See also *Harvey v. Tama County*, 53 Iowa, 228, 5 N. W. 130.

¹³ *Ohio Nat. Bank v. Hopkins*, 8 App. D. C. 146; *School City v. Hickman*, 47 Ind. App. 500; *Pitt v. Board of Education*, 216 N. Y. 304, 110 N. E. 612.

¹⁴ *Supra*, § 120.

¹⁵ *Edgerly v. Hale*, 71 N. H. 138, 51 Atl. 679; *Dull v. Mammoth Min. Co.*, 28 Utah, 467, 79 Pac. 1050. See also *Oden v. Coco*, 249 U. S. 587, 39 S. Ct. 386; *Coco v. Oden*, 143 La. 718, 79 So. 287.

§ 1731. Obtaining a pardon.

A promise in consideration of efforts by personal solicitation to procure a pardon, or in consideration of the assent or withdrawal of opposition to the granting of a pardon is generally held invalid since the decision of the pardoning power should not be influenced by persuasions of those paid to make or withhold them.¹⁶ But if the means contemplated and used are open and professedly made for pay, as in the preparation of a petition and making an argument before the pardoning power, the agreement is generally upheld.¹⁷

§ 1732. Elections.

The purity of elections is of vital importance, and any agreement with voters tending to influence them by improper means, and any agreement with third persons to influence voters by indirect means, are equally invalid;¹⁸ as is a contract between rival candidates that one shall withdraw in consideration of a promise by the other to appoint him to office,^{18a} but open arguments in favor of a candidate or measure, or work connected therewith may be made the consideration for a promise.¹⁹ A contract to pay campaign expenses is under any circumstances of doubtful legality, but is clearly bad if there is reason for the

¹⁶ *Norman v. Cole*, 3 Esp. 253; *Haines v. Lewis*, 54 Iowa, 301, 6 N. W. 495, 37 Am. Rep. 202; *Deering v. Cunningham*, 63 Kans. 174, 65 Pac. 263, 54 L. R. A. 410; *Gordon v. Gordon*, 168 Ky. 409, 413, 182 S. W. 220, L. R. A. 1916 D. 576 (statutory); *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Buck v. Paw Paw First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Kribben v. Haycraft*, 26 Mo. 396; *O'Reilly v. Cleary*, 8 Mo. App. 186, 190; *Hatzfield v. Gulden*, 7 Watts, 152, 32 Am. Dec. 750.

¹⁷ *Formby v. Pryor*, 15 Ga. 258; *Bird v. Meadows*, 25 Ga. 251; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Timothy v. Wright*, 8 Gray, 522; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 898, 30 L. R. A.

737, 51 Am. St. 493; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Newbold v. McCrorey*, 103 S. Car. 299, 87 S. E. 542. See also *Lampleigh v. Brathwait*, Hobart, 105; *Gordon v. Gordon*, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916 D. 576. In *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060, the fact that the promised compensation was contingent on the granting of the pardon was held not to invalidate the agreement.

¹⁸ *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Nichols v. Mudgett*, 32 Vt. 546. See also *Cooper v. Slade*, 6 E. & B. 447; *Simpson v. Yeend*, L. R. 4 Q. B. 626; *Jackson v. Walker*, 5 Hill, 27.

^{18a} *Hand v. Willard F. Bailey Co.* (Neb.), 172 N. W. 356.

¹⁹ *Hurley v. Van Wagner*, 28 Barb. 109; *Sizer v. Daniels*, 66 Barb. 426.

belief that the person promising to pay such expenses desires, for his own future advantage in dealing with public contracts or otherwise, to secure the election of a particular candidate.²⁰

§ 1733. Contracts for railroad locations or stations, or operations.

The contracts of railroads and analogous public service companies in regard to the location of their stations and rights of way are carefully scrutinized, and if opposed to the public interest will not be enforced. Subscriptions conditional on the adoption of a particular route, or the construction of a station at a particular place have indeed been generally upheld;²¹ and agreements on the part of railroads to maintain stations at particular places, so long as there is no exclusion of other stations, have also been sustained, and have even been specifically enforced.²² Where, however, it appears that the enforcement

²⁰ *Ward v. Hartley*, 178 Mo. 135, 77 S. W. 302.

²¹ *Farrington v. Stucky*, 165 Fed. 325, 91 C. C. A. 311; *Carlisle v. Terre Haute, etc., R. Co.*, 6 Ind. 316; *Fisher v. Evansville, etc., R. Co.*, 7 Ind. 407; *McClure v. Gulf R. Co.*, 9 Kans. 373; *McMillan v. Maysville, etc., R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181; *Henderson & Nashville R. v. Leavell*, 16 B. Mon. 358; *Central Turnpike Corp. v. Valentine*, 10 Pick. 142; *Troy & Greenfield R. Co. v. Newton*, 1 Gray, 544; *Pacific Railroad Co. v. Seely*, 45 Mo. 212, 217, 100 Am. Dec. 369; *Chapman v. Mad River, etc., R. Co.*, 6 Ohio St. 119; *Baltimore & Ohio R. Co. v. Ralston*, 41 Ohio St. 573; *Piper v. Choctaw, etc., Imp. Co.*, 16 Okl. 436, 85 Pac. 965; *Cumberland, etc., R. Co. v. Baab*, 9 Watts, 458, 36 Am. Dec. 132; *Rhey v. Ebensburg Plank R. Co.*, 27 Pa. 261; *Racine County Bank v. Ayers*, 12 Wis. 512. But see *contra* *Baird v. Salina Northern R. Co. (Cal.)*, 173 Pac. 1069; *Butternuts, etc., Turnpike Co. v. North*, 1 Hill, 518; *Fort Edward, etc., Plank Co. v. Payne*, 15 N. Y. 583; *Holladay v. Patterson*, 5 Ore. 177.

²² *Grimes v. Minneapolis &c. R. Co.*, 133 Minn. 442, 158 N. W. 719, L. R. A. 1916 F. 687 (damages); *Griswold v. Minneapolis &c. R. Co.*, 12 N. Dak. 435, 97 N. W. 538. In *Herrzog v. Atchison, T. & S. F. R. Co.*, 153 Cal. 496, 95 Pac. 898, 899, 17 L. R. A. (N. S.), 428, the court said: "The contract here alleged did not bind the company to limit in any degree the facilities to be furnished to the public. It required the establishment and maintenance of a station at a place named, but left the company free to establish additional stations as they might be needed, without limitation of number or location. Contracts similar to the one here in question have been specifically enforced. *Hood v. North Eastern Ry. Co.*, L. R. 8 Eq. 666; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun, 467, cited with approval in *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Murray v. Northwestern R. Co.*, 64 S. C. 520, 42 S. E. 617. Where such contracts are limited to the creation of a right to a certain station or train service at given points, without in any way making the right exclusive

of the contract would impose a great burden upon the defendant, with a slight or no corresponding benefit to the plaintiff, or that such enforcement would be detrimental to the interests of the public, specific relief will be denied.²³ Moreover, when an agreement not only requires a railroad to maintain a station at a particular place, but also requires that no other station shall be established in the vicinity, the agreement is against public policy.²⁴ And some decisions hold that a bargain by an

or infringing upon the company's obligation to furnish proper service at any other place where it may be needed we are not prepared to hold that their enforcement would necessarily be violative of public policy. *Texas & St. L. R. Co. v. Roboards*, 60 Tex. 545, 48 Am. Rep. 268; *International & G. N. R. Co. v. Dawson*, 62 Tex. 260; *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44." See also *Parrott v. Atlantic &c. R. Co.*, 165 N. C. 295, 81 S. E. 348.

²³ *Herzog v. Atchison, T. & S. F. R. Co.*, 153 Cal. 496, 95 Pac. 899, 17 L. R. A. (N. S.) 428; *Conger v. New York, etc., R. Co.*, 120 N. Y. 29, 23 N. E. 983; *Murdfeldt v. New York, etc., R. Co.*, 102 N. Y. 703, 7 N. E. 404; *Clarke v. Rochester, etc., P. Co.*, 18 Barb. 350; *Ford v. Oregon Elec. R. Co.*, 60 Oreg. 278, 117 Pac. 809, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914 A. 280.

In *Kansas City Southern Ry. Co. v. Quigley*, 181 Fed. 190, 205, the court said: "In the *City of Tyler et al. v. St. Louis & Southwestern Ry. Co. of Texas et al.* (Tex. Civ. App.), 87 S. W. 238, the city brought suit against the railroad company to restrain it from the removal of the machine shops and general offices from Tyler to Texarkana. . . . There was a written contract between the parties that the shops and general offices should perpetually remain and be operated at Tyler. The court . . . held that the contract was not against public policy, but denied the injunction, and remitted the city to its suit at law for damages. In *Texas & Pacific Railway*

v. City of Marshall, 136 U. S. 393, 10 S. Ct. 846, 34 L. Ed. 385, it was held that a similar contract for a permanent location of the eastern terminus and Texas offices and machine and car works at Marshall, Tex., was satisfied by the location and maintenance for a period of eight years at that point, and that if the contract was to be construed to mean that the eastern terminus, shops, etc., should forever be maintained there, then the contract would not be enforced in equity, and that complainant's remedy was at law for a breach of the contract." Equitable relief was denied also in *Beasley v. Texas & Pacific Ry. Co.*, 191 U. S. 492, 24 S. Ct. 164, 48 L. Ed. 274, for the enforcement of a contract not to build a depot within three miles of another depot. Under the statutes in many States, any contract of this sort, even though not wholly invalid, would doubtless be subordinated, if necessary, to the orders of public service commissions.

²⁴ *Farrington v. Stucky*, 165 Fed. 325, 330, 91 C. C. A. 311; *Florida Central, etc., R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; *Gray v. Chicago, etc., Ry. Co.*, 189 Ill. 400, 59 N. E. 950; *Lyman v. Suburban R. Co.*, 190 Ill. 320, 60 N. E. 515; *Cleveland, etc., Ry. Co. v. Coblurn*, 91 Ind. 557; *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 5 N. E.

officer, stockholder, or even another individual to induce the railroad to construct a station in a particular place for the private advantage of himself or his co-contractor is invalid.²⁵ A contract by a railroad construction company, bound by its undertaking with the railroad company to construct the road between two fixed points, by which it agreed with outside persons for its private advantages to construct the road along certain lines has also been held invalid.²⁶ Other contracts by railroads to violate, or in consideration of violating, or tending to lead them to violate their duties as public service corporations are unlawful;²⁷ and the same is true of the contracts of other public service corporations.²⁸

§ 1734. Contracts for location of public buildings and improvements.

It is the duty of a municipality to erect its public buildings where they will best serve public convenience. As any inducement of a private nature to place or maintain such a building in a particular location will necessarily tend to the neglect of

404, 55 Am. Rep. 719; *Chicago, I. & L. R. Co. v. Southern Ind. R. Co.*, 38 Ind. App. 234, 70 N. E. 843; *First Nat. Bank v. Hendrie*, 49 Iowa, 402, 31 Am. Rep. 153; *Williamson v. Chicago, etc.*, R. Co., 53 Iowa, 126, 4 N. W. 870, 38 Am. Rep. 206; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kans. 602, 15 Am. Rep. 357; *Baird v. Salina Northern R. Co.*, 103 Kans. 452, 173 Pac. 1069, L. R. A. 1918 F. 1201; *Lexington &c. R. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257; *Pacific Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Montclair Academy v. North Jersey St. Ry. Co.*, 65 N. J. L. 328, 47 Atl. 890; *Levy v. Tatum* (Tex. Civ. App.), 43 S. W. 941; *Horner v. Chicago, etc., Ry. Co.*, 38 Wis. 165. See also *Beasley v. Texas & Pac. R. Co.*, 191 U. S. 492, 48 L. Ed. 274, 24 S. Ct. 164.

²⁵ *McCowen v. Pew*, 153 Calif. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800; *Peckham v. Lane*, 81 Kan. 489, 106

Pac. 464, 25 L. R. A. 967; *Fuller v. Dame*, 18 Pick. 472; *Baltimore & Ohio R. Co. v. Ralston*, 41 Ohio St. 573. See also *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 32 L. Ed. 819, 9 S. Ct. Rep. 402; *Holladay v. Patterson*, 5 Or. 177.

²⁶ *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 32 L. Ed. 819, 9 S. Ct. Rep. 402.

²⁷ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950 (leasing); *Denver &c. R. Co. v. Atchison &c. R. Co.*, 15 Fed. 650 (division of territory); *State v. Hartford & New Haven R. Co.*, 29 Conn. 538 (discontinuance of necessary service); *Peoria &c. R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489 (rebate).

²⁸ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 S. Ct. Rep. 553 (restraint of competition); *St. Louis v. Gas Light Co.*, 5 Mo. App. 484, 529 (division of territory).

this duty an agreement of the municipality in consideration of such an inducement is invalid.²⁹

For this reason an agreement by an individual to procure the location or maintenance of a public building in a certain place, or an agreement in consideration of such procurement is invalid;³⁰ and though an agreement by individuals to bear part of the cost of public improvements is not necessarily invalid,³¹ a contract whereby for a consideration citizens agree to advocate³² or oppose³³ a public improvement is invalid, unless at least the matter is one in which the promisor has an individual property interest, which will be peculiarly affected.³⁴

§ 1735. Contracts with an interested official.

It has previously been seen³⁵ that the directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract

²⁹ *Colburn v. County Commissioners*, 5 Colo. App. 90, 61 Pac. 241; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652, 4 L. R. A. (N. S.) 589. See also *Spence v. Harvey*, 22 Calif. 336, 83 Am. Dec. 69; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746. But see *contra*, *Currier v. United States*, 184 Fed. 700, 106 C. C. A. 654; *Davis v. Board of Commissioners* (Okla.), 158 Pac. 294.

³⁰ *Bush v. Russell*, 10 Ala. 590, 61 So. 373; *Woodman v. Inner*, 47 Kan. 26, 27 Pac. 125, 27 Am. St. 274; *Hare v. Phaup*, 23 Okl. 575, 101 Pac. 1050, 138 Am. St. 852; *Davis v. Bolon* (Okl.), 177 Pac. 903. But see *contra*, *Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73; *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; and *cf.* *Campbell v. House* (Okl.), 176 Pac. 913.

³¹ *Electric Plaster Co. v. Blue Rapids*

City, 77 Kan. 580, 96 Pac. 68; *Board v. Piedmont Realty Co.*, 134 N. C. 41, 46 S. E. 723.

³² *Doane v. Chicago Ry. Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 (see also *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755); *Maguire v. Smock*, 42 Ind. 1; *Howard v. F. I. Church of Baltimore*, 18 Md. 451. See also *Glenn v. Southwestern Gravel Co.* (Okl.), 177 Pac. 586. *Cf.* *Makemson v. Kauffman*, 35 Ohio St. 444, 445.

³³ *Corns v. Clouser*, 137 Ind. 201, 36 N. E. 848; *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264.

³⁴ A promise to pay money to one through whose land a road has been laid out, for withdrawing his opposition to opening it, was held valid in *Weeks v. Lippencott*, 42 Pa. 474. A contrary decision is *Smith v. Applegate*, 3 Zabz, 352, and see *Pingry v. Washburne*, 1 Aiken, 264, 15 Am. Dec. 676.

³⁵ *Supra*, § 1533.

with that body, and this is often enacted in statutes.³⁶ But there are decisions holding that if the contract was in fact fair, and the interested party either did not vote for it or his vote was unnecessary the contract is not unlawful unless made so by statute.³⁷ When there is such a statute it has been held that even though the agreement has been carried out, the municipality may recover what it has paid.³⁸ If the personal interest of a public official is not that of a direct contractor, but only indirect, there is more reason for considering each case on its special facts, and for holding those illegal only where lack of proper disclosure, fraudulent intent or some unfairness exists.³⁹ But if a contract is for the mere performance or in con-

³⁶ *Fort Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Pipe Creek School Tp. v. Hawkins*, 49 Ind. App. 595, 97 N. E. 936; *Bay v. Davidson*, 133 Ia. 688, 111 N. W. 25, 9 L. R. A. (N. S.) 1014; *Nunemacher v. Louisville*, 98 Ky. 334, 32 S. W. 1091; *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659; *Young v. Mankato*, 97 Minn. 4, 105 N. W. 969, 3 L. R. A. (N. S.) 849; *Drake v. Elizabeth*, 69 N. J. L. 190, 54 Atl. 248; *Beebe v. Sullivan County*, 64 Hun. 377, 19 N. Y. S. 629 (aff'd without opinion, 142 N. Y. 631, 37 N. E. 566); *Snipes v. Winston*, 126 N. C. 374, 35 S. E. 610, 78 Am. St. 666; *Davidson v. Guilford County*, 152 N. C. 436, 67 S. E. 918; *Norbeck & Co. v. State*, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916 A. 229; *Northport v. Northport Town-site Co.*, 27 Wash. 543, 68 Pac. 204. See also *Brennan v. Purington Paving Brick Co.*, 171 Ill. App. 276; *Dillon on Municipal Corporations*, §§ 772, 773.

³⁷ *Ensley v. Hollingsworth*, 170 Ala. 396, 54 So. 95, Ann. Cas. 1912 D. 652 (three judges dissenting); *Reclamation Dist. v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

³⁸ In *Bangor v. Ridley*, 117 Me. 297, 104 Atl. 230, it was held that under

Me. Rev. St., c. 4, § 43, prohibiting a member of a city government being interested in any contract and making agreements in violation thereof void, a city alderman, who furnished teams and received payment for services, was liable to the city for the amount so received, the money having been paid under an implied agreement made void by the statute; and that the fact that the city received full value for the money paid, and no harm came to the public, was immaterial. See also *Marshall v. Ellwood City*, 189 Pa. 348, 41 Atl. 994.

³⁹ In *People's Savings Bank v. Big Rock Stone, etc., Co.*, 81 Ark. 599, 99 S. W. 836, it was held against public policy to permit a bank of which the mayor of a city was a stockholder and president to take an assignment of the claim of a contractor against the city for the price of work which he had performed for the city, when the work was required to be inspected and accepted for the city by a board of which the mayor was chairman. On the general question when an indirect interest of a public official will invalidate a contract to which he assented in his representative capacity, see *O'Neill v. Auburn*, 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140, and note thereto.

sideration of the mere performance by a public official of his official duty,⁴⁰ or for the non-performance or in consideration of the non-performance of his official duty,⁴¹ it is in every case opposed to public policy.

§ 1736. Bargains for offices or advantages in private corporations.

The officers and even the stockholders of a private corporation are under certain duties to it and often to the public, which must not be made the subject of bargain. An agreement by a large stockholder or group of stockholders for considerations enuring to them personally, to procure the appointment of another as an officer of the corporation is invalid.^{41a} And if the

⁴⁰ *Bridge v. Cage*, Cro. Jac. 103; *Plackett v. Gresham*, 3 Salk. 75; *Morris v. Burdett*, 1 Camp. 218; *Neustadt v. Hall*, 58 Ill. 172; *Mason v. Manning*, 150 Ky. 805, 150 S. W. 1020; *Putnam v. Woodbury*, 68 Me. 58; *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70.

⁴¹ *Bracebridge v. Vaughan*, 1 Cro. Eliz. 66; *Fuller v. Prest*, 7 T. R. 109; *Cole v. Gower*, 6 East, 110; *El Dorado County v. Davison*, 30 Cal. 520; *Carey v. Prentice*, 1 Root, 91; *Cook v. Shipman*, 24 Ill. 614; *Hennessey v. Hill*, 52 Ill. 281; *Cole v. Parker*, 7 Iowa, 167, 71 Am. Dec. 439; *Lucas v. Allen*, 80 Ky. 681; *Bills v. Comstock*, 12 Met. 468; *Wheelwright v. Sylvester*, 4 Allen, 59; *Newson v. Thighen*, 30 Miss. 414; *McWilliams v. Phillips*, 51 Miss. 196 (but see *Appling County v. McWilliams*, 69 Ga. 840); *Bank of Orange County v. Wakeman*, 1 Cow. 46; *Board v. Thompson*, 33 Ohio St. 321.

^{41a} *West v. Camden*, 135 U. S. 507, 34 L. Ed. 254, 10 S. Ct. 838; *Gilchrist v. Hatch* (Ind. App.), 100 N. E. 473; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Woodruff v. Wentworth*, 133 Mass. 309; *Wilbur v. Stoepel*, 82 Mich. 344,

46 N. W. 724, 21 Am. St. Rep. 568; *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72; *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Fennessy v. Ross*, 5 N. Y. App. Div. 342, 39 N. Y. S. 323; *Snow v. Church*, 13 N. Y. App. Div. 108, 42 N. Y. S. 1072; *Fabre v. O'Donohue*, 173 N. Y. S. 472; *Gage v. Fisher*, 5 N. Dak. 297, 65 N. W. 809, 31 L. R. A. 557; *Withers v. Edwards*, 26 Tex. Civ. App. 189, 62 S. W. 795. See also *Elliott v. Richardson*, L. R. 5 C. P. 744; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388, 76 Am. St. Rep. 262; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep., 623; *Wood v. Manchester Fire, etc., Co.*, 54 N. Y. App. Div. 522, 63 N. Y. S. 427, 67 N. Y. S. 1150; *Flaherty v. Cary*, 62 N. Y. App. Div. 116, 70 N. Y. S. 951, affd. 174 N. Y. 550, 67 N. E. 1082. Cf. *Greenwell v. Porter*, [1902] 1 Ch. 530; *Almy v. Orne*, 165 Mass. 126, 42 N. E. 561; *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193; *Seymour v. Detroit, etc., Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; *Barnes v. Brown*, 80 N. Y. 527; *Bonta v. Gridley*, 77 N. Y. App. Div. 33, 78 N. Y. S. 961.

main purpose of a contract between corporate stockholders is to secure a passive directorate, subject to control of one stockholder or a group of stockholders, it is unlawful.^{41b} But "it is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy or action, or upon the officers whom they will elect. An ordinary agreement among a minority in number, but a majority in shares, for the purpose of obtaining control of the corporation by the election of particular persons as directors is not illegal. Shareholders have the right to combine their interests and voting powers to secure such control of the corporation, and the adoption of and adhesion by it to a specific policy and course of business. Agreements upon a sufficient consideration between them, of such intendment and effect, are valid and binding, if they do not contravene any express charter or statutory provision or contemplate any fraud, oppression, or wrong against other stockholders or other illegal object."^{41c} But a bargain to vote for corporate action in consideration of other private advantage than that which might accrue to the promisor from the benefit to the corporation from taking the action, is invalid.^{41d}

§ 1737. Contracts of fiduciaries tending to impair fidelity.

A bargain by officers of a corporation for personal advantage in return for entering into an agreement on behalf of the corporation with a third person is invalid.⁴² A trustee's violation

^{41b} *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918 E. 247.

^{41c} *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918 E. 247, citing *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949; *Thompson v. Thompson Carnation Co.*, 279 Ill. 54, 116 N. E. 648, Ann. Cas. 1917 E. 591; *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63.

^{41d} In *Palmbaum v. Magulsky*, 217 Mass. 306, 104 N. E. 746, Ann. Cas. 1915 D. 799, an agreement by a stockholder for private pecuniary consideration to join in voting for a disposition

of the corporate assets was held illegal. In *Rosenthal v. Light*, 173 N. Y. S. 743, an undertaking by the defendant that a corporation which he should form (and did form), should buy goods from the plaintiff at a price named by him and should sell them at prices which he should fix was held illegal.

⁴² *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary, 418, 426; *cf.* S. C. 1 McCrary, 581; *Standard Lumber Co. v. Butler Ice Co.*, 146 Fed. 359, 76 C. C. A. 639, 7 L. R. A. (N. S.) 467; *Smythe's Estate v. Evans*, 209 Ill. App. 376, 70 N. E. 906; *Landes v. Hart*, 131 N. Y. App. Div. 6, 115 N.

of his duties as such cannot support a promise,⁴³ and the promise of a fiduciary to do anything in violation of his duties is equally unlawful.⁴⁴ This is true not only of a trustee but of an agent or attorney.⁴⁵

A contract by an agent, even though acting as such without compensation, to receive without his principal's consent compensation from others for the performance of his agency is invalid.⁴⁶ And a contract with an agent which contemplates bribing the agents of others is itself invalid.⁴⁷ Even though the industry in which an agent's employer was engaged was itself opposed to public policy a contract by the agent to disclose for private profit his employer's misbehavior is illegal.⁴⁸ So likewise is a contract by an attorney to exert influence on others in an unprofessional way.⁴⁹ Similarly a contract between

Y. S. 337. See also *Moss v. Copelof*, 231 Mass. 513, 121 N. E. 508.

⁴⁴ *Wilhelm's Appeals*, 30 Pa. 478; *Foote v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205. Cf. *Citizens' State Bank v. Rosenberger*, 40 S. Dak. 256, 167 N. W. 154.

⁴⁵ *Danielwits v. Sheppard*, 62 Cal. 339; *Lamport v. Beeman*, 34 Barb. 239.

⁴⁶ *Smalley v. Greene*, 52 Ia. 241, 3 N. W. 78, 35 Am. Rep. 267.

⁴⁷ *Holcomb v. Weaver*, 136 Mass. 265. *A fortiori* this is true if the agent is paid for his services by the principal. *Harrington v. Victoria Graving Dock Co.*, 47 L. J. Q. B. 594; *Page v. Moore*, 235 Pa. 161, 83 Atl. 580. Similarly one who has bargained for corrupt profits to be paid by an agent cannot recover them. *Talbott v. Lockett* (Md.), 30 Atl. 565. See also *Howard v. Murphy*, 70 N. J. L. 141, 56 Atl. 143; *Dake v. Patterson*, 5 Hun, 558. The illegality of any agreement or conduct of an agent involving disloyalty most frequently arises in suits between the agent and his principal. See *supra*, §§ 1022, 1023, 1477.

⁴⁸ *Smith v. David B. Crockett Co.*, 85 Conn. 282, 82 Atl. 569, 39 L. R. A. (N. S.) 1148.

⁴⁹ In *Barry v. Mulhall*, 162 N. Y. App. D. 749, 147 N. Y. S. 996, a contract, whereby the plaintiff undertook for half profits to sell for the defendant letters between a national association and numerous parties which the defendant, an employee of the association, had secured and retained, tending to show its corrupt political campaign to prevent tariff legislation, and furnishing material for a great journalistic sensation, was held invalid and the plaintiff was denied recovery of his share of the profits.

⁵⁰ In *Flack v. Warner*, 278 Ill. 368, 116 N. E. 202, L. R. A. 1917 F. 464 (see also *Warner v. Flack*, 278 Ill. 303, 116 N. E. 197), it was held that contracts by which attorneys undertook to render legal services to clients in controlling and advising a third person to prevent her from disposing of her property, so as to disinherit the clients and to secure to them certain rights and interests in such person's property before her death, were invalid as contrary to public policy, as they necessarily tended to encourage improper attempts to control the exercise of the free judgment and will of the owner of the property and the right to dispose of it according to

a family physician and a surgeon whom the physician had called in to perform operations, by which the surgeon was to divide his fees with the physician, is against public policy as tending to impair fidelity to the patient;⁵⁰ and probably any contract for reward to influence by apparently disinterested advice the conduct of a third person is similarly obnoxious to public policy, even when neither party at the time bears a fiduciary relation to the person to be influenced.⁵¹

§ 1738. Agreements, the performance of which involves a wrong to a third person.

An agreement which contemplates a wrong to a third person, or to undefined members of the public, whether trespass, breach of trust, or fraud, is illegal. Such is an agreement to print a book in violation of another's copyright;⁵² or a contract to sell goods, known to be held by the seller in trust for a third person. Neither could be enforced by one who was cognizant of the facts.

A sale or agreement to sell any article which is so deleterious to public health as to be inimical to the public welfare, or is so deceptively labelled or prepared as to be likely to defraud persons subsequently induced to buy it, is invalid.⁵³ Whether an agreement to sell goods which to the buyer's knowledge the seller

her own judgment, and to interfere with natural rights and interests of third parties, and offered an incentive to exert for a money consideration undue and improper influences contrary to sound morality.

⁵⁰ *McNair v. Parr*, 177 Mich. 327, 143 N. W. 42.

⁵¹ See *Alpers v. Hunt*, 86 Calif. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. 17; *Bollman v. Loomis*, 41 Conn. 581; *DeBoer v. Harmsen*, 131 Mich. 91, 90 N. W. 1036; *Torpey v. Murray*, 93 Minn. 482, 101 N. W. 609; *Smith v. Rose*, 192 Mo. App. 580, 184 S. W. 910; *Ridgely v. Keene*, 134 N. Y. App. D. 647, 119 N. Y. S. 451; *Simon v. Garlitz* (Tex. Civ. App.), 133 S. W. 461. Cf. *Higgins v. Hill*, 56 L. T. (N. S.) 426.

⁵² *Nichols v. Ruggles*, 3 Day, 145, 3 Am. Dec. 262. But in *Edward Thompson Co. v. Pakulski*, 220 Mass. 96, 107 N. E. 412, where the infringer of a copyright had made a settlement for the infringement, he was allowed to recover the price of the infringing work.

⁵³ *Church v. Proctor*, 66 Fed. 240, 33 U. S. App. 1, 13 C. C. A. 426 (agreement to sell menhaden to be resold as mackerel); *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331 (agreement for the sale of falsely labelled sardines); *Warshaw v. Elwood*, 83 Conn. 430, 76 Atl. 531 (agreement to purchase inferior goods, falsely label them, sell them as "bankrupt stock" of superior goods, and divide the profits).

was under contract to sell to another would be illegal and unenforceable is not clear; ⁵⁴ but a contract of employment which, as the parties know can be fulfilled only by violating an existing contract of employment with another has been held invalid. ⁵⁵ So-called "endless chain" agreements also have been held unlawful, as likely to defraud guileless persons. Generally in these, in return for a promissory note, a license is given to make sales within a certain territory, and a privilege of making similar bargains with others who in turn shall have the same privilege, and so on. ⁵⁶ Similarly the "Bohemian Oats" agreements, in which for an excessive price paid or promised, the seller of seed oats agrees to sell to others a specified number of bushels of the oats raised by the first buyer, have been held unlawful. ⁵⁷

⁵⁴ Sir Frederick Pollock apparently considers any agreement illegal which involves a breach of contract. Cf. *Citizens' State Bank v. Rosenberger*, 40 S. Dak. 256, 167 N. W. 154; *Wald's Pollock, Contracts* (3d ed.), 376.

⁵⁵ *Wanderers' Hockey Club v. Johnson* (Brit. Col.), 25 Western Law Rep. 434. In *Rhodes v. Malta Vita Pure Food Co.*, 149 Mich. 235, 112 N. W. 940, the plaintiff sued for a promised salary. It appeared that at the time of his employment by the defendant he was under an unexpired contract of employment with the Force Food Company, a rival in business, and that the purpose of the defendant in inducing the plaintiff to enter into its service was to further a plan to "put Force out of business." It was held that the plaintiff could not recover, because the contract on which he sued was illegal. It may perhaps be assumed that the same result would have been reached had the defendant for the purpose of embarrassing the Force Food Company induced a manufacturer to contract to sell machinery, which he was under previous contract to sell to the Force Food Company. See also *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717.

⁵⁶ Contracts of this type were held illegal in *Couch v. Hutchinson*, 2 Ala. App. 444, 57 So. 75; *Saylor v. Crooker*, 97 Kan. 624, 156 Pac. 737, Ann. Cas. 1918 D. 473; *Hubbard v. Freiburger*, 133 Mich. 139, 94 N. W. 727; *Ozark Bank v. Hanks*, 142 Mo. App. 110, 125 S. W. 221; *Twentieth Century Co. v. Quilling*, 130 Wis. 318, 110 N. W. 174.

⁵⁷ *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281; *Merrill v. Packer*, 80 Ia. 542, 45 N. W. 1076; *Shipley v. Reasoner*, 80 Ia. 548, 45 N. W. 1077; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. 355.

In *Boston Piano, etc., Co. v. Seckinger*, 198 Mich. 312, 164 N. W. 263, an agreement signed by the defendant for the purchase from the plaintiff of a piano and other articles necessary to put into operation a so-called advertising campaign, wherein the piano was to be given away to successful contestants, was held invalid, since the scheme furnished by the plaintiff as part of the contract of sale, involved deception on the part of the defendant to procure trade.

In *Neville v. Dominion of Canada News Co., Ltd.*, [1915] 3 K. B. 556, the plaintiff was a director of a company

§ 1739. Agreements in fraud of creditors.

A contract or transfer intended to defraud creditors can neither be rescinded nor enforced by legal proceedings on behalf of the fraudulent debtor.⁵⁸ This is clear on principle at least where there is an actual and not merely a constructive intent to defraud. Therefore if a fraudulent grantor sues for the price he should not be allowed to recover, whether the parties intended a permanent transaction or the fictitious appearance of one. It is so held in some States.⁵⁹ But in many States such an action is allowed if the contract is on its face unobjectionable, and the plaintiff's case can be made out without exposing the fraud.⁶⁰ Where the buyer or grantee under a

which was engaged in selling land in Canada. The defendants were the proprietors of a weekly newspaper in which they held themselves out as giving honest advice to intending purchasers of Canadian land. The plaintiff agreed with the defendants, who owed him 1490*l.*, that if they paid him 750*l.* by certain instalments and observed the terms of the agreement in all respects he would accept the payment in full satisfaction of their debt. One of the terms was that the defendants should not publish in any periodical published by them any comment upon the plaintiff's land company, its directors, business or land, or upon any company with which the defendants had notice that the land company was connected or concerned. Upon a subsequent breach of this term by the defendants, the plaintiff brought this action under the agreement to recover the balance of the whole 1490*l.* It was held, affirming the decision of Atkin, J., that the agreement was unenforceable, being vitiated by the term in question upon two grounds, namely, (1) that the term was in restraint of trade and was wider than was reasonably necessary for the protection of the plaintiff, and (2) that the term was void as being against public policy, inasmuch as it was not consistent with the proper

conduct of the newspaper in the public interest.

⁵⁸ *Dent v. Ferguson*, 132 U. S. 50, 33 L. Ed. 242, 10 S. Ct. Rep. 13; *Schermerhorn v. De Chambrun*, 64 Fed. 195, 12 C. C. A. 81; *Baird v. Howison*, 154 Ala. 359, 45 So. 668; *Hollis v. Morris*, 2 Harr. (Del.) 128, and see cases cited *infra*, n. 63.

⁵⁹ *Church v. Muir*, 33 N. J. L. 318; *Nellis v. Clark*, 4 Hill, 424, 20 Wend. 24; *Briggs v. Merrill*, 58 Barb. 389; *Bradford v. Beyer*, 17 Ohio St. 388. See also *Norris v. Norris*, 9 Dana, 317, 35 Am. Dec. 138; *Demaritt v. Miles*, 22 N. H. 523; *Powell v. Inman*, 7 Jones L. 28; *Harvin v. Weeks*, 11 Rich. L. 601.

⁶⁰ *Giddens v. Bolling*, 93 Ala. 92, 9 So. 427 (but see *Glover v. Walker*, 107 Ala. 540, 18 So. 251); *Landwirth v. Shaphran*, 47 La. Ann. 336, 16 So. 839; *Butler v. Moore*, 73 Me. 151, 40 Am. Rep. 348; *Maxfield v. Jones*, 76 Me. 135, 137; *Dyer v. Homer*, 22 Pick. 253; *Harvey v. Varney*, 98 Mass. 118; *Stillings v. Turner*, 153 Mass. 534, 27 N. E. 671; *Gary v. Jacobson*, 55 Miss. 204, 30 Am. Rep. 514; *Telford v. Adams*, 6 Watts, 429; *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370. See also *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981.

fraudulent bargain seeks to recover the property, the situation is somewhat different, for while the grantor or seller is necessarily a participant of the fraud in a fraudulent conveyance, the grantee or buyer is not. If the buyer was ignorant of the fraud there is no reason why he should not enforce his rights to the same extent as any other buyer. Whether mere knowledge of a wrongful intent on the part of the seller would deprive him of a right to enforce the bargain involves a question much in dispute in regard to illegal contracts generally; namely, whether mere knowledge by one party to the contract of an illegal purpose of the other in entering into the transaction so taints the former party with the illegality as to preclude recovery by him, or whether to produce this result it is necessary that he should have intended to forward the illegal purpose, not merely known that the designs of the other party were illegal. The buyer's right to enforce an executory contract where the seller intended to defraud his creditors should be governed by the principles applied to other cases of contracts where the plaintiff has guilty knowledge.⁶¹ But the courts which allow recovery of the price by a fraudulent seller would doubtless generally allow an action against the seller by the buyer or grantee whatever the extent of his participation in the fraud.⁶² If, however, the title to the property has passed to the buyer and possession only has been retained by the seller, the buyer even though a party to the fraud to the fullest extent may recover the property. He is in such a case not suing on the illegal contract but enforcing a property right.⁶³

⁶¹ See *infra*, § 1754.

⁶² See *Harvey v. Varney*, 98 Mass. 118.

⁶³ *Bush v. Rogan*, 65 Ga. 320, 38 Am. Rep. 785; *Bibb v. Baker's Adm'r*, 17 B. Mon. 292; *Peterson v. Brown*, 17 Nev. 172, 45 Am. Rep. 437; *Jackson v. Garnsey*, 16 Johns. 189; *York v. Merritt*, 80 N. C. 285; *Boyle v. Rankin*, 22 Pa. St. 188; *Croft v. Jennings*, 173 Pa. St. 216, 220, 33 Atl. 1026; *Broughton v. Broughton*, 4 Rich. L. 491; *Hoeser v. Kraeka*, 29 Tex. 450; *Starke's Ex. v. Littlepage*, 4 Rand. 368. See also *Moore v. Cline*, 115 Ga.

405, 406, 41 S. E. 614; *Russell v. Cole*, 167 Mass. 6, 9, 44 N. E. 1057, 57 Am. St. Rep. 432. *Contra*, *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531.

Courts will not aid a fraudulent grantor to recover his property from a grantee to whom the title was entrusted. *Kirby v. Reynes*, 138 Ala. 194, 35 So. 118; *Castellor v. Brown*, 119 Ga. 461, 46 S. E. 632; *Jayne v. Jayne*, 148 Ky. 613, 147 S. W. 41; *Redmond v. Hayes*, 116 Minn. 403, 133 N. W. 1016.

Under a deed or contract of composition with creditors, it is assumed in the absence of express statement to the contrary, that all creditors are to fare alike. Consequently a secret agreement to give one creditor an advantage not shared by others is in fraud of them and is ground for avoiding the composition itself by the others, and not only defeating the agreement with the greedy creditor to give him an advantage,⁶⁴ but also (it has been held in England) depriving him of any right under the composition. The release therein binds him though he is unable to enforce any executory promise for his own advantage.^{64a} If, however, excessive payment is actually made to a creditor, it cannot be recovered from him, unless in subsequent bankruptcy proceedings the elements of a voidable preference can be established.^{64b}

§ 1740. Quasi-contractual recovery.

Where legislative services bargained for or performed are in part illegal, and in part legal, the rule generally applicable to partly illegal contracts prevails, and no recovery can be had for the legal portion of the services.⁶⁵ Where, however, a contract has been induced by bribery or improper solicitation of officials, though the government or corporation for whom the

⁶⁴ *Ex parte* Milner, 15 Q. B. D. 605; Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150 (advantage given by third person); Morrison v. Schlesinger, 10 Ind. App. 665, 38 N. E. 493; Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359; Solinger v. Earle, 82 N. Y. 393 (advantage given by third person). See also Coleman v. Waller, 3 Younge & J. 212; Knight v. Hunt, 5 Bing. 432; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517; Brown v. Nealley, 161 Mass. 1, 36 N. E. 464; Vanderhoef v. Youmans, 85 N. Y. Misc. 418, 147 N. Y. S. 347. Cf. Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606. If the debtor is ignorant of an advantage given by a third person to one creditor, other creditors cannot avoid the composi-

tion. *Martin v. Adams*, 81 Hun, 9, 30 N. Y. S. 523. See also *Ex parte* Milner, 15 Q. B. D. 605; *Bank of Commerce v. Hoeber*, 88 Mo. 37, 44, 57 Am. Rep. 359.

^{64a} *Mallalieu v. Hodgson*, 16 Q. B. 680; *Ex parte* Phillips; *Re Harvey*, 36 Weekly Rep. 567; *Mayhew v. Boyes*, 103 L. T. (N. S.) 1. But see *contra*, *Batchelder & Lincoln Co. v. Whitmore*, 122 Fed. 355, 58 C. C. A. 517.

^{64b} *Batchelder & Lincoln Co. v. Whitmore*, 122 Fed. 355, 58 C. C. A. 517.

⁶⁵ *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 S. Ct. Rep. 553; *Haselton v. Sheckels*, 202 U. S. 71, 50 L. Ed. 939, 26 S. Ct. 567; *McBratney v. Chandler*, 22 Kans. 692, 31 Am. Rep. 213.

official was acting may rescind the contract for fraud,⁶⁶ yet it cannot avoid payment for the fair value of anything it actually receives under the contract, if the contract itself was not illegal, and the only flaw was the improper inducement to enter into it.⁶⁷ This is in accordance with the general rule in regard to the rescission of contracts induced by fraud.⁶⁸

§ 1741. Contracts in regard to marriage.

As the sanctity of the marriage relation is at the foundation of the welfare of the State, the law has looked with jealous regard at contracts concerning that relation. A contract or a condition in restraint of marriage has been generally held void.⁶⁹ Such conditions are not infrequently attached to conveyances or gifts by will;⁷⁰ and in such transfers the general rule is that if the condition is precedent to the vesting of an estate, the estate fails and the attempted transfer is ineffectual; but if the condition is subsequent the estate conveyed is never divested and the transfer is absolute.⁷¹ In contracts it is not easily possible for the condition to be subsequent in effect though it may be so in form.⁷² Consequently if a condition in a contract is in unlawful restraint of marriage, as well as where the promise itself is open to similar objection, no obligation ever arises.⁷³ Some exception to the general principle is, however, admitted.

⁶⁶ *Crocker v. United States*, 240 U. S. 74, 60 L. Ed. 533, 36 S. Ct. 245. See also *Wakefield Banking Co. v. Normanton Local Board*, 44 L. T. (N. S.) 697.

⁶⁷ *Crocker v. United States*, 240 U. S. 74, 60 L. Ed. 533, 36 S. Ct. 245; *Chouteau v. Allen*, 70 Mo. 290. But see *Lindsey v. Philadelphia*, 2 Phila. 212.

⁶⁸ See *supra*, § 1529.

⁶⁹ *Hartley v. Rice*, 10 East, 22; *Lowe v. Peers*, 4 Burr. 2225; *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *McCoy v. Flynn*, 169 Iowa, 622, 151 N. W. 465, L. R. A. 1915 D. 1064; *Bostick v. Blades*, 59 Md. 231, 43 Am.

Rep. 548; *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459, 49 L. R. A. (N. S.) 632; *Conrad v. Williams*, 6 Hill (N. Y.), 444.

⁷⁰ See *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605, and note thereto.

⁷¹ *Story's Equity Jurisdiction*, § 288; *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244.

⁷² See *supra*, § 667. A condition terminating the right to an annual payment promised, for instance, is in substance a series of conditions precedent to the promisee's right each succeeding year.

⁷³ *Lowe v. Peers*, 4 Burr. 2225; *McCoy v. Flynn*, 169 Iowa, 622, 151 N. W. 465, L. R. A. 1915 D. 1064; *Conrad v. Williams*, 6 Hill, 444.

Restraint of second marriages has generally been held permissible;⁷⁴ and reasonable contracts involving the performance of services which are inconsistent with matrimony have been upheld.⁷⁵ If the restraint is unreasonable, the fact that it is limited in time will not prevent the contract from being unlawful.⁷⁶ And it has been held that a contract between third persons to endeavor to prevent a contemplated marriage of a relative was illegal although the woman in question was of bad character.⁷⁷ Contracts to bring about marriage—so-called marriage brokerage contracts—are likewise invalid.⁷⁸

§ 1742. Separation agreements.

Contracts providing for or contemplating the future separation of husband and wife are opposed to public policy; but if a separation has already taken place, or is to take place contemporaneously with the agreement, the modern English cases⁷⁹ and the majority of American decisions,⁸⁰ sustain an

⁷⁴ *Appleby v. Appleby*, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.), 590, 117 Am. St. Rep. 709, 10 Ann. Cas. 563. But see *Bradley v. Bradley*, 19 Ont. L. Rep. 525.

⁷⁵ *Fletcher v. Osborn*, 282 Ill. 143, 118 N. E. 446, L. R. A. 1918 C. 331; *King v. King*, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. In the case last cited, the plaintiff agreed to take care of the promisor while he lived and to refrain from marriage during that time; he in return promising to leave a legacy. The contract was upheld. See also *Shafer v. Senseman*, 125 Pa. St. 310, 17 Atl. 350. But in *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459, 49 L. R. A. (N. S.) 632, a similar contract was held invalid. A contract between unmarried sisters to leave their property to one another to the exclusion, so far as legally permissible, of future husbands, was upheld in *Kloberg v. Teller*, 171 N. Y. S. 947.

⁷⁶ *White v. Equitable Nuptial, etc., Union*, 76 Ala. 251, 52 Am. Rep. 325;

James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151; *State v. Towle*, 80 Me. 287, 14 Atl. 195; *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 759, 49 L. R. A. (N. S.) 632.

⁷⁷ *Sheppey v. Stevens*, 177 Fed. 484.

⁷⁸ *Drury v. Hooke*, 2 Ch. Cas. 176; *Morrison v. Rogers*, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95; *Johnson's Adm'r v. Hunt*, 81 Ky. 321; *Weeks v. Hill*, 38 N. H. 199; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964; *Overman v. Clemmons*, 19 N. C. 185.

⁷⁹ *Wilson v. Wilson*, 1 H. L. C. 538; *McGregor v. McGregor*, 20 Q. B. D. 529.

⁸⁰ *Walker v. Walker's Ex'r*, 9 Wall. 743, 10 L. Ed. 814; *In re Yoell's Est.*, 164 Cal. 540, 129 Pac. 999; *Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; *McKee v. Reynolds*, 26 Iowa, 578; *French v. French*, 177 Iowa, 682, 157 N. W. 137; *Loud v. Loud*, 4 Bush, 453; *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84, 9

agreement for the support of the wife during the separation. Some States, however, still preserve the stricter rule of the earlier common law that all separation agreements are necessarily invalid;⁸¹ and, doubtless generally in the United States, though the law is otherwise in England, so far as the agreement is executory it is revocable.⁸² It would also be held by some American courts, at least, that the wife's adultery would avoid

L. R. A. 113, 17 Am. St. Rep. 500; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216; *Terkelsen v. Peterson*, 216 Mass. 531, 104 N. E. 351; *Randall v. Randall*, 37 Mich. 563; *Banner v. Banner*, 184 Mo. App. 396, 171 S. W. 2; *Speiser v. Speiser*, 188 Mo. App. 328, 175 S. W. 122; *Amspoker v. Amspoker*, 99 Neb. 122, 155 N. W. 602; *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 27 N. Y. St. 738, 6 L. R. A. 487, 15 Am. St. Rep. 453; *Clark v. Foedick*, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733; *Duryea v. Bliven*, 122 N. Y. 567, 25 N. E. 908, 34 N. Y. St. 205; *Barnes v. Barnes*, 104 N. C. 613, 10 S. E. 304; *Jenkins v. Hall*, 26 Oreg. 79, 37 Pac. 62; *Commonwealth v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Frank's Estate*, 195 Pa. 26, 33, 45 Atl. 489; *Singer's Estate*, 233 Pa. 55, 81 Atl. 898; *Goodrich v. Bryant*, 5 Sneed, 325; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. 854. See also *Moore v. Moore*, 255 Fed. 497.

⁸¹ *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. Rep. 135; *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; *Hill v. Hill*, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848; *Collins v. Collins*, 62 N. C. 153, 93 Am. Dec. 606.

⁸² In *Devine v. Devine*, 89 N. J. Eq. 51, 104 Atl. 370, the court said: "In England the contract of a husband and wife to live apart is not restricted by law to the period of their mutual as-

sent, and the contract can be specifically enforced; either spouse, if without wrong, may by force of the contract maintain a bill to restrain the other from an action for the restitution of conjugal rights. See *Besant v. Wood*, 12 Ch. Div. 605, and cases there cited. In New Jersey separation agreements have no such force. Here married persons may agree to live separate and apart from each other, because it is their privilege to live in that manner so long as they mutually desire to do so, and the husband's agreement to support his wife during that period of time is in harmony with his lawful duty; but an agreement of separation cannot confer on either party the right to live away from the other against the will of the other. *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926; *Mockridge v. Mockridge*, 62 N. J. Eq. 570, 50 Atl. 182. By policy of the law the period for which they thus contract touching their separation is limited to the period of their future mutual assent to live apart. Accordingly, in the absence of wrongdoing on the husband's part, he may require his wife's return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will deny to her any right to support from him, notwithstanding the existence of an agreement wherein they have mutually stipulated to live apart. *Moore v. Moores*, 16 N. J. Eq. 275; *Power v. Power*, 65 N. J. Eq. 93, 55 Atl. 111; *Power v. Power*, 66 J. N. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653."

the husband's obligation to perform promises for her maintenance in a separation deed,⁸² though in England unless there is an express "dum casta" clause the obligation is not terminated.⁸⁴

§ 1743. Agreements facilitating divorce.

All contracts which have for their object or tendency the divorce of married persons are opposed to public policy. Agreements to bring suit for divorce or to make no defence to such a suit, or having for their object such purposes, are unlawful.⁸⁵ But a contract made pending an action for divorce agreeing on the alimony to be paid in case divorce be decreed, not intended or used for collusion or suppression of evidence, is generally held enforceable.⁸⁶ Nor, it has been held, is a con-

⁸² It was so held in *Devine v. Devine*, 89 N. J. Eq. 51, 104 Atl. 370. But in *Randolph v. Field*, 165 N. Y. App. D. 279, 150 N. Y. S. 822, it was held that neither the fact that prior to the making of the agreement the wife, unknown to the husband, had been guilty of adultery, nor that subsequently thereto she had been guilty of further adultery excused the husband from liability to make payments promised in a separation agreement. See also *Hann v. De Freest*, 173 N. Y. S. 414.

⁸⁴ *Fearon v. Aylesford*, 14 Q. B. D. 792; *Sweet v. Sweet*, [1895] Q. B. 12.

⁸⁵ *Moore v. Moore*, 255 Fed. 497; *Rowe v. Young*, 123 Ark. 303, 185 S. W. 438; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Hare v. McGue* (Cal.), 174 Pac. 663; *Smutzer v. Stimson*, 9 Col. App. 326, 48 Pac. 314; *Cronan v. Cronan*, 46 App. Dist. Col. 343; *White v. Winter*, 46 App. Dist. Col. 355; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Edleson v. Edleson*, 179 Ky. 300, 200 S. W. 625; *Engel v. Schloss* (Md.), 106 Atl. 169; *Wolkovisky v. Rapaport*, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915 A. 809; *Adams v. Adams*, 25 Minn. 72; *Blank v. Nohl*, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; *McDon-*

ald v. McDonald, 175 Mo. App. 513, 161 S. W. 850; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Davis v. Hinman*, 73 Neb. 850, 103 N. W. 668; *Cross v. Cross*, 58 N. H. 373; *Schley v. Andrews*, 225 N. Y. 110, 121 N. E. 812; *Train v. Davidson*, 20 N. Y. App. Div. 577, 47 N. Y. S. 289; *Armstrong v. Armstrong*, 1 N. Y. St. 529; *Pierce v. Cobb*, 161 N. C. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Phillips v. Thorp*, 10 Oreg. 494; *Kilborn v. Field*, 78 Pa. St. 194; *Irvin v. Irvin*, 169 Pa. 529, 32 Atl. 445, 20 L. R. A. 292; *In re Mathiot's Estate*, 243 Pa. 375, 90 Atl. 139; *James v. Steere*, 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164; *Palmer v. Palmer*, 26 Utah, 31, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. Rep. 820; *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854. A contract between a wife, after divorce, and her father-in-law by which she, in consideration of the father-in-law's agreement to pay her board and provide for her generally for her life, transferred to the father-in-law the control and custody of her child was not against public policy. *Clark v. Clark*, 122 Md. 114, 89 Atl. 405, 49 L. R. A. (N. S.) 1163.

⁸⁶ In *Maisch v. Maisch*, 87 Conn.

tract by which a husband agrees to pay a sum of money if he subsequently gives cause for divorce—not as a substitute for other redress by the wife but in addition to it.⁸⁷ An agreement by a married man to marry another woman after a divorce not as yet granted from his present wife is illegal;⁸⁸ but if a divorce has already been granted and remarriage is forbidden until the lapse of a specified time, a contract made before lapse of that time to marry after its expiration is valid;⁸⁹ and though a promise to marry another after the death of the promisor's present spouse is against public policy,⁹⁰ a contract to marry after the death of a divorced spouse, where only religious, not legal grounds prevented an immediate marriage is unobjectionable.⁹¹

377, 379, 87 Atl. 729, the court said: "There is a difference of opinion as to the validity of contracts made after divorce proceedings have been independently commenced or determined upon, and where the agreement is in fact an amicable arrangement as to the amount of alimony to be paid in the event of a divorce being granted. In some jurisdictions contracts of this general character are permitted, and even favored. *Pryor v. Pryor*, 88 Ark. 302, 114 S. W. 700; *Burnett v. Paine*, 62 Me. 122; *Badger v. Hatch*, 71 Me. 562; *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604; *Warren v. Warren*, 116 Minn. 458, 133 N. W. 1009; *Randall v. Randall*, 37 Mich. 563; *Palmer v. Fagerlin*, 163 Mich. 345, 128 N. W. 207 [*Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033; *Werner v. Werner*, 153 N. Y. App. D. 719, 138 N. Y. S. 633; *Hammerstein v. Equitable Trust Co.*, 156 N. Y. App. D. 644, 141 N. Y. S. 1065; *Burgess v. Burgess*, 17 S. Dak. 44, 95 N. W. 279]. In other jurisdictions such contracts are held to be contrary to public policy. *Lake v. Lake*, 136 N. Y. App. D. 47, 119 N. Y. S. 686; *Speck v. Dausman*, 7 Mo. App. 165; *Muckenbun v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Hamilton v. Hamilton*, 89 Ill. 349; *Seeley's*

Appeal, 56 Conn. 202, 14 Atl. 291."

In *Maisch v. Maisch*, *supra*, the Connecticut court held that though such an agreement might be invalid if made in Connecticut, yet if made in another State where it was valid, it might be enforced in Connecticut.

⁸⁷ *Bowden v. Bowden*, 175 Calif. 711, 167 Pac. 154, L. R. A. 1918 A. 380.

⁸⁸ *Carter v. Rinker*, 174 Fed. 882; *Leupert v. Shields*, 14 Colo. App. 404, 60 Pac. 193; *Noice v. Brown*, 38 N. J. L. 228, 20 Am. Rep. 388, 39 N. J. L. 133, 23 Am. Rep. 213; *Williams v. Igel*, 62 N. Y. Misc. 354, 116 N. Y. S. 778; *Pierce v. Cobb*, 161 N. C. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379; *Johnson v. Iss*, 114 Tenn. 114, 85 S. W. 79, 108 Am. St. 891; *Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926.

⁸⁹ *Buelna v. Ryan*, 139 Calif. 630, 73 Pac. 466; *Harpold v. Boyle*, 16 Idaho, 671, 694, 102 Pac. 158, 165; *Morgan v. Muench* (Ia.), 156 N. W. 819. *Cf. Haviland v. Halstead*, 34 N. Y. 643.

⁹⁰ *Spiers v. Hunt*, [1908] 1 K. B. 720; *Wilson v. Carnley*, [1908] 1 K. B. 729; *Paddock v. Robinson*, 63 Ill. 99, 14 Am. Rep. 112.

⁹¹ *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

§ 1744. Agreements to resume marital relations.

There seems no reason why an agreement to resume marital relations where one of the parties has just cause for divorce should not be sustained, and it is generally held that an agreement in consideration of such resumption and of the dismissal or forbearance to bring justified proceedings for divorce,⁹² or in compromise of legal proceedings for non-support,⁹³ is valid.

On the other hand, if there is no justification for divorce or separation, an agreement to continue or resume marital relations is certainly insufficient consideration and probably also unenforceable on grounds of policy.⁹⁴

§ 1745. Immoral agreements.

Future illicit cohabitation will not serve as consideration for a promise either of marriage,⁹⁵ the support of a child,⁹⁶ or of pecuniary advantage.⁹⁶ The fact that past cohabi-

⁹² *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452; *Reithmaier v. Beckwith*, 35 Mich. 110; *Duffy v. White*, 115 Mich. 264, 73 N. W. 363; *Mack v. Mack*, 87 Neb. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441; *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227; *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675; *Sommer v. Sommer*, 87 N. Y. App. Div. 434, 84 N. Y. S. 444. But where the promisor was co-respondent in the divorce suit the transaction was held against public policy. *Gipps v. Hume*, 7 Jur. (N. S.) 1301.

⁹³ *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529, L. R. A. 1917 D. 440.

⁹⁴ *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; *Roberts v. Frisby*, 38 Tex. 219, 220. Cf. *Montgomery v. Montgomery*, 142 Mo. App. 481, 127 S. W. 118. In *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, 4 Am.

St. Rep. 334, a promise made in consideration of the plaintiff's return to her husband whom she had left, was held invalid although it was admitted that she had good cause for divorce. Three judges dissented and the case seems of doubtful correctness. It seems, however, to have been approved in *Oppenheimer v. Collins*, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406.

⁹⁵ *Hanks v. Naglee*, 54 Calif. 51, 35 Am. Rep. 67; *Boigneres v. Boulon*, 54 Calif. 146; *Edmonds v. Hughes*, 115 Ky. 561, 74 S. W. 283; *Steinfeld v. Levy*, 16 Abb. Pr. (N. S.) 26; *Baldy v. Stratton*, 11 Pa. St. 316, 323; *Goodall v. Thurman*, 1 Head, 209; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749. But a prior valid contract to marry is not made unenforceable by illicit cohabitation. *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655; *Kurts v. Frank*, 76 Ind. 594, 40 Am. Rep. 275.

⁹⁶ *Friend v. Harrison*, 2 C. & P. 584; *Trovinger v. McBurney*, 5 Cow. 253; *Randolph v. Stokes*, 125 N. Y. App. D. 679, 110 N. Y. S. 20.

⁹⁷ *Walker v. Perkins*, 3 Burr. 1568,

tation is the motive for a promise will not invalidate it,⁹⁷ though such cohabitation, is not in itself sufficient consideration.⁹⁸ As a consideration partly illegal for an indivisible promise vitiates the whole promise, one who serves as house-keeper or servant under a contract of employment cannot recover on the contract if illicit cohabitation was contemplated and actually took place,⁹⁹ and no quasi-contractual recovery can be had for the lawful services actually rendered under such an agreement.¹ The sale or agreement to sell anything in itself immoral or obscene,² or an agreement to manufacture anything of the kind,³ is invalid. How far knowledge that performance of an agreement, lawful in itself, will be used in an improper way, taints the agreement, is later considered.⁴

§ 1746. Contracts inimical to Christianity.

In the early common law an attack upon Christianity, no

1 W. Bl. 517; *Smyth v. Griffin*, 14 L. J. Ch. (N. S.) 28; *Sims v. Eley*, 17 Sim. 1; *Winebrinner v. Weiseger*, 3 T. B. Mon. 32, 35. *Cf. Doty v. Doty's Guardian*, 118 Ky. 204, 80 S. W. 803, 2 L. R. A. (N. S.) 713.

⁹⁷ *Whaley v. Norton*, 1 Vern. 483; *Gray v. Mathias*, 5 Ves. 236; *Nye v. Moseley*, 6 B. & C. 133; *Friend v. Harrison*, 2 C. & P. 584; *Ex parte Nader*, L. R. 9 Ch. 670; *Gay v. Parpart*, 106 U. S. 679, 27 L. Ed. 256, 1 S. Ct. 456; *Burgen v. Straughan*, 7 J. J. Marsh. 583; *Brown v. Kinsey*, 81 N. C. 245; *Burton v. Belvin*, 142 N. C. 151, 55 S. E. 71 (even though cohabitation continues); *Wyant v. Leshner*, 23 Pa. 338.

⁹⁸ *Supra*, § 148.

⁹⁹ *Walker v. Gregory*, 36 Ala. 180; *Sackstaeder v. Kast*, 31 Ky. L. Rep. 1304, 105 S. W. 435.

¹ *Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916 B. 111; *Simpson v. Normond*, 51 La. Ann. 1355, 26 So. 266; *Brown v. Tuttle*, 80 Me. 162, 13 Atl. 583; *Vincent v. Moriarty*, 31 N. Y. App. D. 484, 52 N. Y. S. 519. *Cf. Sanders v. Ragan*, 172 N. C.

612, 90 S. E. 777, L. R. A. 1917 B. 681.

² In *Fores v. Johnes*, 4 Esp. 97, the court said: "For prints whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals and for which the plaintiff might have been rendered criminally answerable for a libel." An agreement for the sale of an obscene book would doubtless fall within the same principle, but a contract for the sale of Voltaire's works was upheld in *St. Hubert Guild v. Quinn*, 64 N. Y. Misc. 336, 118 N. Y. S. 582.

³ One who contracts to print an obscene book cannot recover for his work in performing the contract. *Poplett v. Stockdale, Ry. & Moo*, 337, and the copyright of such a book will not be protected. *Stockdale v. Onwhyn*, 5 B. & C. 173; so of a libelous publication. *Walcott v. Walker*, 7 Ves. 1; *Hime v. Dale*, 2 Camp. 27, n.

⁴ *Infra*, §§ 1754, 1755.

matter in how decorous a manner conducted, was a criminal offence;⁵ and it necessarily follows that any contract involving such an attack would be unlawful. At the present time, however, the promotion of atheism or other religions than Christianity in decorous ways is not a crime;⁶ but a contract with such objects may, nevertheless, conceivably be opposed to public policy. It was so held in England in 1867,⁷ but at the present day it may be doubtful if this decision would be followed, and it is probable that so long as no other interference with rights and opinions of those holding more orthodox views is contemplated than is necessarily involved in an orderly discussion or advocacy of atheistic or heretical doctrines, a contract with such objects would be enforced.⁸

⁵ See 4 Bl. Com. 41; 31 Harv. L. Rev. 289.

⁶ 31 Harv. L. Rev. 291.

⁷ *Cowan v. Milbourn*, L. R. 2 Exch. 230. A contract to let rooms for the delivery of lectures antagonistic to Christianity, was held unlawful and unenforceable. To the same effect is *Pringle v. Napanee*, 43 Up. Can. Q. B. 285. See also *Zeisweiss v. James*, 63 Pa. 465, 3 Am. Rep. 558.

⁸ In *Bowman v. Secular Society*, [1917] A. C. 406, a legacy to a society whose object was to promote the view that human conduct should be based on natural knowledge and not on supernatural belief was upheld. The court recognized that such a decision was inconsistent with *Cowan v. Milbourn*, stated in the preceding note, and overruled that case.

CHAPTER XLVIII

MISCELLANEOUS ILLEGAL AGREEMENTS

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§ 1747. Contracts with alien enemies forbidden.

Trading with the enemy in time of war is illegal; since "the object of war is as much to cripple the enemy's commerce as to capture his property."¹ Therefore, "During a state of hostility the citizens of the hostile states are incapable of contracting with one another,"² and this is true whether the attempted contracts are "made directly by one in person, or indirectly through an agent who is neutral."³ Contracts and sales in an enemy's country between persons there domiciled, however, are not illegal.⁴ And citizens of a loyal State may sell

¹ *Esposito v. Bowden*, 7 E. & B. 763. In *Kershaw v. Kelsey*, 100 Mass. 561. 572, 573, 1 Am. Rep. 142, 97 Am. Dec. 124, the court said: "The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders, for the delivery of either, between the two countries, whether directly or indirectly, or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy." See also *Scholefield v. Eichelberger*, 7 Pet. 586, 8 L. Ed. 793; *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. Ed. 244; *United States v. Quigley*, 103 U. S. 595, 26 L. Ed. 524; *Carson v. Dunham*, 121 U. S. 421, 7 S. Ct. 1030, 30 L. Ed. 992; *The Rapid*,

8 Cranch, 155, 3 L. Ed. 520; *Philips v. Hatch*, 1 Dill. 571; *Habricht v. Alexander's Exrs.*, 1 Woods, 413; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193; *Hennen v. Gilman*, 20 La. Ann. 241, 96 Am. Dec. 396; *Shacklett v. Polk*, 51 Miss. 378, 391; *Rhodes v. Summerhill*, 4 Heisk. 204, 1 Kent, Comm. * 66. The particular contracts, however, relating to real estate, in *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124, and *Brown v. Gardner*, 4 Lea, 145, were held to be lawful. See also *Williams v. Paine*, 169 U. S. 55, 72, 42 L. Ed. 658, 18 S. Ct. 279.

² *Scholefield v. Eichelberger*, 7 Pet. 586, 593, 8 L. Ed. 793; *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939.

³ *United States v. Lapène*, 17 Wall. 601, 602, 21 L. Ed. 693.

⁴ In *Conrad v. Waples*, 96 U. S. 279, 286, 24 L. Ed. 721, the court said: "The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. As between themselves,

to one another goods which are situated in the enemy's country, provided no agreement is made for the transportation or delivery of the goods from the enemy's country.⁵ During the war with Germany, England and subsequently the United States passed "Trading with the Enemy Acts," defining permissible intercourse with alien enemies, providing for the seizure of property belonging to them, suspending the Statute of Limitations, etc.⁶

§ 1748. Contracts with aliens suspended or avoided by declaration of war.

Existing contracts between domestic citizens and enemy aliens, which were entered into before war broke out and which were valid at that time, are either suspended or terminated by a declaration of war. They are merely suspended if the delay in performance caused by the war is not so great as materially to affect the burden of the contract, but otherwise they are terminated.⁷ Where the obligation is a unilateral debt

all the ordinary business between people of the same community in buying, selling, and exchanging property, movable and immovable, could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or where it would have been inconsistent with or have tended to weaken their authority. It was commercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of non-intercourse. So long as the war existed, all intercourse between them inconsistent with actual hostilities was unlawful. But commercial intercourse and correspondence of the citizens of the enemy's country among themselves were neither forbidden nor interfered with, so long as they did not impair or tend to impair the supremacy of the national authority or the rights of loyal citizens. No

people could long exist without exchanging commodities, and, of course, without buying, selling and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves. No principle of public law and no consideration of public policy could be subserved by any edict to that effect; and its enforcement, if made, would be impossible." This passage was quoted with approval in *Briggs v. United States*, 143 U. S. 346, 352, 12 S. Ct. 391, 36 L. Ed. 180.

⁵ *Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180.

⁶ The Federal statute is printed and discussed and compared with the English Statutes in 2 Clark on Receivers, §§ 1271 *et seq.*

⁷ The matter was considered in *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, where the court held the policy of insurance in question was not revived, saying: "The truth

owed to an enemy, the obligation is merely suspended.* As the enemy is excluded from suing, this rule of procedure as well as the rule of substantive law suspending his rights prevents any immediate enforcement of the debt.⁹ But though an alien enemy is disabled from recovering a debt he may, nevertheless, be sued if a citizen can obtain service of process or attach property belonging to him upon which the government does not exercise its right of seizure.¹⁰

is that the doctrine of the revival of contracts suspended during the war is one based on consideration of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive. In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company." The court added with reference to the contract before it: "Failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war."

* In *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939, the court said: "In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Better opinion is that executed contracts such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, a *persona standi in judicio*."

⁹ The disability of an alien enemy to sue is considered in 31 Harv. L. Rev. 470. The effect of war upon contracts is considered in the printed hearings before the sub-committee of the Committee on Commerce of the Senate on H. R. 4960, 65th Congress, First Session, and in Senate Report No. 113, 65th Congress, First Session. Much of this material is reprinted in 2 Clark on Receivers, §§ 1237 *et seq.*

¹⁰ In *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, it was held by the Court of Appeal that where the lessee under a lease made before the outbreak of war becomes an alien enemy on the outbreak of war, his covenant in the lease to pay the rent is not thereby extinguished or suspended, and he may be sued for the rent that accrues due during the war. If such a lessee has assigned the lease taking a covenant of indemnity against liability for the rent, his remedies are suspended whilst he is an alien enemy, so that he cannot during the war enforce his right to indemnity. Lord Reading, C. J., said (p. 712):—"That commercial intercourse between inhabitants of this country with alien enemies, unless permitted by the Sovereign, is prohibited and illegal is beyond question. See *The Hoop*, 1 C. Rob. 196; *Esposito v. Bowden*, 7 E. & B. 763, 779; *Porter v. Freudenberg*, [1915], 1 K. B. 857, 867. And this prohibition at common law of intercourse between residents in this country and aliens is not confined to commercial or trad-

An irrevocable power of attorney given by one not at the time an alien enemy is not invalidated when he becomes such, and an agreement entered into by an attorney which does not involve trading with the enemy is enforceable;¹¹ but the result would be otherwise if exercise of the power necessarily involved commercial intercourse with the enemy.¹²

§ 1749. Agreements involving violation of foreign laws.

A contract which involves no moral turpitude, and the enforcement of which will violate no public policy of the State where action is brought, if valid where made will be enforced in the former jurisdiction, though it would be invalid if made there;^{12a} but no contract will be upheld, the enforcement of which would violate the settled policy of the forum.^{12b} On the

ing intercourse. See *The Panariellos*, 84 L. J. (P.) 140; *Robson v. Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124. The prohibition is based on public policy, which forbids the doing of acts that will or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities and by adding to the resources available to individuals in the enemy State. See *Porter v. Freudenberg*, [1915] 1 K. B. 857, 868. In the present case the contract whereby the defendant covenanted, *inter alia*, to pay rent in respect of the property known as the Prince of Wales' Theatre was a subsisting and valid and enforceable contract at the outbreak of war. Since the war no intercourse has in fact taken place with the alien enemy, unless it can be said that seeking to obtain payment by him of the rent due under the lease is within the prohibition of common law and consequently illegal. It is contended for the defendant that not only would the payment be illegal, but that the lease itself must be treated as at an end or suspended in consequence of the war. Payment by or on account of an alien enemy to persons resident

in this country is not trading with the enemy and is permitted, if the payment arises out of a transaction entered into before the outbreak of war. . . .

"The property of alien enemies is at common law subject to confiscation by the Crown in virtue of the Royal prerogative; see *Hale's Pleas of the Crown*, vol. 1, p. 95; *Porter v. Freudenberg*, [1915] 1 K. B. 857, 867. But if the Crown refrains from exercising the right to confiscate and allows the alien enemy to continue in ownership of the property, he holds it subject to all its obligations. It would be manifestly absurd that he should derive the advantage of holding the property without liability to perform the obligations incident to his right of ownership."

¹¹ *Tingley v. Müller*, [1917] 2 Ch. 144.

¹² *Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie*, [1916] 1 K. B. 763.

^{12a} *The Talus*, 248 Fed. 670, 160 C. C. A. 570, cert. granted *sub nom.* *Sandberg v. McDonald*, 246 U. S. 669, 62 L. Ed. 930, 38 S. Ct. 345.

^{12b} *Union Trust Co. v. Grossman*, 245 U. S. 412, 62 L. Ed. 368, 38 S. Ct. 147.

other hand, if a contract or sale is made with a view of violating the laws of another country, though not otherwise obnoxious to the law either of the forum or of the place where the contract was made, it will not be enforced. Out of comity the courts will treat bargains as against public policy which have for their object the violation of the laws of a sister State.¹³

¹³ *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446 (again before the court in 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355), was an action for the price of intoxicating liquors, which were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel-keeper, who bought the liquor intending to resell it in Maine, against the laws of that State. Holmes, J., delivering the opinion of the court, said: "The question . . . should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed have had reference to the English revenue laws. *Holman v. Johnson*, 1 Cowp. 341; *Pollock, Contract* (5th ed.), 308. See also *McIntyre v. Parks*, 3 Metc. 207. The assertion of that right, however, no doubt was in the interest of English commerce (*Pellecat v. Angell*, 2 Cr. M. & R. 311, 313), and has not escaped criticism (*Story, Conf. Laws*, §§ 257, 264, note 3; *Kent, Comm.*, 265, 266, and *Wharton, Conf. Laws*, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 B. & C. 93, 98, 99; *Harris v. Runnels*, 12 How. 79, 83, 84, 13 L. Ed. 901. Of

course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition it is admitted that an agreement to break the laws of a foreign country would be invalid. *Pollock, Cont.* (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. *Waymell v. Reed*, 5 T. R. 599; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Hull v. Ruggles*, 56 N. Y. 424, 429. [See also *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Kohn v. Schooner Renaissance*, 5 La. Ann. 25, 52 Am. Dec. 577; *Ivey v. Lalland*, 42 Miss. 444, 2 Am. Rep. 606, 97 Am. Dec. 475; *Rocco v. Frapoli*, 50 Neb. 665, 70 N. W. 236; *Rosenbaum v. United States Credit System Co.*, 60 N. J. L. 294, 37 Atl. 595, 64 N. J. L. 34, 44 Atl. 966, 65 N. J. L. 255; *Marshall v. Sherman*, 148 N. Y. 9, 25, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.] On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Couillard*,

§ 1750. Contracts tending to promote illegal acts.

Even though a contract does not directly require any unlawful or improper act for its performance, if the tendency of the contract is to encourage or hold out a reward for a result that can be brought about only by an unlawful act, the contract is opposed to public policy. Illustrations of this have already been given with reference to agreements to secure legislation, but the principle is a general one.¹⁴

It has generally been held that an insurance policy which makes no express condition excepting death by suicide, covers the case of such death even though the insured was sane.¹⁵ The Supreme Court of the United States, however, has not only held that in the absence of express words covering death by suicide while sane the insurance contract must be interpreted as excluding death by such a cause, but has added that even though the contract should in terms provide for payment in spite of the fact that the insured while sane committed suicide, such a provision would be opposed to public policy.¹⁶

102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must know that he actually contemplated the act. *Hayes v. Hyde Park*, 153 Mass. 514, 515, 516, 27 N. E. 522, 12 L. R. A. 249."

¹⁴ *Sage v. Hampe*, 235 U. S. 99, 59 L. Ed. 147, 35 S. Ct. 94. The court held invalid a contract which tended either to induce an Indian landowner to deprive himself of rights which the law sought to protect or to induce improper influence of Government officials. The fact that statutes permitted a conveyance with the approval of the Secretary of the Interior, was held not to validate the contract, since its tendency was to induce the contractor to bring to bear improper influence or attempts to influence on the Secretary of the Interior, or to mislead him as to the welfare of the Indian. See also *Kelly v. Harper*, 7 Ind. Ter.

541, 104 S. W. 829; *Larson v. First Nat. Bank*, 62 Neb. 303, 308, 87 N. W. 18.

¹⁵ *Grand Legion of Illinois v. Beaty*, 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124; *Seiler v. Economic L. Assn.*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; *Supreme Conclave I. O. of H. v. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528; *Morton v. Supreme Council*, 100 Mo. App. 76, 73 S. W. 259; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *Campbell v. Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430.

¹⁶ *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 42 L. Ed. 693, 18 S. Ct. 300. See also *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Plunkett v. Supreme Conclave*, 105 Va. 643, 55 S. E. 9.

§ 1751. Contracts to indemnify for an illegal act.

Because of its tendency to promote illegal acts a contract to save the promisee harmless from the consequences of an act which is necessarily unlawful is itself invalid.¹⁷ Thus a contract to indemnify an officer against the consequences of making such a seizure of property as is necessarily tortious in view of such facts known to the parties is invalid;¹⁸ though if the illegality depended upon extrinsic facts unknown to the parties, the contract of indemnity would be valid.¹⁹ A contract to indemnify a publisher against the consequences of publishing a libel is similarly invalid.²⁰ But where it was not anticipated that any libel would be contained in a book, though out of abundant caution there was inserted in the contract of publication an undertaking by the author that he would indemnify the publisher against the consequences of any libel which the book might contain, the contract was upheld;²¹ and for the same reason agreements to indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid, both in England,²² and in the United States.

Contracts insuring against the consequences of negligence, and undertakings by contractors to assume liability for all

¹⁷ *Bierbauer v. Wirth*, 5 Fed. 336; *Cooper v. Northern Pac. Ry. Co.*, 212 Fed. 533; *Collier's Adm'r v. Windham*, 27 Ala. 291, 62 Am. Dec. 767; *James v. Hendree's Adm'r*, 34 Ala. 488; *Kenna v. Calumet &c. Co. (Ill.)*, 120 N. E. 259; *Lebanon Carriage Co. v. Faulkner*, 25 Ky. L. Rep. 1037, 76 S. W. 1083; *Jose v. Hewett*, 50 Me. 248; *Babcock v. Terry*, 97 Mass. 482. In *Boylston Bottling Co. v. O'Neill*, 231 Mass. 498, 121 N. E. 411, the defendant guaranteed the collections made by the plaintiff's driver. Recovery on the guaranty was denied because the drivers' duty partly consisted of delivering liquor in a no-license town in violation of law. Cf. *Messersmith v. American Fidelity Co.*, 187 N. Y. App. D. 35, 175 N. Y. S. 169.

¹⁸ *Martyn v. Blithman*, Yelv. 197; *Thompson v. Rock*, 4 M. & S. 338;

Samuel v. Evans, 2 T. R. 569; *Mosedel v. Middleton*, T. Raym. 222; *Knipe v. Hobart*, 1 Lutw. 229; *Buffendeau v. Brooks*, 28 Cal. 641; *Hodsdon v. Wilkins*, 7 Me. 113, 20 Am. Dec. 347; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; *Love v. Palmer*, 7 Johns. 159; *Webber v. Blunt*, 19 Wend. 188, 32 Am. Dec. 445.

¹⁹ See *supra*, § 1631.

²⁰ *Clay v. Yates*, 1 H. & N. 73; *Colburn v. Patmore*, 1 C. M. & R. 73; *Shackell v. Rosier*, 2 Bing. (N. C.) 634; *Gale v. Leckie*, 2 Stark. 107; *Arnold v. Clifford*, 2 Sumn. 238; *Lea v. Collins*, 4 Sneed, 393; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

²¹ *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087, 22 L. R. A. 253, *Lathrop, J., dissented.*

²² *Wald's Pollock*, Cont. 3d ed. 377 note (m).

damages incurred in the prosecution of work are upheld.²³ A contract to indemnify against the consequences of an illegal act already committed is also valid,²⁴ unless there was an understanding prior to the commission of the illegal act that subsequently indemnity should be given;²⁵ or unless the illegal act in question was an unprosecuted crime, in which case the agreement would be open to the objection of tending to stifle prosecution.²⁶

§ 1752. Contracts collaterally connected with unlawful intent or act.

A contract though in itself neither unlawful in what it promises, nor in the consideration for the promise, may be obnoxious as part of a general scheme to bring about an unlawful result, or may be closely connected with some unlawful plan or act. There is no doubt that on the first assumption, the contract is unlawful. Where the contract is merely collaterally connected with an unlawful purpose or act, the rule generally adopted is that where the contract is only remotely connected with an unlawful transaction and rests upon an independent and legal consideration, and the plaintiff can establish his case without relying upon the unlawful transaction, the contract is valid. Thus a contract of insurance is not invalidated by the fact that the property insured is used for an illegal purpose;²⁷

²³ *Peterson v. Chicago, etc., R. Co.*, 119 Wis. 197, 96 N. W. 532.

²⁴ *Calif. Civ. Code*, § 2774; *Rogers v. Kneeland*, 10 Wend. 218, 13 Wend. 114, N. Dak. Comp. L. (1913), § 2774, *Okla. Rev. L.* (1910), § 1076, *S. Dak. C. C.*, § 1961; *Hunter v. Agee*, 5 *Humph.* 57; *Hall v. Huntoon*, 17 *Vt.* 244, 44 *Am. Dec.* 332.

²⁵ *Shackell v. Rosier*, 2 *Bing. (N. C.)* 634; *Atkins v. Johnson*, 43 *Vt.* 78, 5 *Am. Rep.* 260.

²⁶ *Hinds v. Chamberlin*, 6 *N. H.* 225. See also *Shackell v. Rosier*, 2 *Bing. (N. C.)* 634; *Lea v. Collins*, 4 *Sneed*, 393; and *supra*, § 1718. In *Calif. Civ. Code*, § 2774, it is provided that such a contract is valid unless the act was a

felony; and this provision is copied in *N. Dak. Comp. L.* (1913), § 6643; *Okla. Rev. L.* (1910), § 1076; *S. Dak. Civ. Code*, § 1961.

²⁷ *Conithan v. Royal Ins. Co.*, 91 *Miss.* 386, 45 *So.* 361, 18 *L. R. A. (N. S.)* 214, 124 *Am. St. Rep.* 701; *Phenix Ins. Co. v. Clay*, 101 *Ga.* 331, 28 *S. E.* 853; *Loehner v. Home Mutual Ins. Co.*, 17 *Mo.* 247; *Nebraska, etc., Ins. Co. v. Christensen*, 29 *Neb.* 572, 45 *N. W.* 924; *Electrova Co. v. Spring Garden Ins. Co.*, 156 *N. C.* 232, 72 *S. E.* 306, 35 *L. R. A. (N. S.)* 1216. See also *Ocean Ins. Co. v. Polleys*, 13 *Pet.* 157, 10 *L. Ed.* 105; *Boardman v. Merrimack Ins. Co.*, 8 *Cush.* 583, where it was held that illegal registry of a

as where a stock of liquor kept for unlawful sale is insured.²⁸ It is under the same principle that where a surety who has paid a gambling debt has been given a note by the principal, the note may be enforced;²⁹ and the principle finds application under a variety of other circumstances.³⁰ On the other hand,

vessel did not invalidate insurance thereon.

²⁸ *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.*, 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873; *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; *Insurance Co. of North America v. Evans*, 64 Kans. 770, 68 Pac. 623; *Niagara Ins. Co. v. De Graff*, 12 Mich. 124. But see *contra*, *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Carri-gan v. Looming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

²⁹ *Powell v. Smith*, 66 N. C. 401. See also cases of money paid for gambling debts, *supra*, § 1681.

³⁰ The leading case is *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468. See also *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 48 C. C. A. 482; *Missouri Fidelity & Co. v. Art Metal & Co.*, 242 Fed. 630, 155 C. C. A. 320; *Ingersoll v. Campbell*, 46 Ala. 282; *Phillips v. Pine Bluff & Co. R. Co.* (Ark.), 208 S. W. 313; *Hubbard v. Mulligan*, 13 Colo. App. 116, 57 Pac. 738; *Warren v. Hewitt*, 45 Ga. 501; *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009; *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039, 19 L. R. A. 692, 42 Am. St. 353; *Baker v. Page*, 11 Me. 381, 26 Am. Dec. 540; *Polosi v. Bugbee*, 217 Mass. 579, 105 N. E. 222; *Quigley v. Wolf*, 177 Mich. 467, 143 N. W. 882; *Disbrow v. Creamery Package Mfg. Co.*, 110 Minn. 237, 125 N. W. 115; *Holt v. Barton*, 42 Miss. 711, 2 Am. Rep. 640; *Owens v. Davenport*, 39 Mont. 555, 104 Pac. 682, 28 L. R. A. (N. S.) 996; *Gallagher v. Cornelius*, 23 Nott. 27, 57 Pac. 447; *Ballin v. Fourteenth St. Store*, 123 N. Y. App. D.

582, 108 N. Y. S. 26, 195 N. Y. 580, 89 N. E. 1095; *Messersmith v. American Fidelity Co.*, 187 N. Y. App. D. 35, 175 N. Y. S. 169; *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735, Ann. Cas. 1914, D; *Wald v. Wheelon*, 27 N. Dak. 624, 147 N. W. 402; *Walters Nat. Bank v. Bantock*, 41 Okla. 153, 137 Pac. 717; *Patty v. City Bank*, 15 Tex. Civ. App. 475, 41 S. W. 173; *Rousseau v. Everett* (Tex. Civ. App.), 209 S. W. 460; *Dinkelspeel v. O'Day*, 47 Utah, 18, 151 Pac. 344; *Monahan v. Monahan*, 77 Vt. 133, 59 Atl. 169, 70 L. R. A. 935; *Watson v. Fletcher*, 7 Gratt. 1. See also *supra*, §§ 1661, 1681.

In *Missouri Fidelity, etc., Co. v. Art Metal, etc., Co.*, 242 Fed. 630, 155 C. C. A. 320, the action was brought upon a bond given by the defendant to secure the second renewal of a note which was originally given for the price of goods sold in violation of a statute of Missouri, which forbids under a penalty of \$1,000 a foreign corporation to do business in the State until it has filed with the secretary of state its articles of incorporation, and paid certain fees. The court said, citing *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 167 Fed. 496, 93 C. C. A. 132; *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.*, 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 48 C. C. A. 482; *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *Jefferson v. Burhans*, 85 Fed. 949, 29 C. C. A. 481: "We think this case falls within the rule first stated in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468, and

a contract which is directly connected with an unlawful transaction or plan will not be enforced.³¹

§ 1753. Test of whether agreement is collateral. Parol evidence.

The test is often suggested, as determining whether the relation of an illegal transaction is sufficiently close to the plaintiff's alleged cause of action to preclude recovery, that if enforcement of the plaintiff's claim does not require aid or proof of the illegal contract or transaction, the plaintiff may recover.^{31a} As a negative test this seems sound; that is, a plaintiff cannot be allowed to recover if as part of his case he is compelled to allege and prove unlawful acts or agreements,³² but the converse does not seem equally true. Even though his case can be made out without indicating anything unlawful, proof must be admissible to show that the plaintiff is endeavoring to enforce an obligation which is part of, or so closely con-

subsequently applied in many cases in the Supreme Court and in this court, namely, that when a contract is only remotely connected with an unlawful transaction, and rests upon a new and independent consideration, and the plaintiff can make out his case without any reliance upon the unlawful transaction, the new contract is valid and should be enforced. It will be observed from the statements of facts that the defendant here occupies the meanly dishonest position of having received the full purchase price of plaintiff's goods, and then refusing to pay for them, although it has given repeated contracts upon new and independent considerations binding it to make the payment. As observed by Mr. Justice Holmes, when a member of the Supreme Court of Massachusetts, in *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355, in fixing the degree of proximity to the illegal transaction necessary to taint a new contract, the moral turpitude involved in the original transaction will be given some weight by the court.

As the only moral turpitude here is that which is implied from failure to comply with a penal statute, there is no justification for an extension of the effect of the illegality to collateral undertakings resting upon a new consideration."

³¹ *Mills Novelty Co. Dupouy*, 203 Fed. 254, 121 C. C. A. 452, 45 L. R. A. (N. S.) 788; *Cleveland &c. Ry. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72; *Ferguson v. Yunt*, 13 S. Dak. 120, 82 N. W. 509; *Johnson v. Berry*, 20 S. Dak. 133, 104 N. W. 1114, 1 L. R. A. (N. S.) 1159.

^{31a} See cases cited in the preceding section.

³² *Miller v. Ammon*, 145 U. S. 421, 36 L. Ed. 759, 12 S. Ct. Rep. 884; *Jemison v. Birmingham &c. R. Co.*, 125 Ala. 378, 28 So. 51; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Missouri Fidelity & Casualty Co. v. Scott* (Ok.), 178 Pac. 122; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70

nected with an unlawful plan, as to make recovery opposed to public policy. "The line of proximity will vary somewhat according to the gravity of the evil apprehended."³³ Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal or part of an illegal transaction;³⁴ and illegality if serious need not be pleaded or urged to enable the court to act upon it.³⁵

§ 1754. Knowledge of another's unlawful purpose.

Frequently a sale or contract to sell goods is not in itself unlawful, but the purpose of the buyer or seller is unlawful. It is held in England that mere knowledge of an illegal purpose of the other party to the transaction will render a bargain so opposed to public policy that no recovery can be had upon it.³⁶ And an equally severe rule has been enforced in a number of decisions in this country.³⁷ But the weight of authority in the United States does not support so strict a rule. In a Massa-

³³ Holmes, J. See the following section.

³⁴ Collins v. Blantern, 2 Wils. 341; Greville v. Attkins, 9 B. & C. 462; McMullen v. Hoffman, 174 U. S. 639, 43 L. Ed. 1117, 19 S. Ct. Rep. 839; Muskogee Land Co. v. Mullins, 165 Fed. 179, 91 C. C. A. 213, 16 Ann. Cas. 357; Way v. Greer, 196 Mass. 237, 81 N. E. 1002; Zeller v. Leiter, 189 N. Y. 361, 82 N. E. 158. And see numerous other cases cited in 16 Ann. Cas. 388, n.. Where a party to an illegal contract makes a prima facie case without disclosing the illegality, defendant's guilty participation does not preclude him from proving as a defence the illegal part of the contract. Lanham v. Meadows, 72 W. Va. 610, 47 L. R. A. (N. S.) 592, 78 S. E. 750.

³⁵ See *supra*, § 1630 a.

³⁶ Pearce v. Brooks, L. R. 1 Ex. 213. The seller of a brougham to a prostitute who knew that it was to be used as part of the latter's display was held debarred from recovering the price.

See also Uphill v. Wright, 103 L. T. (N. S.) 834.

³⁷ Milner v. Patton, 49 Ala. 423; Oxford Iron Co. v. Spradley, 51 Ala. 171; Ware v. Jones, 61 Ala. 288; Jones v. Owens (Ga. 1919), 99 S. E. 121, 387; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Williamson v. Baley, 78 Mo. 636; Fisher v. Lord, 63 N. H. 514, 3 Atl. 927; Jones v. Surprise, 64 N. H. 243, 9 Atl. 384 (*cf.* Durkee v. Moses, 67 N. H. 115, 23 Atl. 793); Hull v. Ruggles, 56 N. Y. 424; Arnot v. Pittston Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Materne v. Horwits, 101 N. Y. 469, 5 N. E. 331; Lewis v. Latham, 74 N. C. 283 (*cf.* Lang v. Lynch, 38 Fed. 489); Spurgeon v. McElwain, 6 Ohio, 442, 27 Am. Dec. 266; Pabst Brewing Co. v. Smith, 39 Okl. 403, 135 Pac. 381; Mordecai v. Dawkins, 9 Rich. L. 262; Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; Aiken v. Blaisdell, 41 Vt. 655; Mound v. Barker, 71 Vt. 253, 44 Atl. 346. See also Johns v. Reed, 77 Neb. 492, 109 N. W. 738.

chusetts decision,³⁸ Holmes, C. J., in delivering the opinion of the court, said, in speaking of a sale of liquor in Massachusetts which the buyer intended to resell in Maine contrary to the law of the latter State: "In our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiff's knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiff's to coöperate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts,³⁹ the line of proximity will vary somewhat according to the gravity of the evil apprehended,⁴⁰ and in different courts with regard to the same or similar matters.⁴¹ But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote."⁴²

³⁸ *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355.

³⁹ Citing *Commonwealth v. Peaslee*, 177 Mass. 287, 59 N. E. 55; *Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N. E. 770.

⁴⁰ Citing *Steele v. Curle*, 4 Dana, 381, 385, 388; *Hanauer v. Doane*, 12 Wall. 342, 446, 20 L. Ed. 439; *Bickel v. Sheets*, 24 Ind. 1, 4; to which may be added *Green v. Collins*, 3 Cliff. 494; *Tracy v. Talmage*, 14 N. Y. 162, 215, 67 Am. Dec. 132; *Messersmith v. American Fidelity Co.*, 187 N. Y. App. D. 35, 175 N. Y. S. 169, 171.

⁴¹ Compare *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138, with *Pearce v. Brooks*, L. R. 1 Ex. 213.

⁴² Citing *McIntyre v. Parks*, 3 Metc. 207; *Sortwell v. Hughes*, 1 Curt. C. C. 244, 247; *Green v. Collins*, 3 Cliff. 494; *Hill v. Spear*, 50 N. H. 253, 9 Am.

Rep. 205; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Distilling Co. v. Nutt*, 34 Kans. 724, 729, 10 Pac. 163; *Webber v. Donnelly*, 33 Mich. 469; *Tuttle v. Holland*, 43 Vt. 542. *Braunn v. Keally*, 146 Pa. St. 519, 524, 23 Atl. 389, 28 Am. St. Rep. 811; *Wallace v. Lark*, 12 S. C. 576, 578, 32 Am. Rep. 516; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Jameson v. Gregory's Exr.*, 4 Metc. (Ky.) 363, 370; *Bickel v. Sheets*, 24 Ind. 1; *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138. To these cases may be added *Hollenberg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172, 122 Am. St. Rep. 17; *California Raisin Growers' Assoc. v. Abbott*, 160 Cal. 601, 117 Pac. 767; *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5

At all events mere reasonable cause of belief without actual knowledge, on the part of a seller of goods, that the purchaser is buying them for an unlawful use, does not prevent recovery of the price.⁴³

§ 1755. Promotion of another's unlawful purpose.

If a seller does anything beyond making the sale to aid the unlawful purpose of the purchaser, he cannot recover.⁴⁴ A common application of these principles is in regard to leases

L. R. A. 432, 10 Am. St. Rep. 23; *Jackson v. City Bank*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; *Brunswick v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. 222, 52 Am. Rep. 547; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *Gambis v. Sutherland's Est.*, 101 Mich. 355, 59 N. W. 652; *Chamberlin v. Fisher*, 117 Mich. 428, 75 N. W. 931; *Darling v. Kipp*, 93 Neb. 781, 141 N. W. 830; *Delavina v. Hill*, 65 N. H. 94, 19 Atl. 1000; *Bryson v. Haley*, 68 N. H. 337, 38 Atl. 1006; *Amey v. Granite State Ins. Co.*, 68 N. H. 446, 44 Atl. 601; *Main v. Berlin Dry Goods Co.*, 75 N. H. 511, 77 Atl. 483; *Brooklyn Distilling Co. v. Standard Distilling Co.*, 120 N. Y. App. 237, 105 N. Y. S. 264; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. 923; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154. See also *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22.

⁴³ *Ramsey v. Smith*, 138 Ala. 333, 35 So. 325; *Brunswick v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *Ely v. Webster*, 102 Mass. 304; *Adams v. Coulliard*, 102 Mass. 167.

⁴⁴ *Kohn v. Melcher*, 43 Fed. 641 (furnishing false invoices of liquor sold to deceive authorities); *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. 222, 52 Am. Rep. 547 (packing liquor deceptively to aid the buyer's purpose); *Commercial Sec. Co. v. Archer*, 179 Ky. 842, 201 S. W. 479 (sale of prizes for "popularity contest" with in-

structions for fictitious voting to maintain public interest); *Bancher v. Mansel*, 47 Me. 58 (taking precautions on behalf of the buyer against seizure of liquor sold); *Foster v. Thurston*, 11 Cush. 322 (giving the sale the appearance of being made to a third person); *Storz v. Finklestein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644, 48 Neb. 27, 66 N. W. 1020 (participation in illegal purpose and profits); *Skiff v. Johnson*, 57 N. H. 475 (putting up and labelling goods in packages so that they might be conveniently used in illegal lottery scheme); *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927 (packing liquor so as to conceal its character); *Hull v. Ruggles*, 56 N. Y. 424 (putting up packages with tickets in them for use in illegal lottery scheme); *Arnot v. Pittston Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190 (agreeing not to make competitive sales, thereby aiding defendant's purpose to gain an illegal monopoly); *Chimene v. Pennington* (Tex. Civ. App.), 79 S. W. 63 (using materials sold in construction of combustible building within fire limits of a city in violation of law); *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154 (marking casks of liquor with no name, but merely a diamond inclosing a letter S, in order to prevent seizure); *Aiken v. Blaisdell*, 41 Vt. 655 (marking kegs of liquor "benzine" or "cider vinegar," and packing them in barrels or boxes). See also *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Way-*

and sales to proprietors of houses of prostitution,⁴⁵ and also in regard to money lent for gambling,⁴⁶ or other illegal purpose.

Reed v. Reed, 5 T. R. 599, where a seller who had packed goods for the purpose of facilitating smuggling was held debarred from recovering the price.

⁴⁵ See *Hollenberg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172 (seller of piano recovered price, though he knew the character of the place where it was to be used); *Belmont v. Jones House Furnishing Co.*, 94 Ark. 96, 125 S. W. 651, 140 Am. St. Rep. 112 (to the same effect); *Ashford v. Mace*, 103 Ark. 114, 146 S. W. 474, 39 L. R. A. (N. S.) 1104 (lessor's knowledge of lessee's intent to sublet for immoral purposes did not make original lease void); *Ramsey v. Smith*, 138 Ala. 333 (knowledge of buyer's illegal purpose apparently regarded as sufficient to prevent conditional seller or his assignee with notice recovering piano on buyer's default); *Postelle v. Rivers*, 112 Ga. 850, 38 S. E. 109 (recovery not allowed for board and lodging furnished to defendant to maintain her in a life of prostitution); *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128 (seller of furniture, knowing the character of the place where it was to be used, recovered the price); *Sampson v. Townsend*, 25 La. Ann. 78 (to the same effect, though the plea alleged the seller delivered and put up the furniture for the express purpose of enabling the defendant to fit up her house); *Mahood v. Tealza*, 26 La. Ann. 108 (to the same effect as *Hubbard v. Moore*, *supra*); *McDonald v. Born*, 135 Mich. 177, 97 N. W. 693 (money paid to enable defendant to conduct her illegal business cannot be recovered); *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506 (seller of beer sold with knowledge of the character of the

place where it was to be used recovered the price); *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383, 104 Mo. 349, 16 S. W. 505 (specific performance of agreement in form a sale with monthly payments denied, it appearing that transaction was so made to evade statute forbidding leases of premises for houses of prostitution); *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603 (lessor of premises which he knows or intends shall be used for unlawful purposes cannot recover rent); *Bishop v. Honey*, 34 Tex. 245 (mechanic's lien may be enforced against premises which lienor knew when taking part in building them were to be used for immoral purposes); *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418 (the plaintiff was not allowed to recover the price for furniture supplied on a conditional sale to the keeper of a brothel, the court inferring from the large credit given and instalment payments provided for that the plaintiff must have expected the price to be realized from the immoral business. The court declined to express an opinion whether mere knowledge by the plaintiff of the defendant's unlawful purpose would have precluded recovery. It was further held that the fact that the notes in suit were not those originally given for the price, but were new notes given to compromise suits brought on the original notes did not help the plaintiff. The original illegality tainted the whole transaction); *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294 (rent of premises known by the landlord to be used for immoral purposes cannot be recovered); *Levy v. Davis*, 115 Va. 814, 80 S. E. 791 (seller of furniture not allowed to reclaim it or recover the price); *Washington Liquor Co. v.*

⁴⁶ See *supra*, § 1681.

Mere knowledge of a borrower's illegal purpose will not deprive a lender of his right to recover money lent; ⁴⁷ but if the lender participates in the illegal use of the money lent, he cannot recover. ⁴⁸

§ 1756. The distinction often difficult.

It must be admitted that where a plaintiff has furnished the defendant with the necessary means to carry out an illegal

Shaw, 38 Wash. 398, 80 Pac. 536 (seller of liquor, knowing the character of the place where it was to be used, recovered the price); *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960 (seller of goods on conditional sale not allowed to recover them on buyer's default. The court held that such a sale necessarily involved participation in the immoral business, distinguishing the case from an absolute sale on credit). Similar decisions are *Case v. Monk*, 7 Ala. App. 419, 62 So. 268; *Abbott Furniture Co. v. Mobley*, 141 Ga. 456, 81 S. E. 196. See also *Colburn v. Coburn* (Tex. Civ. App.), 211 S. W. 248.

⁴⁷ *Jenson v. Toltec Ranch Co.*, 174 Fed. 86, 98 C. C. A. 60 (loan which corporation desired for *ultra vires* purpose); *Hines v. Union Savings Bank*, 120 Ga. 711, 48 S. E. 120 (loan which the borrower desired to prevent the prosecution of her husband); *McGavock v. Puryear*, 6 Cold. 34 (loan used for expenses of equipping cavalry for the Confederate army); *Bond v. Perkins*, 4 Heisk. 364; *Jones v. Planters' Bank*, 9 Heisk. 455; *Puryear v. McGavock*, 9 Heisk. 461; *Oxford Iron Co. v. Spradley*, 51 Ala. 171 (loan used for manufacture of iron for the Confederate government); *Lewis v. Alexander*, 51 Tex. 578 (loan used for contraband trading); *Futch v. Sanger* (Tex. Civ. App.), 163 S. W. 597.

No recovery was allowed in the

following cases: *Johnson v. McMillon*, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918 C. 244 (loan of money intended to be used for removing a witness from the jurisdiction unenforceable); *Plumer v. Smith*, 5 N. H. 553, 22 Am. Dec. 478 (loan to prevent criminal prosecution); *Leak v. Commissioners of Richmond County*, 64 N. C. 132; *Setzer v. County Commissioners*, 64 N. C. 516; *Brickell v. Halifax*, 81 N. C. 240 (loan to a county to aid the Confederacy); *Kingsbury v. Flemming*, 66 N. C. 524; *Critcher v. Holloway*, 64 N. C. 526; *Kingsbury v. Gooch*, 64 N. C. 528 (loan to hire a substitute for the Confederate army); *Smitherman v. Sanders*, 64 N. C. 522 (loan for equipment of Confederate Company).

⁴⁸ *Viser v. Bertrand*, 14 Ark. 267 (money paid by the attorney of a married woman to her husband at her request to induce the husband not to contest divorce proceedings); *Johnson v. McMillon*, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918 C. 244 (loan to enable borrower who was accused of murder to spirit away witnesses against him); *Johnstown Land Co. v. Brainerd Brewing Co.* (Minn.), 172 N. W. 211 (the lender made it a condition of his loan that the borrower should use the lender's beer in an illegally established saloon); *Pierson v. Green*, 69 S. Car. 559, 48 S. E. 624 (loan to prevent criminal prosecution where the lender took part in the illegal use).

purpose the distinction between the mere knowledge of and the promotion of that purpose is often difficult to draw, and the rule gives a court or jury considerable power to turn a decision one way or the other.⁴⁹ But if performance of the contract can have no other purpose or effect than an illegal one there can certainly be no recovery. Thus notes given for a gambling slot machine cannot be enforced.⁵⁰

§ 1757. Executory promise to furnish goods intended for unlawful purpose imposes no liability.

Though a seller who knows the illegal purposes of a buyer of goods of a character not exclusively appropriate for such purposes, may not on that account be denied a right to recover the price of the goods, he may, nevertheless, while the contract is still executory, refuse to carry it out. While the buyer's illegal purpose will not protect him against an action for the price, it will certainly deprive him of his cause of action against the seller if the latter was ignorant at the time the contract was made of the buyer's illegal purpose;⁵¹ and even though the seller was then cognizant of the illegal purpose it seems that the result should be the same. The buyer is equally guilty in both cases, and it is his guilt which should determine whether he can recover.

§ 1758. Effect of performance, illegal when contract was made, becoming legal.

It may sometimes happen that a contract is illegal when it is made either because of the illegal purpose of the parties to the contract or for other reasons, and that when the contract is performed the transaction has become lawful either because the purpose of the parties has changed or because changes in the

⁴⁹ See L. R. A. 1918 C. 247.

⁵⁰ *Kuhe v. McGally Universal Press Co.*, 123 Ala. 452, 26 So. 535, 82 Am. St. 135. Cf. *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138, where recovery was allowed for fitting up a gambling house; and *Greenland v. Mitchell*, 3 Alaska, 271, where recovery was al-

lowed for building such a house, and see *supra*, § 1681.

⁵¹ See *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Church v. Proctor*, 66 Fed. Rep. 240, 244, 33 U. S. App. 1, 13 C. C. A. 426; *Foley Mfg. Co. v. Sierra Nevada Lumber Co.*, 172 Fed. 197, 96 C. C. A. 649. But see *O'Brien v. Brietenbach*, 1 Hilt. 304.

law or other external circumstances have made that lawful which was previously unlawful. It does not impair the validity of a sale when made that the prior contract to make it was illegal;⁵² but if a contract originally illegal still remains executory, a subsequent change of the law, permitting such contracts to be made, will not ordinarily justify recovery.⁵³ It is within the power of a legislature, however, to validate existing contracts made in violation of the law theretofore in force, and this construction has generally, been given to statutes repealing usury laws.⁵⁴

§ 1759. Effect of performance, legal when contract was made, becoming illegal.

In the converse case where the contract was originally legal, but because of a change in purpose of the parties, or a change in the law, performance of the acts contracted for on one side or the other has become illegal, any subsequent performance of such acts is against public policy and the party who has undertaken to perform them is excused from so doing.⁵⁵ If in spite of the legal prohibition he still performs, he cannot recover what was promised him in return therefor.⁵⁶ Where, however, that portion of the performance of the contract which is prohibited, has already been performed before the prohibition, the remainder of the contract is not invalidated by the prohibition, and may be enforced.⁵⁷ Likewise, if a sale has been completely

⁵² See cases of contracts made on Sunday, and subsequently performed on a secular day. *Supra*, §§ 1704, 1707; *Cones v. The United States*, 8 Ct. Cl. 421. In this case a contract was made for the sale of cotton within the enemy's country, but the sale was subsequently carried out within the Union lines. The sale was legal and the property passed.

⁵³ *Lanning v. Osborne*, 82 Fed. 575; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276; *Quarles v. Evans*, 7 La. Ann. 543; *Robinson v. Barrows*, 48 Me. 186; *Schaum v. Brandt* 116 Md. 560, 82 Atl. 551; *Springfield*

Bank v. Merrick, 14 Mass. 322; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43 *Nichols v. Poulson*, 6 Ohio, 305. But see *Washburn v. Franklin*, 13 Abb. Pr. 140.

⁵⁴ See *supra*, § 1683.

⁵⁵ See *infra*, § 1938.

⁵⁶ See *Gray v. Sims*, 3 Wash. C. C. 276; *American Mercantile Exchange v. Blunt*, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. 463.

⁵⁷ In *Anheuser-Busch Brewing Assoc. v. Bond*, 66 Fed. 653, 13 C. C. A. 655, 32 U. S. App. 38, a debt arising from sales of lager beer in Indian Territory

carried out, the subsequent agreement of the parties to utilize the property sold for an illegal purpose will not deprive the seller of his right to recover the price.⁵⁸

§ 1760. Change of purpose regarding performance not unlawful in itself.

It has been laid down on high authority that "When it is sought to avoid an agreement, not being in itself unlawful, on the ground of its being meant as part of an unlawful scheme, or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement."⁵⁹

The correctness of this rule seems, however, questionable. Public policy certainly requires that the illegal intent whenever conceived should not be carried into execution. According to the rule stated in the text, an innocent party may be bound to aid in the execution of an illegal purpose or be liable for breach of contract. There seems no theoretical difficulty in saying that the change of purpose subsequent to the formation of the contract gives rise to a defence which did not previously exist.⁶⁰

On the other hand if the original purpose of the parties was unlawful though their contract itself was not, and they subsequently make an agreement to supersede their original purpose

when such sales were permissible was enforced after they had been forbidden by law.

⁵⁸ This may be inferred from *Ware v. Curry*, 67 Ala. 274; *Pond v. Smith*, 4 Conn. 297. In *Ware v. Curry*, the vendor's lien on real estate sold by him was held not lost by aid given the buyer after the sale in the illegal purposes of manufacturing iron for the Confederate government. In *Pond v. Smith*, a part owner of a ship who fitted the ship out was held entitled to reimbursement in spite of a subsequent agreement that the vessel should be illegally employed as a privateer. See also *Johns v. Reed*, 77 Neb. 492, 109 N. W. 738.

⁵⁹ Lord Howden *v. Simpson*, 10 A.

& E. 793, 818, quoted by Sir Frederick Pollock, *Wald's Pollock Contracts* (3d ed.), 493. And see *Church v. Proctor*, 66 Fed. 240, 33 U. S. App. 1, 13 C. C. A. 426; *Pape v. Wright*, 116 Ind. 502, 507, 19 N. E. 459; *Sawyer v. Taggart*, 14 Bush, 727, 734; *Wall v. Schneider*, 59 Wis. 352, 359, 18 N. W. 443.

⁶⁰ Suppose a seller had contracted to sell a large number of rifles to a buyer who intended to dispose of them in lawful trade, but who subsequently, as the seller discovers before performance of the contract, plans to dispose of them to a government at war with the United States. Can the buyer hold the seller liable in damages for refusing to deliver the rifles according to contract?

and to carry out the agreement in a lawful way, there seems no reason why the courts should thereafter refuse to enforce the contract.⁶¹

§ 1761. Illegal performance of legal contract.

It has been said that "there is no policy of the law against the plaintiff's recovery unless his contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way."⁶² It is submitted that if this statement is made as a general principle it is unsound. The illegality of the plaintiff in relation to the contract is the vital test, not merely the character of the contract.⁶³ It is true that not every illegal act in performing a contract will vitiate recovery; thus if a carpenter in building a legal fence commits a trespass, this will not preclude recovery for the fence, but if the performance rendered by the plaintiff is something in itself forbidden by law to be rendered the facts that the contract was in such general terms as to cover either such illegal performance or a lawful performance, and that both parties originally had no intention to have the performance unlawful, will surely not justify a recovery on the contract for the price of the unlawful performance. An agent can recover no commissions for negotiating a contract or sale by illegal means,⁶⁴ though his contract with his principal did not specify the means to be employed, and his case would not be helped by proving that the principal or that both the principal and he himself originally expected legal means only would be employed. It would be a novel public policy which would deny recovery against a wrong-doing principal where both parties originally had an evil intent, and would allow recovery against an innocent principal when the

⁶¹ See *supra*, § 1674.

⁶² *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041. See also *Armour v. Jesmer*, 76 Wash. 475, 136 Pac. 689.

⁶³ See *supra*, §§ 1630, 1631.

⁶⁴ *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. In this case the plaintiff had contracted for a commission for inducing the Turkish government, whose consul in

the United States he was, to buy arms of the defendant company. He was denied recovery. See also *Findlay v. Perts*, 66 Fed. 427, 31 U. S. App. 340, 13 C. C. A. 559, 29 L. R. A. 188; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 54 U. S. App. 639, 29 C. C. A. 438. And see *Wald's Pollock, Contracts* (3d ed.), 377, note. Compare *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557.

plaintiff is equally guilty in both cases. Not the illegality of the contract, but the illegality of the plaintiff's conduct either in entering into or in performing the contract is the true ground for denying recovery.⁶⁵

§ 1762. Executory and executed illegal contracts.

The illegality of a contract or sale may result either from the illegality of the promise or from the illegality of the consideration given for the promise. A promise to do an illegal thing for a legal consideration is unenforceable,⁶⁶ and equally so is a promise to do a legal thing for an illegal consideration.⁶⁷ If the agreement is bilateral and the promise on either side is unlawful, both promises are unenforceable; for one promise is itself unlawful and the other is given for unlawful consideration. If an illegal contract has been partly executed, the parties are in effect left as they stand, for all relief for non-performance of the rest of the obligation is denied. Therefore, a seller cannot recover possession of goods illegally sold on a conditional sale, though the condition has been broken.⁶⁸

§ 1763. Contracts and sales prohibited by statute.

For the protection of the public or for purposes of taxation, or for both reasons, many statutes are enacted forbidding certain contracts and sales either altogether or unless certain statutory regulations are complied with. There can be no doubt that if a statute directly prohibits a contract or sale it cannot be enforced by the parties to it, and the imposition of a penalty is at least *prima facie* an implied prohibition of the transaction to which the penalty attaches;⁶⁹ but though no pen-

⁶⁵ See *supra*, § 1630.

⁶⁶ For instance, a promise to make an illegal sale in return for a legal consideration of money paid in advance.

⁶⁷ For example, a promise to pay the price for goods illegally sold.

⁶⁸ *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.

⁶⁹ *Clark v. Protection Ins. Co.*, 1 Story, 109, 122; *Swann v. Swann*, 21 299; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Harrison v. Jones*, 80 Ala. 412; *Campbell v. Segars*, 81 Ala. 259, 1 So. 714; *Youngeblood v. Birmingham Trust Co.*, 95 Ala. 521, 12 So. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245; *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210; *Moorehouse v. Kukalman*, 177 Ind. 471, 96 N. E. 600; *Dillon v. Allen*, 46 Iowa, 299, 26 Am.

alty is imposed, the transaction may nevertheless be invalidated.⁷⁰

§ 1764. *Mala prohibita* and *mala in se*.

No distinction is now made between things which are merely *mala prohibita* and things which are *mala in se*. Courts cannot go behind the legislative prohibition when the prohibition itself is clear.⁷¹ But in determining what validity, if any, a forbidden contract has, it is often important to consider how far and for what reason the prohibited transaction is wrongful, since the courts will endeavor so to deal with the transaction as to give effect to the fundamental purpose of the Legislature and to a wise public policy.⁷²

Rep. 145; Durgin v. Dyer, 68 Me. 143; Roby v. West, 4 N. H. 285, 17 Am. Dec. 423; Brackett v. Hoyt, 29 N. H. 264; Gregory v. Wilson, 36 N. J. L. 315, 13 Am. Rep. 448; Covington v. Threadgill, 88 N. C. 186; Bloom v. Richards, 2 Ohio St. 387, 395; Pennsylvania Co. v. Wentz, 37 Ohio St. 333, 338; McConnell v. Kitchens, 20 S. C. 430; Elkins v. Parkhurst, 17 Vt. 105; Bancroft v. Dumas, 21 Vt. 456.

⁷⁰ In Norbeck & N. Co. v. State, 32 S. Dak. 189, 142 N. W. 847, 849, the court said: "A contract founded on a statute making an act penal is void, although the statute does not pronounce it void or expressly prohibit it. A contract that is declared and pronounced to be null and void by express law is just as null and void as if made penal. The effect on the contract is the same in either case. Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793; Seidenbender v. Charles, 4 Serg. & R. 151, 8 Am. Dec. 682."

In Dodson v. McCurnin, 178 Iowa, 1211, 160 N. W. 927, 929, L. R. A. 1917 C. 1084, the court said: "It is not necessary that a prohibited evil

should be made criminal or even penalized to vitiate contracts made in furtherance of that evil. Jemison v. Birmingham, 125 Ala. 378, 28 So. 51; McGehee v. Lindsay, 6 Ala. 16; Moog v. Hannon's Ad'r, 93 Ala. 503, 9 So. 596. And a contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against the positive provisions. Hunt v. Knickerbacker, 5 Johns. 327; Wetmore v. Brien, 3 Head. 723." A contract to make a settlement which would violate a statutory rule against perpetuities is unenforceable. Carrier v. Carrier, 228 N. Y. 114, 123 N. E. 135.

⁷¹ Bank v. Owens, 2 Pet. 527, 539, 7 L. Ed. 508; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979; Penn v. Bornman, 102 Ill. 523, 530; Greenough v. Balch, 7 Me. 461; White v. Buss, 3 Cush. 448; Downing v. Ringer, 7 Mo. 585; Hill v. Spear, 50 N. H. 253, 277, 9 Am. Rep. 205; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Rossman v. McFarland, 9 Ohio St. 369, 379; Holt v. Green, 73 Pa. St. 198, 13 Am. Rep. 737; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605.

⁷² In Dunlop v. Mercer, 156 Fed.

§ 1765. Illustrations of prohibitory statutes.

Where a statute prohibits altogether the sale of certain goods, not only an agreement for such a sale is invalid, but if a sale is made in violation of law the agreed price cannot be recovered.⁷³

Where a statute requires a broker to obtain a license before sales of the kind in question can be negotiated by him, there is no doubt that if such a sale is made by one acting as a broker without the required license, he can recover no compensation for

545, 555, 86 C. C. A. 435, the court said: "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its validity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power. *Fritts v. Palmer*, 132 U. S. 282, 289, 293, 10 S. Ct. 93, 33 L. Ed. 317; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188; *Logan County Bank v. Townsend*, 139 U. S. 67, 76, 11 S. Ct. 496, 35 L. Ed. 107; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 13 S. Ct. 66, 36 L. Ed. 956; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 896, 897, 58 C. C. A. 79, 82, 83; *Sioux City etc., Co. v. Trust Co.*, 82 Fed. 124, 134, 49 U. S. App. 523, 27 C. G. A. 73, 83; *Hanover Bank v. First Nat. Bank of Burlingame*, 109 Fed. 421, 426, 48 C. C. A. 482, 487; *Speer v. Board of County Commrs.*, 88 Fed. 749, 758, 60 U. S. App. 38, 32 C. C. A. 101, 110; *National Bank of Xenia v. Stewart*, 107 U. S. 676, 2 S. Ct. 778, 27 L. Ed. 592; *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *O'Hare v. Bank*, 77 Pa. St. 96; *Pangborn v. Westlake*, 36 Iowa, 546; *Chattanooga R. &*

C. R. Co. v. Evans, 14 C. C. A. 116, 121, 122, 66 Fed. 809, 815, 31 U. S. App. 432."

⁷³ Thus in Massachusetts a sale of milk below a certain standard is an illegal sale. *Miller v. Post*, 1 Allen, 434; *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 201. In Maine the seller of cattle infected with tuberculosis cannot recover the price, though ignorant that the cattle were diseased. *Church v. Knowles*, 101 Me. 264, 63 Atl. 1042. The sale of animals afflicted with glanders is prohibited in Arkansas. *Compagnonette v. Mo-Armick*, 91 Ark. 69, 120 S. W. 400. The sale of imported second-hand clothing is prohibited in Georgia. *Smith v. Evans*, 125 Ga. 109, 53 S. E. 589. In *Law v. Hodson*, 11 East, 300, recovery was denied the seller of bricks because of the statute requiring bricks to be of certain dimensions to which the bricks sold did not conform. In *Wheeler v. Russell*, 17 Mass. 258, a note calling for shingles of illegal size was similarly unenforceable. In *Eaton v. Kegan*, 114 Mass. 433, the price of oats sold by the bag was held not recoverable because of a statute requiring such goods to be sold by the bushel; but in *Eldredge v. McDermott*, 178 Mass. 256, 59 N. E. 806, the court held that if a custom was proved that a bag of oats contained two bushels, the price of oats sold in bags could be recovered, being in effect a sale by the bushel. See also *Durgin v. Dyer*, 68 Me. 143.

his services.⁷⁴ And even though sale of particular goods is not illegal in itself, if the seller is violating the law in selling them without complying with some statutory prerequisite, the policy of the law generally denies recovery of the price. This has been held even when the only illegality is breach of a requirement under statutory penalty that the seller shall take out a license, if the purpose of the statute is, in part at least, for the protection of the public and not solely for purposes of revenue.⁷⁵ It may be observed, however, that a statute which requires a license to be paid for by a traveling salesman is void, at least so far as concerns salesmen from another State, as violating the provision of the Federal Constitution giving Congress exclusive control over interstate and foreign commerce.⁷⁶

§ 1766. Further illustrations of prohibitory statutes.

The price of liquor sold in violation of a liquor license law, cannot be recovered,⁷⁷ nor the price of goods sold in violation

⁷⁴ *Cope v. Rowlands*, 2 M. & W. 149; *Hustis v. Picklands*, 27 Ill. App. 270 (paper); *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Black v. Security Mutual Assn.*, 95 Me. 35, 49 Atl. 51, 54 L. R. A. 899; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 437; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737; *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. The rule is the same in regard to other occupations for which a similar requirement is made; see the following section.

⁷⁵ *Bull v. Harragan*, 17 B. Mon. 349 (peddler). And see decisions cited *infra*, n. 77, of unlicensed sales of liquor. In *Mabry v. Bullock*, 7 Dana, 337, it appears that the statute expressly provided that all contracts for the sale of clocks should be void unless the seller has a license. See also *Rash v. Farley*, 91 Ky. 344, 15 S. W. 862, 34 Am. St. 233; *Best v. Bauder*, 29 How. Pr. 489; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. But compare

Banks v. McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. 478; *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; *Jones v. Berry*, 33 N. H. 209; *Eberstadt v. Jones*, 19 Tex. Civ. App. 480, 48 S. W. 558. See also *Smith v. Lindo*, 4 C. B. (N. S.) 395, where an unlicensed broker was allowed to recover from his principal money paid in executing a purchase for him. In *Levison v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, an unlicensed pawnbroker was held to have no lien on goods on which he had made a loan. See also *Ferguson v. Norman*, 5 Bing. (N. C.) 76; *Victorian Daylesford Syndicate v. Dott*, [1905] 2 Ch. 624; *Bonnard v. Dott*, [1906] 1 Ch. 740; *Lodge v. National Union Inv. Co.*, [1907] 1 Ch. 300.

⁷⁶ *Coldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336, 23 S. Ct. 229, and cases cited; *Crenshaw v. Arkansas*, 227 U. S. 389, 33 S. Ct. 294, 57 L. Ed. 565, and cases cited.

⁷⁷ *Miller v. Ammon*, 145 U. S. 421, 12 S. Ct. 844, 36 L. Ed. 759; *Lang v. Lynch*, 38 Fed. 489; *O'Bryan v. Fits-*

of a law requiring weights and measures to be sealed,⁷⁸ or of a law requiring coal⁷⁹ or lumber⁸⁰ to be weighed or surveyed by a public officer, or requiring goods to be marked to indicate their character or composition.⁸¹ A physician without the license to practice required by law cannot recover for his services,⁸² nor can a lawyer,⁸³ steamboat en-

patrick, 48 Ark. 487, 3 S. W. 527; Dolson v. Hope, 7 Kans. 161; Vannoy v. Patton, 5 B. Mon. 248; Cobb v. Billings, 23 Me. 470; Bondy v. Hardina, 216 Mass. 44, 102 N. E. 935; Loranger v. Jardine, 56 Mich. 518, 23 N. W. 203; Niagara Falls Brewing Co. v. Wall, 98 Mich. 158, 57 N. W. 99; Solomon v. Dreschler, 4 Minn. 278; Lewis v. Welch, 14 N. H. 294; Coldwell v. Wentworth, 14 N. H. 431; Covington v. Threadgill, 88 N. C. 186; Griffith v. Wells, 3 Denio, 226; Bancroft v. Dumas, 21 Vt. 456; Aiken v. Blaisdell, 41 Vt. 655; Bach v. Smith, 2 Wash. Terr. 145, 3 Pac. 831; Gorsuth v. Butterfield, 2 Wis. 237; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605.

⁷⁸ Miller v. Post, 1 Allen, 434; Bishbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Smith v. Arnold, 106 Mass. 269; Sawyer v. Smith, 109 Mass. 220; Eaton v. Kegan, 114 Mass. 433. ⁷⁹ Little v. Poole, 9 B. & C. 192; Libby v. Downey, 5 Allen, 299.

⁸⁰ Richmond v. Foss, 77 Me. 590, 1 Atl. 830; Prescott v. Battersby, 119 Mass. 285; Pray v. Burbank, 10 N. H. 377.

⁸¹ The following cases relate to fertilizers: Pacific Guano Co. v. Mullen, 66 Ala. 582; Merriman v. Knox, 99 Ala. 93, 11 So. 741; Brown v. Adair, 104 Ala. 652, 16 So. 439; Brown v. Raisin Fertilizer Co., 124 Ala. 221, 26 So. 891; Bowdoin v. Alabama Chemical Co., (Ala. 1918), 79 So. 4; Kleckley v. Leyden, 63 Ga. 215; Johnston v. McConnell, 65 Ga. 129; Lorents v. Conner, 69 Ga. 761; Vanmeter v. Spurrier, 94 Ky. 22, 21 S. W. 337; McConnell

v. Kitchens, 20 S. C. 430. But see Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720. The same rule was applied where the statute in question related to other goods. Forster v. Taylor, 5 B. & Ad. 887 (butter); Buxton v. Hamblen, 32 Me. 448 (hay).

⁸² D'Allex v. Jones, 2 Jur. (N. S.) 979; Harrison v. Jones, 80 Cal. 412; Taliaferro v. Moffett, 54 Ga. 150; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880; Quarles v. Evans, 7 La. Ann. 543; Fox v. Dixon, 58 Hun, 605, 12 N. Y. S. 267; Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. 922. Cf. Prietto v. Lewis, 11 Mo. App. 600; Smythe v. Hanson, 61 Mo. App. 285.

⁸³ Taylor v. Crowland Gas & Coke Co., 10 Exch. 293; Hittson v. Browne, 3 Colo. 304; Tedrick v. Hiner, 61 Ill. 189; East St. Louis v. Freels, 17 Ill. App. 339; Parkins v. McDuffee, 63 Me. 181; Browne v. Phelps, 211 Mass. 379, 97 N. E. 762; McIver v. Clarke, 69 Miss. 408, 10 So. 581; Westcott v. Baker, 83 N. J. L. 460, 85 Atl. 315; Goldenberg v. Law, 17 N. Mex. 546, 131 Pac. 499; Buxton v. Lietz, 139 N. Y. S. 46; Hall v. Bishop, 3 Daly, 109. Cf. *In re Horton*, 8 Q. B. D. 434; Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; Brooks v. Volunteer Harbor Assoc., 233 Mass. 168, 123 N. E. 511, 4 A. L. R. 1086; Harland v. Lilienthal, 53 N. Y. 438, 440. A corporation cannot engage in the practice of law, even though it employs, as agents for the purpose, members of the bar. Application of Cooperative Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A.

gineer,⁸³ teacher,⁸⁴ architect,⁸⁵ plumber,⁸⁶ or a scavenger⁸⁷ for whom the law makes a similar requirement. An innkeeper without a required license cannot recover for board and lodging.⁸⁸ Agreements for the conveyance of homestead property entered into by one only of a married couple have been held not only to afford no ground for specific enforcement to the extent of the right of the party contracting,⁸⁹ but to give no right to recover damages against him.⁹⁰ The object of the homestead statute it is thought would be defeated if such a liability were permitted, since it might be used as a means of wringing consent from an unwilling spouse. Whether the failure of a vendor of land to comply with a law requiring a plat first to be recorded deprives him of a right to recover the price has been differently decided.⁹¹ Recovery of rent has been denied to a landlord who failed to comply with a statute requiring the erection of fire-escapes on the leased building;⁹² and somewhat similarly, a plaintiff who had done threshing for the plaintiff with a machine not provided with appliances which the law required has been denied recovery for his services.⁹³ Some of the cases cited in this section are not always easy to distinguish from decisions

(N. S.) 551, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

⁸³ *The Pioneer*, Deady, 72.

⁸⁴ *Wells v. People*, 71 Ill. 532.

⁸⁵ *Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282. The court held that a valid contract might be made before a professional certificate was obtained though the services might not legally be rendered till it was obtained.

⁸⁶ *Johnston v. Dahlgren*, 31 N. Y. App. D. 204, 52 N. Y. S. 555.

⁸⁷ *De Wit v. Lander*, 72 Wis. 120, 39 N. W. 349.

⁸⁸ *Stanwood v. Woodward*, 38 Me. 192.

⁸⁹ *Mundy v. Shellabarger*, 161 Fed. 503, 88 C. C. A. 445; *Clark v. Bird*, 158 Ala. 278, 48 So. 359, 132 Am. St. Rep. 25; *Wheelock v. Countryman*, 133 Iowa, 289, 110 N. W. 598; *Thompson v. Foken*, 81 Nev. 261, 115 N. W. 770.

⁹⁰ *Mundy v. Shellabarger*, 161 Fed. 503, 88 C. C. A. 445; *Wheelock v. Countryman*, 133 Iowa, 289, 110 N. W. 598; *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018; *Silander v. Gronna*, 15 N. Dak. 552, 108 N. W. 544, 125 Am. St. 616; *Rosenthal v. Pleck*, 166 Wis. 598, 166 N. W. 445. *Cf. White v. Bates*, 234 Ill. 276, 84 N. E. 906.

⁹¹ That it does, see *Downing v. Ringer*, 7 Mo. 585; *Mason v. Pitt*, 21 Mo. 391. See also *Bemis v. Becker*, 1 Kan. 226. That it does not, *Pangborn v. Westlake*, 36 Ia. 546; *Strong v. Darling*, 9 Ohio, 201.

⁹² *Leuthold v. Stickney*, 116 Minn. 299, 133 N. W. 856, 39 L. R. A. (N. S.) 231, Ann. Cas. 1913 B. 405. The case is criticised in 74 Cent. L. J. 196.

⁹³ *Ingersoll v. Randall*, 14 Minn. 400.

where recovery was allowed on the ground that the purpose of the statute was to secure revenue.⁹⁴

§ 1767. Slight violations of statutory prohibitions.

Where the illegality of work done or of materials furnished under a contract is slight, or where judgment for the defendant will impose a severe forfeiture upon the plaintiff, courts are astute to discover ground for allowing the plaintiff to recover. Where the plaintiff contracted to construct a building of combustible materials within fire limits of the city in violation of an ordinance, the plaintiff was denied recovery;⁹⁵ but where a contract did not in its terms necessarily involve a violation of building laws, the fact that the plaintiff performed the contract with materials not allowed by law, was held not to preclude recovery.⁹⁶

§ 1768. Statutes purely for revenue.

Statutes sometimes impose a tax upon the transaction of certain business merely for the purpose of revenue, and not with any view of limiting or regulating the trade itself. If such

⁹⁴ See *infra*, § 1768.

⁹⁵ *Chimene v. Pennington*, 34 Tex. Civ. App. 424, 79 S. W. 63.

⁹⁶ *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041 (commented on, *supra*, § 1761). So recovery for a heating plant was allowed, though the plans had been disapproved by an official inspector whose certificate was required by law and the plaintiff was aware of this. *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863. In *Konig v. Mayor, etc., of Baltimore*, 128 Md. 465, 466, 97 Atl. 837, the court said: "Where a contract for the construction of a public filtration plant is entered into by a contractor and a municipality, honestly on both sides, and with no intention of violating the law, and yet the contract is in conflict with the city's charter powers, then, after the work is done, courts should not be zealous in depriving the contractor of his pay or

profits, when it is not shown or claimed that it was otherwise than well done, but shown to be of great benefit to the public, and when the taxpayer who brings the suit shows no injury to himself or to the city, and who after merely instituting such a suit used no diligence in bringing it to a conclusion. While ignorance of the law is not a valid excuse, contractors engaged in work all over the country cannot be supposed to keep familiar with every detail of municipal charters." In *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136, a contract by which plaintiff was required to procure certain letters and return them to the writer was held not illegal, though it was agreed that they should be transmitted through the mails and they were not mailable under the federal statutes. The court considered the method of return merely an incidental matter.

statutes merely impose a penalty for failure to comply with their provisions, contracts made without paying the requisite tax or obtaining the requisite license are not thereby made unenforceable. It is to be observed, however, that a statute, though purely for revenue, may, in order to make more certain the collection of revenue, absolutely prohibit and make unlawful all contracts or sales made without compliance with the law.⁹⁷ It is not always easy to determine whether a statute is purely for revenue and whether, if this is so, the statute prohibits and renders unlawful all contracts and sales made without satisfying its requirements. A number of cases arose under the United States Internal Revenue Laws passed during the Civil War, and it was generally held that these laws were merely for the purpose of revenue and did not render the contract itself unlawful.⁹⁸ But there are contrary decisions.⁹⁹ Instances may be found of other penal laws which have been held to be so exclusively for revenue as not to invalidate contracts made by persons who had not satisfied the statutory requirements.¹

⁹⁷ *Smith v. Mawhood*, 14 M. & W. 452; *Hall v. Bishop*, 3 Daly, 109; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230.

⁹⁸ *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Corning v. Abbott*, 54 N. H. 469; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Woodward v. Stearns*, 10 Abb. Pr. (N. S.) 395; *Rahter v. First Nat. Bank*, 92 Pa. St. 393; *Aiken v. Blaisdell*, 41 Vt. 655.

⁹⁹ *Creekmore v. Chitwood*, 7 Bush, 317; *Harding v. Hagar*, 60 Me. 340, 63 Me. 515; *Hall v. Bishop*, 3 Daly, 109; *Best v. Bauder*, 29 How. Pr. 489; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737.

¹ *Johnson v. Hudson*, 11 East, 180 (tobacco dealer without license); *Brown v. Duncan*, 10 B. & C. 93 (grain dealer who contrary to revenue regulations carried on a retail business within two miles of a distillery and did not have his name inserted in the excise book as one of the partners in the distillery); *Smith v. Mawhood*, 14 M. & W. 452 (tobacco dealer without a

license); *Harris v. Runnels*, 12 How. (U. S.) 79, 13 L. Ed. 901 (slave brought into Mississippi and sold there without formalities required by law); *Pangborn v. Westlake*, 36 Iowa, 546 (real estate sold before plat recorded as required by law); *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433 (traveling salesman sold goods without a license); *Strong v. Darling*, 9 Ohio, 201 (real estate sold before plat recorded); *Fairly v. Wappoo Mills*, 44 S. C. 227, 253, 22 S. E. 108, 118, 29 L. R. A. 215, 225 (sale by unlicensed broker). See also *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254.

In *Goldsmith v. Manufacturers' Liability Ins. Co.*, 132 Md. 283, 103 Atl. 627, the court approved the decision in *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539, 51 Am. St. 478, where an unlicensed peddler recovered the price of goods sold, and *Coates v. Locust*, 102 Md. 291, 62 Atl. 625, 5 Ann. Cas. 895, where the court upheld the contract of an unlicensed real estate broker, and said (103 Atl. 628):

§ 1769. Revenue statutes may invalidate contracts.

On a true construction generally even a revenue statute will be found to prohibit contracts made without satisfying the requirements of the law. There can certainly be no doubt that a contract or sale is illegal which, irrespective of the persons who take part in it, itself necessarily involves a breach of a revenue law—as a contract to sell liquor without paying the government tax;² or goods without payment of customs duties.³

§ 1770. Statutes for the protection of the parties.

Besides contracts in violation of a statute purely for revenue, there are other statutes which, though they make transactions in violation of them unenforceable, do not make them illegal,

"It is settled that, where the contract which the plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute, no court will lend its assistance to give it effect. *Cope v. Rowlands*, 2 M. & W. 149. By the great weight of authority a contract entered into by an unlicensed person, engaged in a trade, business, or profession required to be licensed, and made in the course of such trade, business or profession, cannot be enforced by such person, if it appears that the license required by the statute is, in whole or in part, for the protection of the public, and to prevent improper persons from engaging in such trade, business, or profession. If, however, the purpose of the statute is to raise revenue only, his right to enforce such contract is not defeated by the want of a license. *Elliott on Contracts*, § 287; *Cope v. Rowlands*, 2 M. & W. 149; *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; *Black v. Security Mutual Life Assoc.*, 95 Me. 35, 49 Atl. 51, 54 L. R. A. 939; *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230." In the case before it, however, the Maryland court denied the right of an unlicensed insurance agent to

recover for securing an insurance contract to be written by the defendant company, on the ground that the statute requiring the licensing of insurance agents was in part at least for the protection of the public. Cf. with the decisions cited in this section those cited *supra*, § 1766.

² *Creekmore v. Chitwood*, 7 Bush, 317; *Curren v. Downs*, 3 Mo. App. 468. In *North Carolina v. Vanderford*, 35 Fed. 376, it was held that a purchaser of whiskey without the stamps or brands required by law had no title which the law would protect and one who destroyed such whiskey was not criminally liable.

³ *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Reed*, 5 T. R. 599; *Condon v. Walker*, 1 Yeates, 483; *Mullen v. Kerr*, 6 U. C. Q. B. (O. S.) 171. In the case last cited a seller in the United States furnished false invoices for the purpose of evading the Canadian customs duties. Recovery of the price was not allowed. Such a case as *Holman v. Johnson*, 1 Cowp. 341, where the actual transaction involved no breach of law, but the seller knew the buyer intended to break the law thereafter, must be distinguished. See *infra*, § 1754.

properly speaking. These statutes are intended for the protection of the individual parties to a transaction, rather than for the general protection of the public. Such a statute is the Statute of Frauds; and such is the statute of the United States, requiring contracts with the government to be "reduced to writing and signed by the contracting parties with their names at the end thereof."³ A contract made without complying with the requirements of these statutes is as completely unenforceable as if it were illegal.⁴ But unlike illegal contracts, if the contract is carried out by either party, legal redress may be had for the non-performance of the other party.⁵ In the section of the Statute of Frauds relating to the sale of goods, part performance on either side is in terms made a satisfaction of the statute, and, therefore, after such part performance, recovery may be had on the contract itself.⁶ Under the Federal statute referred to, the contract remains unenforceable even after full performance by the seller, but as the provisions of the statute are held to be rather for the purpose of compelling governmental officials to comply with statutory directions for the formation of contracts than to render illegal a contract made otherwise, one who has performed a contract where the required formalities were not observed may recover on a *quantum meruit* or *quantum valebat*.⁷ A Michigan statute prohibiting doing business under an assumed name, though rendering a contract made in violation of it unenforceable by the offending party, does not preclude recovery thereon by one who innocently contracted with him.⁸

Reference may also be made here to *ultra vires* contracts of corporations.⁹ Lack of corporate capacity should not be confused with illegality.

³ U. S. Comp. St., § 6895.

⁴ See as to the Statute of Frauds, *supra*, § 527. As to the Federal statute referred to, see *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518; *South Boston Iron Co. v. United States*, 118 U. S. 37, 6 S. Ct. 928, 30 L. Ed. 69; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 24 S. Ct. 47, 48 L. Ed. 130.

⁵ See *supra*, §§ 533-537.

⁶ See *supra*, § 540.

⁷ *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 24 S. Ct. 47, 48 L. Ed. 130; *United States v. Andrews*, 207 U. S. 229, 243, 52 L. Ed. 185, 28 S. Ct. Rep. 100.

⁸ *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C. 697. See also *infra*, § 1773.

⁹ See *supra*, § 271.

§ 1771. Contracts of corporations doing business illegally.

The laws of the several States almost invariably prescribe certain conditions which must be satisfied before foreign corporations are authorized to do business within the State. Some of these statutes do not expressly provide that no action can be maintained upon contracts or sales made without satisfying the statutory conditions for doing business legally. Such statutes may either provide a specific penalty for doing business illegally or no consequence may be expressed in the statute as a result of violation of the law. A plausible argument has been made in some cases for a difference under statutes of these two types in regard to the effect upon the right of a corporation to sue upon a contract made by it, though it has not complied with that statute. It is suggested that when a penalty is expressly imposed it may fairly be regarded as the only consequence the law meant to impose for violation of the law, but that where the statute merely prohibits without penalty, the contract must be thereby made unenforceable or no punishment would follow a violator of the law.¹⁰ Though careful consideration must be given in each case to the words of the statute in question, the conflicting decisions of the courts do not seem, generally, based on very secure or sound distinctions. In a number of cases it has been held that recovery may be had upon contracts made in violation of laws prohibiting the transaction of business without observance of certain formalities, either with a penalty attached or without such a penalty.¹¹ Other authorities, however, hold that contracts

¹⁰ The statutes and decisions under them are collected in 50 Am. L. Rev. 641. See also Ann. Cas. 1914 A. 702, 24 L. R. A. 315n, 21 L. R. A. (N. S.) 707, 38 *id.* 210.

¹¹ *Northwestern Mutual Life Ins. Co. v. Overholt*, 4 Dill. 287; *Lasswell Land &c. Co. v. Lee, Wilson & Co.*, 236 Fed. 322, 149 C. C. A. 454; *Thomas Cusock Co. v. Ford*, 138 La. 1096, 71 So. 196; *Kendrick & Roberts, Inc., v. Warren Bros. Co.*, 110 Md. 47, 72 Atl. 461; *Rogers & Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580; *Kelly v. Rice-Blake Lumber Co.*, 167 Mass. 23, 44

N. E. 1090; *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855; *Gold Issue Mining &c. Co. v. Pennsylvania F. Ins. Co.*, 267 Mo. 524, 608, 184 S. W. 999 (Colorado law); *King v. National Mining Co.*, 4 Mont. 1, 1 Pac. 727; *G. Ober & Sons Co. v. Katsenstein*, 160 N. C. 439, 76 S. E. 476; *Wright v. Lee*, 4 S. Dak. 237, 55 N. W. 931; *Eastern Building Assn. v. Snyder*, 98 Va. 710, 37 S. E. 298; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Edison General Electric Co. v. Canadian Pacific Navigation Co.*, 8 Wash. 370, 36 Pac. 260, 24

made under such circumstances cannot be enforced.¹² So insurance companies have been denied the right to recover premiums when the business was done in violation of local statutes.¹³

§ 1772. Statutes expressly prohibiting recovery.

Modern statutes in regard to foreign corporations frequently expressly provide, in effect, that no action shall be maintainable on the contracts of the corporation if it has not satisfied the requirements of the statute. Even where such is the form of the statute, the contracts are generally held not void, but merely unenforceable until satisfaction of the statute. The statute may, therefore, be satisfied so as to make a contract or sale enforceable, after the contract or sale has been entered into, and in some States even after action has been brought upon it.¹⁴ In other jurisdictions a different result has been

L. R. A. 315, 40 Am. St. Rep. 910; Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925. See also Fritts v. Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. Ed. 317.

¹² Cullman County v. Vincennes Bridge Co., 251 Fed. 473, 163 C. C. A. 467; Dudley v. Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; Boulden v. Estey Organ Co., 92 Ala. 182, 9 So. 283; Dundee Mortgage & Trust Investment Co. v. Nixon, 95 Ala. 318, 10 So. 311; Cook v. Rome Brick Co., 98 Ala. 409, 12 So. 918; Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala.), 50 So. 341; Oliver Company v. Louisville Real Est. Co., 156 Ky. 628, 161 S. W. 570, 51 L. R. A. 293, Ann. Cas. 1915 C. 565; Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211; Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344; German-American Bank v. Smith (Mo. App.), 208 S. W. 878; Pennington v. Townsend, 7 Wend. 276; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743.

¹³ The Manistee, 5 Biss. 382; Cin-

cinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Franklin Ins. Co. v. Louisville & A. Packet Co., 9 Bush, 590; American Ins. Co. v. Stoy, 41 Mich. 385, 1 N. W. 877; American Ins. Co. v. Smith, 73 Mo. 368; Stewart v. Northampton Mutual Live Stock Ins. Co., 38 N. J. L. 436.

¹⁴ See Crefeld Mills v. Goddard, 69 Fed. 141; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 897, 58 C. C. A. 79; Wetzel & T. Ry. v. Tennis Bros. Co., 145 Fed. 458, 75 C. C. A. 266; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 534, 69 S. W. 572, 91 Am. St. Rep. 87; Sutherland-Innes Co. v. Chaney, 72 Ark. 327, 80 S. W. 152; Woolfort v. Dixie Cotton Oil Co., 77 Ark. 203, 91 S. W. 306, 113 Am. St. Rep. 139; Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S. W. 741; J. R. Watkins Medical Co. v. Martin, 132 Ark. 108, 200 S. W. 283 (cf. Hogan v. Intertype Corporation, 136 Ark. 52, 206 S. W. 58); California Savings & Loan Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; State v. American Book Co., 69 Kan. 1, 76 Pac. 411; John Deere Plow Co. v.

reached, and such bargains have been held permanently unenforceable by the offending corporation.^{13b} As has been said, however, the statutes in the various States are not identical and must in each case be examined. In a few States the statutes are expressed in such clear terms that no other inference is possible except that the contracts in question, if not void, at least are permanently unenforceable in the state courts.¹⁴

Wyland, 69 Kans. 255, 261, 76 Pac. 863; *Hamilton v. Reeves*, 69 Kans. 844, 76 Pac. 418; *Ryan Livestock & Feeding Co. v. Kelly*, 71 Kans. 874, 81 Pac. 470; *Boggs v. Kelly*, 76 Kans. 9, 90 Pac. 765; *Kendrick & Roberts, Inc., v. Warren Bros. Co.*, 110 Md. 47, 72 Atl. 461; *Strasbaugh v. Sanitary Can Co.*, 127 Md. 632, 640, 96 Atl. 863; *National Fertilizer Co. v. Fall River Savings Bank*, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420 [overruled by *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 120 S. W. 31, 23 L. R. A. (N. S.) 492]; *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706; *Neuchatel Asphalte Co. v. Mayor of New York*, 155 N. Y. 373, 49 N. E. 1043; *Hirschfeld v. McCullagh*, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1141; *Swift v. Little*, 28 R. I. 108, 65 Atl. 615; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 624, 32 Pac. 1073, 34 Pac. 774. See also *Singer Mfg. Co. v. Brown*, 64 Ind. 548; *Smith v. Little*, 67 Ind. 549.

^{13b} *Pittsburgh Construction Co. v. West Side Belt R. Co.*, 151 Fed. 125; *In re Conecuh Lumber Co.*, 180 Fed. 249; *Junction Placer Min. Co. v. Reed*, 28 Idaho, 219, 225, 153 Pac. 564; *Thompson Co. v. Whithed*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; *United Lead Co. v. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 78 N. E. 567; *Fruin-Colnon Contracting Co. v. Chatterton*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857; *Heileman Brewing*

Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441 (see also *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989); *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 120 S. W. 31, 23 L. R. A. (N. S.) 492; *Parke v. Mullett*, 245 Mo. 168, 149 S. W. 461; *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552; *Delaware River Quarry &c. Co. v. Bethlehem &c. Passenger Ry. Co.*, 204 Pa. 22, 53 Atl. 533; *Luce v. Cook*, 227 Pa. 224, 228, 75 Atl. 1098. See also *Peck-Williamson &c. Co. v. McKnight (Tenn.)*, 205 S. W. 419. In Missouri the fact that the contract on which suit is brought was made before the statute was complied with is not fatal to recovery if the necessary compliance took place before performance of the contract was begun. *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604; *Wulff v. Armstrong Cork Co.*, 250 Mo. 723, 157 S. W. 615; *Frazier v. Rockport*, 199 Mo. App. 80, 202 S. W. 266. Cf. *Tri-State Amusement Co. v. Forest Park &c. Co.*, 192 Mo. 404, 90 S. W. 1020; *Booth v. Scott (Mo. App.)*, 205 S. W. 633. But in Pennsylvania, recovery cannot be had under these circumstances. *Pittsburgh Construction Co. v. West Side Belt R. Co.*, 151 Fed. 125.

¹⁴ *Finch v. Zenith Furnace Co.*, 245 Ill. 586, 593, 92 N. E. 521; *Halsey v. Jewett Dramatic Co.*, 114 N. Y. App. Div. 420, 99 N. Y. S. 1122; *Cary-Lombard Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54.

Even though a claim of a corporation is said to be void under local law, it is sometimes said that any recognition of the claim after the corporation has complied with the law amounts to a binding ratification.^{14a}

Ratification as a means of making binding what was originally void for illegality or of creating a new obligation without consideration has been elsewhere criticized;^{14b} but after the corporation has complied with the law, there is no difficulty in an adoption by the parties of the terms of a bargain made before such compliance, if both parties thereby assume some detrimental performance.^{14c}

The New York statute requires a certificate from the Secretary of State to the effect that a foreign corporation has complied with certain prescribed conditions; and further provides that "No foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State unless prior to the making of such contract it shall have procured such certificate." Under this provision a contract made without obtaining the required certificate is not void,^{14d} and an action may be maintained upon it either in the courts of another State,^{14e} or in the Federal courts,^{14f} if jurisdiction can be obtained. In Vermont it has been held that under a statute prohibiting an action in the State by the offending corporation or by an assignee of the corporation or by any person claiming under such assignee or corporation, a receiver of the corporation might maintain an action;^{14g} and a

^{14a} *St. Louis Union Trust Co. v. Chicot County &c. Co.*, 127 Ark. 577, 193 S. W. 69. Part payments by the maker on account of a note, said to be void, were held to bind him to pay the remainder.

^{14b} *Supra*, §§ 1145, 1707; *infra*, § 1896.

^{14c} *Montgomery Traction Co. v. Montgomery Light & W. P. Co.*, 229 Fed. 672, 144 C. C. A. 82; *Turner Construction Co. v. Union Terminal Co.*, 229 Fed. 702, 144 C. C. A. 112, cert. denied, 241 U. S. 678, 60 L. Ed. 1233, 36 S. Ct. 727. See also *Lanz-Owen Co. v. Garage Equipment*

Mfg. Co., 151 Wis. 555, 139 N. W. 393.

^{14d} *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210.

^{14e} *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

^{14f} *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914 A. 699; *Johnson v. New York Breweries Co.*, 178 Fed. 513, 101 C. C. A. 639. See also under an Illinois statute, *Kawin v. American Colortype Co.*, 243 Fed. 317, 156 C. C. A. 97.

^{14g} *Underhill v. Rutland R. (Vt.)*, 98

holder in due course of a negotiable note originally given to such a corporation as part of its unauthorized business within the State, has almost universally been allowed to recover.¹⁴

§ 1773. Corporation illegally doing business is liable on its contracts, and may set them up in defence.

It should be added that even though a corporation does business in violation of a statute, and in consequence thereof becomes unable to enforce the obligation of the other party under a contract, it is not itself excused from liability upon its own obligation.¹⁵ The corporation, however, whether sued directly upon the contract or on other grounds, may set up by way of defence the terms of such a contract;¹⁶ and when the other party to the contract has repudiated his obligations the corpora-

Atl. 1017. But a purchaser of a negotiable note from the receiver of a non-complying corporation was denied recovery in *Hogan v. Intertype Corporation*, 136 Ark. 52, 206 S. W. 58.

¹⁴ *Lauter v. Jarvis-Conklin & Co.*, 85 Fed. 894, 29 C. C. A. 473; *McMann v. Walker*, 31 Colo. 281, 72 Pac. 1055; *Rhodes v. Elberton & Co. R. Co.*, 16 Ga. App. 426, 85 S. E. 611; *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873; *Northwest Thrasher Co. v. Riggs*, 75 Kans. 518, 89 Pac. 921; *Williams v. Cheney*, 3 Gray, 215; *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769; *National Bank of Commerce v. Pick*, 13 N. Dak. 74, 99 N. W. 63; *Edwards v. Hambly Fruit Products Co.*, 133 Tenn. 142, 180 S. W. 163; *State Bank of Chicago v. Holland*, 103 Tex. 286, 126 S. W. 564; *Carrollton Press Brick Co. v. Davis* (Tex. Civ. App.), 155 S. W. 1046. A contrary decision is *Hogan v. Intertype Corporation*, 136 Ark. 52, 206 S. W. 58.

¹⁵ *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, 23 S. Ct. 206, and authorities therein referred to. See also *Citizens' Nat. Bank v. Bucheit* (Ala. App.), 71 So.

82 (cert. denied 72 So. 1019); *Commercial Nat. Bank v. Jordan* (Fla.), 71 So. 760; *Ryerson v. Shaw*, 277 Ill. 524, 530, 115 N. E. 650; *Ross v. New South Farm & Home Co.*, 191 Ill. App. 353; *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 582, Ann. Cas. 1913 C. 697; *Gaul v. Keil & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069; *Morgan v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019. In *Ryerson v. Shaw*, 277 Ill. 524, 115 N. E. 650, it was held that any officer or agent of a corporation negotiating a contract in Illinois in its behalf while it had failed to comply with the local statute became personally liable on the contract. It would seem that an implied warranty of authorization was the true ground of liability. See *supra*, § 282.

¹⁶ Thus in *Jones v. Wells-Fargo Co.*, 83 N. Y. Misc. 145 N. Y. S. 601, an express company when sued was allowed to set up a limitation of liability contained in its contract. In *Carrier Engineering Corp. v. International Mfg. Co.*, 104 N. Y. Misc. 191, 171 N. Y. S. 641, the defendant corporation was even allowed to counterclaim.

tion may recover anything which it has transferred under the contract.^{15b}

§ 1774. Wrongful addition of “& Company” to name.

A related question arises under a New York statute which makes it a penal offence for one doing business to add the words “& Company” to his name as a business designation unless those words represent an actual partner or partners. It has been repeatedly held in construing the statute that a contract made by a person doing business in violation of the statute is binding and enforceable by him unless at least in the formation of the particular contract in question the defendant was deceived and relied on the credit of other partners supposed to exist.¹⁶

^{15b} *Lesswell Land & Lumber Co. v. Lee Wilson & Co.*, 236 Fed. 322, 149 C. C. A. 454 (Mo.). In *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435 (Minn.), a foreign corporation which without compliance with Minnesota statutes had made a conditional sale in Minnesota was allowed to reclaim the property on the buyer's default; and in *United Shoe Machinery Co. v. Ramlose*, 231 Mo. 510, 132 S. W. 1133, under similar circumstances the corporation was allowed to reclaim leased property. See further as to the right of a foreign corporation to bring action to protect its property: *Junction Placer Min. Co. v. Reed*, 28 Idaho, 219, 153 Pac. 564.

In *Denton v. Booth*, 202 Mich. 215, 168 N. W. 491, 2 A. L. R. 114, the court had under consideration the effect of a statute requiring registration of the names of the partners etc. on an action for the recovery of property the sale of which was under negotiation. The court said (p. 493): “Under the finding of the jury that no completed sale had been made it follows that there was no contract to rescind, and that when the demand was made for the return of the horses to the plaintiffs, defendants were holding them,

not under any title acquired by the antecedent negotiations of a sale, but simply pending those negotiations.

“Coming, then, to the provisions of the statute, can it be said that the members of a copartnership who have failed to comply with the law in filing a certificate in writing with the county clerk containing the required information as to the details of the copartnership are prevented from using the courts of the state for the purpose of redressing a wrong? We think not. It would, we think, hardly be claimed that, had defendants stolen the 13 horses from a barn of the plaintiffs, the plaintiffs, even though they had not filed the certificate required by law, could not have maintained an action in replevin or for a wrongful conversion of the animals. We are not unmindful of the fact that we have held (*Maurer et al. v. Greening Nursery Co.*, 199 Mich. 522, 526, 165 N. W. 861) that the members of a copartnership who have not complied with the act cannot prosecute an action under a contract. We do not think however, that the effect of this statute should be extended, it being in plain derogation of common-law rights.”

¹⁶ *Gay v. Seibold*, 97 N. Y. 472, 49

§ 1775. State power to control interstate commerce is limited.

It is a difficult question which cannot be fully considered here to determine what constitutes doing business within a State by a foreign corporation and the difficulty is increased especially in regard to sales of goods by the provision of the Federal Constitution which intrusts to the National Congress the regulation of interstate and foreign commerce. "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."¹⁷ Subject to this important qualification the matter is within the State's control. "The authority of the State to restrict the right of a foreign corporation to engage in business within its limits or to sue in its courts, so long as interstate commerce be not thereby burdened, is perfectly well settled."^{17a}

In construing State statutes regulating foreign corporations the courts endeavor to give such a construction as will be in accordance with the Federal Constitution, and if such a construction is not possible, the statutes themselves so far as they go beyond the permitted limits are unconstitutional and void.

Am. Rep. 533; *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 236 (see also 165 N. Y. 646, 59 N. E. 1130); *Taylor v. Bell & Bogart Soap Co.*, 18 N. Y. App. Div. 175, 45 N. Y. S. 939; *Loeb v. Firemen's Ins. Co.*, 68 N. Y. App. Div. 113, 79 N. Y. S. 510; *Vandergift v. Bertron*, 83 N. Y. App. Div. 548, 82 N. Y. S. 153; *Hopp v. McWhirter*, 107 N. Y. S. 823. See also in regard to the effect of a Michigan statute requiring the filing of a certificate stating certain details of partnership agreements: *Denton v. Booth*, 202 Mich. 215, 168 N. W. 491, 2 A. L. R. 114, stated *supra*, n. 15.

¹⁷ *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 190, 81 L. Ed. 650, 8 S. Ct. 737.

^{17a} *Interstate Amusement Company v. Albert*, 239 U. S. 560, 568, 60 L. Ed. 439, 36 S. Ct. 168, citing *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 655, 39 L. Ed. 297, 15 S. Ct. 207; *Bank of Augusta v. Earle*, 13 Pet. 519, 580, 591, 10 L. Ed. 274; *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 48 L. Ed. 225, 24 S. Ct. 92; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. Ed. 193, 35 S. Ct. 57.

§ 1776. Unconstitutional state prohibitions.

A foreign corporation, therefore, without conforming to local statutes may, except so far as is indicated in the following section, ship its goods into another State to purchasers; and may also solicit orders in such State by advertisement or by traveling salesmen.¹⁸ Upon similar principles a buyer for an unlicensed foreign corporation may solicit goods for shipment to his principal.¹⁹ But a corporation, although doing only interstate business within a State is not thereby rendered immune from service of process upon its agents.^{19a}

¹⁸ *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137, 5 S. Ct. 739; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862, 11 S. Ct. 213; *Stockard v. Morgan*, 185 U. S. 27, 46 L. Ed. 785, 22 S. Ct. 576; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. Ed. 565, 33 S. Ct. 294; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. Ed. 624, 38 S. Ct. 292; *Wagner v. Meakin*, 92 Fed. 76, 63 U. S. App. 477, 33 C. C. A. 577; *Atlas Engine Works v. Parkinson*, 161 Fed. 223; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145, 9 So. 136; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918; *Gunn v. White Sewing Mach. Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; *Kindel v. Beck, etc.*, Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58; *Ware Cattle Co. v. Anderson*, 107 Iowa, 231, 77 N. W. 1026; *Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819 (see also *Wilcox Cordage, etc., Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117); *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; *Maxwell v. Edena*, 65 Mo. App. 439; *Henderson Woolen Mills v. Edwards*, 84 Mo. App. 448; *McNaughton Co. v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610; *Zion Co-operative Mercantile Assn. v. Mayo*, 22 Mont. 100, 55 Pac. 915; *People v. Wemple*, 131

N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; *Wrought Iron Range Co. v. Campen*, 135 N. C. 506, 47 S. E. 658; *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 Ohio St. 217, 45 N. E. 197; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466, 43 Atl. 1092. But see *Elliott v. Parlin*, 71 Kans. 665, where the court relying on *Pennsylvania Lumbermen's Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. Ed. 810, 25 S. Ct. 483, apparently failed to notice that a State Legislature cannot impose the same restrictions on the sale of goods within its borders by citizens of other States that it can in regard to insurance contracts and other business which does not fall within the designation of interstate commerce. As Alaska is a territory and subject to federal law, a Congressional enactment making certain conditions for the right of a foreign corporation to do business within the territory is applicable though the only business transacted is interstate commerce. *Van Schuyver Co. v. Breedman*, 5 Alaska, 260.

¹⁹ *McNaughten v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610.

^{19a} *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479.

It is beyond the power of a State to prohibit a foreign corporation which is a regular means of interstate commerce (as a telegraph company) from carrying on such commerce within its borders, even for non-payment of legitimate taxes.²⁰ Nor can a State impose a tax on any foreign corporation which operates as a direct burden on interstate commerce;²¹ nor can such a corporation be prohibited from maintaining an action in the Federal courts;²² nor required to file statements of its condition as a preliminary to purely interstate business.²³

§ 1777. Police power of the states.

The only qualification of the exclusive power of Congress in dealing with interstate commerce is imposed by the police power of the several States. By virtue of this power deceptive or dangerous and unhealthful goods may be excluded, but the test of what is deceptive or dangerous and unhealthful does not depend on the opinion of the State Legislature. Thus formerly intoxicating liquors could not be excluded,²⁴ without the consent of Congress;²⁵ oleomargarine, as such, cannot be shut out,²⁶ but artificially colored oleomargarine may be;²⁶ and a State may limit or prohibit the sale of goods, such as cigarettes (which, though legitimate articles of commerce and not to be classed with diseased meat or decayed fruit, are yet thought by many

²⁰ *Western Union Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; *Williams v. Talladega*, 226 U. S. 404, 415, 57 L. Ed. 275, 33 S. Ct. 116.

²¹ *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 48 L. Ed. 134, 24 S. Ct. 39; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 59 L. Ed. 265, 35 S. Ct. 99; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295, 38 S. Ct. 126; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. Ed. 624, 38 S. Ct. 292.

²² *David Lupton's Sons Co. v. Automobile Co.*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435.

²³ *Buck Stove & Range Co. v.*

Vickers, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189.

²⁴ *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 S. Ct. 664.

²⁵ In 1913, by the Webb-Kenyon Law Congress gave permission to States to prohibit importation of intoxicating liquors; and the validity of this statute has been sustained. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 S. Ct. 180; *Seaboard Air Line Ry. v. North Carolina*, 245 U. S. 298, 62 L. Ed. 299, 38 S. Ct. Rep. 96.

²⁶ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 757.

²⁷ *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 15 S. Ct. 154.

to be harmful), after they have been taken from the original packages or are no longer in the hands of the original buyer, provided no discrimination is made between goods which are imported and those produced within the State.²⁷ Game laws prohibiting the possession and sale of game at certain seasons including that taken in other States or in foreign countries are also constitutional.²⁸ A State may require a formula to be given by the seller of concentrated food for stock;²⁹ and the use of trading stamps may be regulated.³⁰

§ 1778. Illustrations of protected interstate commerce.

Subject to the slight qualification thus imposed by the police power, a corporation in one State may not only sell its goods for delivery in another State but collect the price in the latter State.³¹ And goods may be sent to a factor in another State for sale on commission, the title to remain in the foreign corporation until the goods are sold, without thereby violating statutes prohibiting the doing of business within the State by unlicensed foreign corporations.³² And even though a corporation of one State maintain a storehouse in another, to which goods are shipped as ordered and from which they are distributed, any laws of the latter State not justifiable under the police power, cannot affect its business, for it is interstate commerce.³³ But if it is an agent's duty to sell and deliver, as a resident agent of a foreign corporation, it seems that the latter

²⁷ *Austin v. Tennessee*, 179 U. S. 343, 44 L. Ed. 224, 21 S. Ct. 132.

²⁸ *New York v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 S. Ct. 10.

²⁹ *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 S. Ct. 715; *Standard Food Co. v. Wright*, 225 U. S. 540, 56 L. Ed. 1197, 32 S. Ct. 784.

³⁰ *Rast v. Van Deman*, 240 U. S. 342, 60 L. Ed. 679, 36 S. Ct. 370.

³¹ *Kirven v. Virginia, etc., Co.*, 145 Fed. 288, 76 C. C. A. 172; *New York, etc., Co. v. Williams*, 102 N. Y. App. Div. 1, 92 N. Y. S. 808, *affd.*, 184 N. Y. 579, 77 N. E. 1192. And see cases cited, *supra*, n. 18. In *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 S. Ct. 57, 59 L. Ed. 193, the court held in-

valid so far as it applied to an action for the price of goods sold in interstate commerce a statute of South Dakota which required as a condition of the maintenance of an action by a foreign corporation in the courts of the State, appointment of an agent on whom process in any suit might be served, the filing of a copy of this appointment and of its charter with the Secretary of State and the payment of a fee of \$25.

³² *Atlas Engine Works v. Parkinson*, 161 Fed. 223.

³³ *Caldwell v. North Carolina*, 187 U. S. 622, 57 L. Ed. 336, 23 S. Ct. 229; *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616.

is not engaged in interstate commerce, but is doing business within the State, and is, therefore, subject to local laws.³⁴ And the installation of machinery or other goods may be so far a distinct matter from the interstate sale as to subject a corporate seller undertaking the work to local laws imposing conditions on the transaction of business within the State.^{34a}

§ 1779. Where some things promised are illegal, and some legal, the latter may be enforced if consideration is legal.

It was early decided,³⁵ that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. This is the simplest form of the problem of partly illegal contracts. If legal consideration has actually been given and a unilateral contract formed, or if the promises are under seal and binding without consideration, the rule thus early established has never been questioned.³⁶ For the same reason

³⁴ *John Dere Plow Co. v. Wyland*, 69 Kans. 255, 76 Pac. 863; *Commonwealth v. Read Phosphate Co.*, 113 Ky. 32, 33 Ky. L. Rep. 2284, 67 S. W. 45; *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404; *Vaughan Machine Co. v. Lighthouse*, 64 N. Y. App. Div. 138, 71 N. Y. S. 799; *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53. See also *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, 23 S. Ct. 206.

^{34a} In *Browning v. Waycross*, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 828, a foreign unlicensed corporation contracted to sell and install lightning rods to be shipped into the State. It was held that the "affixing of lightning rods to houses was the carrying on of a business of a strictly local character peculiarly within the exclusive control of state authorities." See also *Phoenix Nursery Co. v. Trostel*, 166 Wis. 215, 164 N. W. 995, and a note collecting decisions in L. R. A. 1917 C. 1012.

³⁶ *Pigot's Case*, 11 Coke, 26b, 27b.

³⁵ *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 530; *McCullough v. Virginia*, 172 U. S. 102, 115, 43 L. Ed. 382, 19 S. Ct. 134; *Western Union Tel. Co. v. B. & S. W. Ry. Co.*, 3 McCrary, 130; *McCullough v. Smith*, 243 Fed. 823, 156 C. C. A. 335; *Edgar v. Ames*, 255 Fed. 835, 167 C. C. A. 163; *Sims v. Alabama Brewing Co.*, 132 Ala. 311, 31 So. 35; *Sales-Davis Co. v. Henderson Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527; *Denson v. Alabama &c. Iron Co. (Ala.)*, 73 So. 525; *Wells v. Vandalia R. Co.*, 56 Ind. App. 211, 103 N. E. 360; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655; *Miller v. Atchison &c. R.*, 97 Kans. 782, 156 Pac. 780; *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522; *Edleson v. Edleson*, 179 Ky. 300, 200 S. W. 625; *Presbury v. Fisher*, 18 Mo. 50; *Faist v. Dahl*, 86 Neb. 669, 126 N. W. 84; *Erie Ry. Co. v. Union L. & E. Co.*, 35 N. J. L. 240; *Leavitt v. Palmer*, 3 N. Y. 19, 37, 51 Am. Dec. 333; *Ohio v. Board of Education*, 35 Ohio St. 519, 527; *Pennsylvania Co. v. Wents*, 37 Ohio St. 333, 339. Cf. *Santa Clara*

where one of two things is promised in the alternative, and one is lawful and the other unlawful, the lawful promise may be enforced.³⁷ But a qualification must be added to the broad statement of the rule. If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced.³⁸ Perhaps the commonest application of the principle involved in the partial enforcement of an unreasonable contract is restraint of trade. If the covenants of such a contract can be divided and one division is within the limits allowed by law, it may be enforced, although the rest of the covenant extends the proposed restraint beyond permissible limits.³⁹

§ 1780. Illegal consideration.

The problem of partly illegal contracts quite commonly arises where it is not a promise which is illegal but part of the consideration. Where there is a single consideration for one or more promises and any part of the consideration is illegal, the promises are wholly unenforceable.⁴⁰ And the same result

Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463.

³⁷ *Hanauer v. Gray*, 25 Ark. 350, 99 Am. Dec. 226.

³⁸ *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918 E. 247; *Pulp Wood Co. v. Green Bay Paper &c. Co.*, 168 Wis. 400, 170 N. W. 230.

³⁹ *Price v. Green*, 16 M. & W. 346; *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Haynes v. Doman*, [1899] 2 Ch. 13, 24; *Oregon S. N. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Western Union Tel. Co. v. B. & S. W. Ry. Co.*, 3 McCrary, 130; *Dean v. Emerson*, 102 Mass. 480; *Pelts v. Eichele*, 62 Mo. 171; *Lange v. Werk*, 2 Ohio St. 520; *Smith's Appeal*, 113 Pa. St. 579, 6 Atl. 251. Compare *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606. See also *United States*

v. Bradley, 10 Pet. 343, 9 L. Ed. 155; *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 530.

⁴⁰ *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 250; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117, 19 S. Ct. 839; *Haselton v. Sheckells*, 202 U. S. 71, 50 L. Ed. 939, 26 S. Ct. 567; *Western Indemnity Co. v. Crafts*, 240 Fed. 1, 153 C. C. A. 37; *Pettit's Admr. v. Pettit's Distributees*, 32 Ala. 288; *Bryant Lumber Co. v. Fourche*, 124 Ark. 313, 187 S. W. 455; *Railroad Co. v. Taylor*, 6 Colo. 1; *Giles v. De Cow*, 30 Colo. 412, 70 Pac. 681; *Chandler v. Johnson*, 39 Ga. 85; *Ramsay's Est. v. Whitbeck*, 183 Ill. 550, 56 N. E. 322; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Koster v. Seney*, 99 Iowa, 584, 68 N. W. 824; *Gerlach v. Skinner*, 34 Kans. 86, 8 Pac. 257, 55 Am. Rep. 240; *Kimbrough v. Lane*, 11 Bush, 556; *Amer-*

must follow even though there are several considerations, some of which are legal, if the legal considerations are not apportioned to corresponding promises, for otherwise it is impossible to maintain an action on any of the promises without basing it to some degree upon the illegal portion of the consideration.⁴¹ Where, however, not only is the consideration separable into legal and illegal portions, but also the promises are correspondingly apportioned; that is, where the contract may properly be called divisible, it has been held that recovery may be had upon the promises which are supported by the legal portions of the consideration; and subject to a qualification similar to that stated in the preceding section, this is sound.⁴²

§ 1781. Sale of several things at separate prices.

This doctrine has been especially applied in the law of sales to cases where several lots of goods have been sold and separate prices affixed to each lot, and as to some of the goods sold, the transaction has been legal, but as to others, illegal. If wholly

ican Mercantile Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 468; Perkins v. Cummings, 2 Gray, 268; Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407, 170 Mass. 560, 49 N. E. 1020; Kennedy v. Welch, 196 Mass. 592, 596, 83 N. E. 11; B oylston Bottling Co. v. O'Neill, 231 Mass. 498, 121 N. E. 411; Snider v. Willey, 33 Mich. 483; Bixby v. Moor, 51 N. H. 402; Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; Saratoga County Bank v. King, 44 N. Y. 87; Foley v. Speir, 100 N. Y. 552, 3 N. E. 477; Butterick Pub. Co. v. Mistrot-Munn Co., 217 N. Y. 678, 112 N. E. 1055; Cahill v. Gilman, 84 N. Y. Misc. 372, 146 N. Y. S. 224; Covington v. Threadgill, 88 N. C. 186; Widoe v. Webb, 20 Ohio St. 431, 435, 5 Am. Rep. 664; McQuade v. Rosecrans, 36 Ohio St. 442; Stanard v. Sampson, 23 Okla. 13, 99 Pac. 796; Pearce v. Wil-

son, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; Sullivan v. Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110; Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288; Lloyd v. Robinson (Tex. Civ. App.), 160 S. W. 128; Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712. Cf. Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480. And see Royal Exchange Assurance Corporation v. Sjörforsakrings Aktiebolaget Vega, [1901] 2 K. B. 567, 573.

⁴¹ Mission Brewing Co. v. Rickert (Cal. App.), 179 Pac. 720; Thacker v. Smith (Kan.), 175 Pac. 983; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625; Moss v. Copelof, 231 Mass. 513, 121 N. E. 508.

⁴² Henshaw v. Smith, 102 Kan. 599, 171 Pac. 616; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625; Barriere v. Depatie, 219 Mass. 33, 35, 106 N. E. 572; Shevalier v. Doyle, 88 Neb. 560, 130 N. W. 417; and see cases in the following section.

separate agreements are made for each article there is no difficulty in enforcing the legal sales.⁴³ It may be supposed, however, that but a single bargain has been made for a number of articles but a different price has been affixed to each. It might seem at first sight that no recovery could be allowed here even for the legal items of the bargain, for it cannot be assumed that the defendant would have paid the same price for some of the goods if the whole transaction was not to be carried out, nor that the seller would otherwise sell them for the same price. If there were no question of illegality in the case, it cannot be doubted that the buyer might refuse to take part of the goods if the seller refused to give all and if part were taken on the assumption that the rest were to follow, the buyer might return what he had received.⁴⁴ Nevertheless, it has been held that the seller may recover the price of the articles legally sold,⁴⁵ and it seems rightly; for by the delivery of each of the articles at a specified price a separate debt arises for the price of that article, and a count for goods sold and delivered could be maintained without further evidence. It is not open to the defendant to set up that owing to an illegal contract the price was fixed at a different figure than it otherwise might have been. The illegal contract will serve no better as a defence than as a cause of action. But where the articles legally sold were merely incidental to the execution of an illegal purpose, no recovery even for them can be had.⁴⁶

§ 1782. Partly illegal bilateral contracts.

In the preceding sections reference has been made to unilateral contracts exclusively. In bilateral contracts a further element complicates the problem. In such contracts the consideration must be good on both sides. If, therefore, a promise is

⁴³ *Towle v. Blake*, 38 Me. 528; *Goodwin v. Clark*, 65 Me. 280; *Robinson v. Green*, 3 Metc. 159; *Rundlett v. Weeber*, 3 Gray, 263; *Holt v. O'Brien*, 15 Gray, 311; *Chase v. Burkholder*, 18 Pa. St. 48.

⁴⁴ See *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.

⁴⁵ *Boyd v. Eaton*, 44 Me. 51, 69

Am. Dec. 83; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Carleton v. Woods*, 28 N. H. 290.

⁴⁶ *Wirth v. Roche*, 92 Me. 383, 42 Atl. 794 (bottles in which beer was illegally sold); *Bligh v. James*, 6 Allen, 570 (casks in which liquor was illegally sold).

made by A to do something lawful while B promises to do two things, one lawful and one unlawful, there can be no recovery on either side. B cannot recover because part of the consideration for the defendant A's promise is unlawful. A cannot recover even on B's lawful promise because since his own promise is unenforceable, it is itself insufficient consideration for B's promise.^{46a} If, however, A performs his promise, the situation becomes the same as if the contract had originally been unilateral, and A can recover on B's lawful promise.⁴⁷ If the legal portion of a bilateral contract is severable, legal promises on one side being wholly supported by legal promises on the other, and the illegal portion of the contract does not go to its essence, the legal part may be enforced.⁴⁸

§ 1783. Illegal and insufficient consideration distinguished.

Care must be taken to distinguish illegal consideration from consideration which is merely bad for insufficiency. Consideration of the latter sort will not invalidate a contract, though not of itself sufficient to support a promise. If other consideration exists and there is mutual assent to the bargain, recovery may be had.⁴⁹

^{46a} *Stacy v. Brothers* (Conn.), 107 Atl. 613; *Thacker v. Smith*, 103 Kan. 641, 175 Pac. 783; *Moss v. Cope-
lof*, 231 Mass. 513, 121 N. E. 508.

⁴⁷ See *Kearney v. Whitehaven Col-
liery Co.*, [1893] 1 Q. B. 700; *More v.
Bonnet* 40 Cal. 251, 6 Am. Rep. 621;
Siddall v. Clark, 89 Cal. 321, 26 Pac.
829; *Hynds v. Hays*, 25 Ind. 31; *Bis-
hop v. Palmer*, 146 Mass. 469, 16 N. E.
299, 4 Am. St. Rep. 339; *Fishell v. Gray*,
60 N. J. L. 5, 37 Atl. 606; *Lindsay v.
Smith*, 78 N. C. 328, 24 Am. Rep. 463,
12 Harv. L. Rev. 424. See also an
article by Prof. William P. Rogers, 17
Yale L. Jour. 338. It has been sug-
gested (*Wald's Pollock, Contracts*
[3d ed.], 484), that if A, even before
performing himself, elected to sue on
B's lawful promise and take judg-
ment upon it alone, this would oper-
ate as an assent by A to an agreement

to perform his promise in return for
B's lawful promise, thereby binding
both parties. Perhaps A's consent
should rather be treated as a question
of fact in each case. If not liable on
the contract he should be quasi-
contractually.

⁴⁸ *Edgar v. Ames*, 255 Fed. 835,
167 C. C. A. 163; *Achen v. Atchison
&c. Ry. (Kans.)*, 175 Pac. 980; *Huber
v. Culp*, 46 Okla. 570, 149 Pac. 216.

⁴⁹ See *Pierce v. Pierce*, 17 Ind. App.
107; *King v. King*, 63 Ohio St. 363,
369, 59 N. E. 111, 52 L. R. A. 157, 81
Am. St. Rep. 635. It is to be observed
that the portion of the consideration
which is insufficient as such must,
nevertheless, be given in order to
make the bargain enforceable. Other-
wise a bargain would be enforced to
which the defendant had never as-
sented.

§ 1784. Notes and accounts stated.

If a note is given in settlement of an account, some items of which are legal and some illegal, though the creditor may disregard the note, if dishonored by the maker, and sue upon the legal items of the account, the note itself is wholly unenforceable.⁵⁰ The same rule applies to an account stated. Though where the parties fix on an agreed sum as that which is due, the amount is recoverable even if it is not the exact amount for which a court would have given judgment in a suit on the original liability, yet if the basis of the account stated is in part illegal items, no recovery can be had upon it, and the creditor must base his action on the legal items of the account.⁵¹ A note in part payment of an account is enforceable if the amount of the note is less than the amount of the legal items of the account.⁵² Renewal notes are subject to the same infirmities as those affecting the original note.⁵³

§ 1785. Recovery of profits of an illegal transaction from a partner or agent.

As a general principle it is certainly true that no accounting or recovery of profits can be had by one party to an illegal transaction against another. The classical case is that of a bill brought by a highwayman to recover a share of the plunder from his confederate,⁵⁴ and the principle in less dramatic form has often been applied subsequently.⁵⁵ On the other hand, it is

⁵⁰ *Moulis v. Owen*, [1907] 1 K. B. 746; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Ayer v. Younker*, 10 Colo. App. 27, 50 Pac. 218; *Johnson v. McMillon*, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918 C. 244; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Cotten v. McKensie*, 57 Miss. 418; *Carleton v. Woods*, 28 N. H. 290; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. But see the contrary decision of *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837. See also *Daniel*, *Neg. Inst.*, §§ 195 *et seq.*

⁵¹ *Cocking v. Ward*, 1 C. B. 858, 877; *Kennedy v. Broun*, 13 C. B. (N. S.) 677; *Dunbar v. Johnson*, 108 Mass.

519. But see *Davis v. Fleahman*, 232 Pa. 409, 81 Atl. 412, 245 Pa. 224, 91 Atl. 489.

⁵² *Warren v. Chapman*, 105 Mass. 87.

⁵³ See *supra*, §§ 1675, 1688.

⁵⁴ *Everet v. Williams*, 9 Law. Qu. Rev. 197. This case which had previously been supposed to be fictitious was there proved to be an actual decision.

⁵⁵ *Sykes v. Beadon*, 11 Ch. D. 170, 195; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117, 19 S. Ct. 839; *Chicago, Milwaukee, etc., R. Co. v. Wabash, etc., R. Co.*, 61 Fed. 993, 9 C. C. A. 659; *Shaffner v. Pinchback*,

not infrequently said that misappropriation by an agent cannot be permitted though the agent with his principal's authority was engaged in an unlawful enterprise;⁵⁶ and the Circuit Court of Appeals has said in allowing recovery of money advanced by a foreign corporation doing business without complying with local statutory requirements, "One can not make a shield of a void contract to rob an associate,"⁵⁷ and such a corporation has been allowed to recover from its agents money collected by them.^{57a} Doubtless if a contract is merely void or unenforceable for any other reason than for illegality this is

133 Ill. 410, 24 N. E. 410, 23 Am. St. Rep. 624; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Martin v. Seabaugh*, 128 La. 442, 54 So. 935; *Snell v. Dwight*, 120 Mass. 9; *Duane v. Merchants' Legal Stamp Co.*, 227 Mass. 466, 116 N. E. 873, 231 Mass. 113; 120 N. E. 370, cert. denied 39 S. Ct. 388; *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. 667; *Barry v. Mulhall*, 162 N. Y. App. Div. 749, 147 N. Y. S. 996; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837; *Watson v. Fletcher*, 7 Gratt. 1; *Kennedy v. Lonaugh*, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913 E. 133. But see *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Kelerher v. Henderson*, 203 Mo. 498, 101 S. W. 1083; *Sharp v. Taylor*, 2 Phil. Ch. 801; *Mitchell v. Fish*, 97 Ark. 444, 134 S. W. 940; *Lewis v. Alexander*, 51 Tex. 578; *Haymond v. Hyer*, 80 W. Va. 594, 92 S. E. 854, L. R. A., 1918 B. 1.

⁵⁶ *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, 1 B. & P. 296; *Catts v. Phalen*, 2 How. 376, 11 L. Ed. 306; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473; *Allen v.*

Forbes, 186 Fed. 276, 108 C. C. A. 322; *Norton v. Blinn*, 39 Ohio St. 145; *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887; *Hertzer v. Geigley*, 196 Pa. 419, 46 Atl. 366, 79 Am. St. Rep. 724; *Baldwin v. Potter*, 46 Vt. 402; *Mechem, Agency* (2d ed.), § 1332. But see *Carey v. Myers*, 92 Kan. 493, 141 Pac. 602, L. R. A. 1916 B. 1056; *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989; *Bauer v. Fabel*, 221 Pa. 156, 70 Atl. 558.

⁵⁷ *Lasswell Land, etc., Co. v. Lee Wilson & Co.*, 236 Fed. 322, 330, 149 C. C. A. 454.

^{57a} *United States Express Co. v. Lucas*, 36 Ind. 361; *Penn Mutual L. Ins. Co. v. Brattleley*, 66 Hun. 635, 21 N. Y. S. 876, affd., without opinion, 142 N. Y. 660, 37 N. E. 460. See also *Hovey's Estate*, 198 Pa. 385, 48 Atl. 311. But in *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989, recovery was denied on a note made by an agent to his principal, a foreign corporation, the agent being allowed to show that the note was for the proceeds of sales made by him on behalf of the corporation which had not complied with the requirements of Minnesota for doing business in the State. The court regarded the case as indistinguishable from cases involving illegality of other kinds.

true;⁵⁸ and in many jurisdictions, a foreign corporation which fails to comply with the required formalities for obtaining a license to do business, is held to be subjected thereby to such penalties only as the statute prescribes.^{58a}

§ 1786. Criticism of suggested distinctions between partner and agent.

But in the case of a contract objectionable because of illegality the general principle is that one may make use of the defence in order to rob an associate,⁵⁹ and it is difficult to draw a distinction between an accounting between partners in an illegal enterprise and a recovery by a principal of illegal gains from his agent. Certainly one who employs an agent to rob a till cannot recover the contents thereof which the agent acquires in the course of his employment. If recovery is to be allowed by either partner or principal in any case, it must be where the illegality is of so slight or venial a character that it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gain the benefit of an illegal transaction.

It has sometimes been suggested that where a new contract has been made regarding the proceeds of an illegal transaction or a new investment of them, an action will lie;⁶⁰ but the soundness of this as a general principle may be questioned.^{60a} If the illegality is slight and does not involve great moral turpitude, a court may permit such a distinction; but a partner or agent in housebreaking, for instance, would surely not be liable to account for the proceeds of stolen silver any more than for a share of the silver itself. Nor would an agreement between the parties as to their respective shares made subsequently to the felony help the plaintiff's case.

⁵⁸ Therefore it is not surprising to find in view of the English doctrine concerning wagers, that one who is employed to make bets and receive winnings, cannot successfully defend an action for them brought by his employer. *De Mattos v. Benjamin*, 63 L. J. Q. B. 248.

^{58a} See *supra*, §§ 1771-1779.

⁵⁹ See cases cited, *supra*, n. 55.

⁶⁰ *Davis v. Fleshman*, 232 Pa. 409, 81 Atl. 412, 245 Pa. 224, 91 Atl. 489. See also *Missouri Fidelity &c. Co. v. Art Metal &c. Co.*, 242 Fed. 630, 155 C. C. A. 320.

^{60a} See *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989, stated *supra*, n. 57a.

A distinction also has been suggested where because of the illegality no title passed to a co-contractor under an illegal contract. There it is argued that the title still remaining in the original owner, he may reclaim possession by legal process. But it is submitted that here too the result can be justified only where the illegality is not extreme. Public policy and illegality would be of merely technical nature if they turned on a distinction between entrusting title and entrusting possession in pursuance of an illegal purpose, and would become almost absurd if a wrong-doer was denied recovery where title had passed to the defendant but was allowed recovery where he had tried to pass title, and where the only reason he failed was because his own illegal purpose made ineffectual the usual method of transfer.

Still further it is said that "if the duty to account arises out of or was part of the illegal transaction itself, so that to require an accounting involves the recognition and enforcement of the illegal contract" no recovery will be allowed.⁶² If the principal did not authorize the agent's unlawful acts, the law may well prefer to trust the principal rather than the agent to make proper disposition of the agent's improper acquisition; but this distinction will not explain the cases; and if the hypothesis is that the agent's conduct was authorized by the principal, it will be equally true in every case that enforcing the duty to account recognizes the illegality; and any distinction between partners and principal and agent becomes unsatisfactory.

§ 1787. Rescission of executed illegal contracts.

It is doubtless possible for the law to make even an attempted executed sale with transfer of possession so absolutely void that no title passes to the buyer; but the mere fact that a sale is against public policy or in violation of statute does not have this effect. The distinction is less important than it might seem at first sight, because even though the buyer is held to acquire no title, the seller on account of his illegality is precluded from attacking the conveyance, and if no other person has a claim

⁶¹ *United Shoe Machinery Co. v. Ramlose*, 231 Mo. 508, 529, 132 S. W. 1133; *British-American Portland Cement Co. v. Citizens' Gas Co.*, 255

Mo. 1, 164 S. W. 468. See also *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C. 697.

⁶² *Mechem, Agency*, § 1332.

to the goods or other property conveyed, the buyer's possession necessarily remains undisturbed. Whatever the reason for the result, the result itself is clear.⁶³ Though the seller is thus unable to rescind where the property and possession have both been parted with, it seems that if possession is retained even though the property has passed, the seller may virtually rescind the transaction. For the buyer cannot establish a right to the goods, and by virtue of his former ownership the seller can maintain an undisturbed possession against the world.⁶⁴ Where money has been paid for illegal services which have been rendered, the payment cannot be reclaimed;⁶⁵ and on the other

⁶³ *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Dent v. Ferguson*, 132 U. S. 50, 33 L. Ed. 242, 10 S. Ct. 13; *St. Louis, V. & T. H. R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 407, 36 L. Ed. 738, 12 S. Ct. 953; *Savings, etc., Trust Co. v. Bear Valley Co.*, 112 Fed. 693, 702; *Dunkin v. Hodge*, 46 Ala. 523; *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17; *Branhan v. Stallings*, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213; *Johnston v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180; *Thompson v. Cummings*, 68 Ga. 124; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592, 598, 22 Am. Rep. 122; *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; *Setter v. Alvey*, 15 Kans. 157; *Ratcliffe v. Smith*, 13 Bush. 172; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Traders' Nat. Bank v. Steere*, 165 Mass. 389, 43 N. E. 187; *Moore v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723; *Hooker v. De Palos*, 28 Ohio St. 251; *Perkins v. Savage*, 15 Wend. 412; *Booker v. Wingo*, 29 S. Car. 116, 7 S. E. 49; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879; *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805; *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629; *Miller v. Larson*, 19 Wis. 463; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638. But see *Savings Bank v.*

National Bank, 38 Fed. 800; *Harrison v. Hatcher*, 44 Ga. 638; *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531; *Perry v. Berger*, 85 Neb. 753, 124 N. W. 133; *Lockren v. Rustan*, 9 N. Dak. 43, 81 N. W. 60; *Drinkall v. Movius Bank*, 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; *Still v. Bussell*, 60 Vt. 478, 12 Atl. 209; *Heckman v. Swartz*, 50 Wis. 267, 6 N. W. 891. Some of the foregoing cases relate to real estate, and some to personality. There seems no reason to distinguish them in principle. A dictum of Martin, B., in *Pearce v. Brooks*, L. R. 1 Ex. 213, 217, to the effect that an executed illegal sale of chattels might be rescinded seems clearly erroneous, and opposed to the view ordinarily taken in England. See *Taylor v. Chester*, L. R. 4 Q. B. 309, 311, 135. In *United Shoe Machinery Co. v. Ramlose*, 231 Mo. 508, 132 S. W. 1133, the court sustained an action of replevin by the lessor of certain shoe machinery to recover it from the lessee though the lease was illegal.

⁶⁴ *Wald's Pollock, Contracts* (3d ed.), 488; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879. See also *supra*, § 1704.

⁶⁵ *Fairweather v. McCulloch*, 43 D. L. R. 525, and see cases cited in the following section.

hand one who has received illegal consideration or performed in whole or in part illegal acts stipulated for in a contract cannot recover reasonable compensation for what he has done but if a contract is prohibited merely for the protection of a class of persons, such a person may waive the prohibition or his acts estop himself from asserting the invalidity, in which case the court will authorize a recovery on *quantum meruit*, *quantum valebat*.⁶⁷ To the general rule that an executed transfer cannot be set aside, there are, however, exceptions which may be included either under the head of an unexecuted illegal purpose or of parties not *in pari delicto*.

§ 1788. Rescission allowed when illegal agreement unexecuted.

Where money has been paid or goods have been delivered in part performance of an illegal agreement, the money or payment for the goods may be recovered so long as the illegal part of the agreement is wholly unexecuted,⁶⁸ unless the whole agreement involved serious moral turpitude. A common application of this doctrine has already been considered with reference to wagers.⁶⁹ On the same principle recovery may be had for lawful services though the contract required unlawful services also to be rendered, if the plaintiff withdrew from the transaction before entering upon the unlawful portion of the contract.⁷⁰

⁶⁷ *Norbeck & Nicholson Co. v. State*, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916 A. 229, and see *supra*, §§ 1703, 1740.

⁶⁸ *Norbeck & Nicholson Co. v. State*, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916 A. 229.

⁶⁹ *Tappenden v. Randall*, 2 B. & P. 467; *Taylor v. Bowers*, 1 Q. B. D. 291; *Kearley v. Thomson*, 24 Q. B. D. 742; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347 (but see s. c. 57 N. Y. 518); *Block v. Darling*, 140 U. S. 234, 35 L. Ed. 476, 11 S. Ct. 832; *Wassermann v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *De Leon v. Walsh*, 140 Cal. 175, 73 Pac. 813; *White v. Franklin Bank*,

22 Pick. 181; *Skinner v. Henderson*, 10 Mo. 205; *Brown v. Timmany*, 2 Ohio, 81; *Trammell v. San Antonio L. Ins. Co. (Tex. Civ. App.)*, 209 S. W. 786; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922.

⁷⁰ See *supra*, §§ 1679, 1680. And see a similar application of principle to an attempted recovery of a payment made to secure an illegal contract of another kind in *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259, L. R. A. 1918 F. 966.

⁷¹ In *Eastern Metal Co. v. Webb Granite, etc., Co.*, 195 Mass. 356, 362, 81 N. E. 251, *Knowlton, C. J.*, said (and his language was quoted with ap-

It will be observed that the right of rescission and recovery of the consideration by a plaintiff must be confined to cases where it is the defendant's promise that is illegal, not the consideration for it; or where a portion only of the consideration is illegal, and that portion is still executory. Where any illegal consideration in an indivisible contract has been given it is clear that nothing, under the terms of the rule, can be recovered.

§ 1789. Parties not in *pari delicto*.

In some cases rescission of an illegal transaction and recovery of consideration is allowed beyond the limits stated in the preceding section. This is true where the parties are said not to be *in pari delicto*. The typical case is where one party acts under compulsion of the other. The doctrine originated in cases

proval in *Duane v. Merchants' Legal Stamp Co.*, 231 Mass. 113, 120 N. E. 370, 372: "It has been held in many cases that, where the matters called for in the contract that render it illegal, do not involve moral turpitude, but are merely *mala prohibita*, either party, while it remains executory, may disaffirm it on account of its illegality and recover back money or property that he has advanced under it. If the contract has been executed the court will not relieve either party from the consequences of his own violation of law. But so long as it is entirely unexecuted in that part which the law forbids, there is a *locus penitentiae*. The doctrine is stated very fully in *White v. Franklin Bank*, 22 Pick. 181. This rule is followed in *Love v. Harvey*, 114 Mass. 80; *Atlas Bank v. Nahant Bank*, 3 Met. 581, and *Morgan v. Beaumont*, 121 Mass. 7.

"It is established in a long line of English cases. *Hastelow v. Jackson*, 8 B. & C. 221; *Bone v. Ekless*, 5 H. & N. 925; *Taylor v. Bowers*, 1 Q. B. D. 291; *Hampden v. Walsh*, 1 Q. B. D. 189; *Strachan v. Universal Stock Exchange, Ltd.* (1895), 2 Q. B. 329; *Hermann v. Charlesworth* (1905), 2 K. B. 123, 135. It is also adopted generally

in America. *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Block v. Darling*, 140 U. S. 234, 239, 35 L. Ed. 476, 11 S. Ct. 832; *Pullman's Car Co. v. Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108, 18 S. Ct. 808; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; *Urwan v. Northwestern Ins. Co.*, 125 Wis. 349, 103 N. W. 1102; *Skinner v. Henderson*, 10 Mo. 205. Most of these cases relate to the recovery of money or property that has been advanced under the illegal contract which is subsequently repudiated. In the present case labor and materials for the improvement of real estate were furnished by the plaintiff." . . .

"When labor and materials have been furnished upon real estate under a contract which contains an illegal element under a prohibitory statute, and when the contract remains entirely executory in that part which is illegal, and is disaffirmed because of its illegality, the disaffirming party has the same right to have compensation for the benefit conferred upon the real estate that he would have to recover for money or property received by the other party before the disaffirmance of such a contract."

where a creditor by pressure induced his debtor to enter in transactions fraudulent as to other creditors.⁷¹ In some cases also the guilt of the parties is differentiated for other reasons. Probably no more exact principle can be laid down than that if a plaintiff though culpable has not been guilty of more turpitude, and the loss he will suffer by being denied relief wholly out of proportion to the requirements either of public policy or of appropriate individual punishment, he may be allowed to recover back, the consideration with which he has parted.⁷² The nature or terms of a statute or rule of law will also sometimes indicate that it is intended for the protection of one class of individuals against another, and where this is the case a party belonging to the class whose protection was intended may recover what he has paid.⁷³ Money lost at gaming is by statute frequently recoverable under this principle.⁷⁴

⁷¹ See *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934, citing earlier decisions.

⁷² Thus in *White v. Franklin Bank*, 22 Pick. 181, the plaintiff had made a deposit in the defendant bank on terms which violated the Banking Law. Though the court admitted that the defendant was blameworthy, it regarded the bank as more seriously guilty, and allowed the plaintiff to recover his money. See also *Reynall v. Sprye*, 1 De G. M. & G. 660; *McDuffee v. Hayden-Coeur d'Alene Irr. Co.*, 25 Ida. 370, 138 Pac. 503; *Lowell v. Boston & L. R. R. Corp.*, 23 Pick. 24, 34 Am. Dec. 33.

In *Davis v. Smoot* (N. C.), 97 S. E. 488, the plaintiff in an accident case contracted to give his physician an illegal contingent fee for acting as an expert witness. Later the physician while his patient was somewhat under the influence of morphine obtained payment of the agreed fee. The plaintiff was allowed to recover it.

⁷³ *Thomas v. City of Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238, 1 S. Ct. 442; *Logan County Bank v. Townsend*, 139 U. S. 67, 35

L. Ed. 107, 11 S. Ct. 496; *Scotten v. State*, 51 Ind. 52; *Deming v. State*, 2 Ind. 416; *Smart v. White*, 73 Me. 33; 40 Am. Rep. 356; *White v. Franklin Bank*, 22 Pick. 181; *Morville v. American Tract. Soc.*, 123 Mass. 129, 137, 138 25 Am. Rep. 40; *Bateman v. Robinson*, 12 Neb. 508, 11 N. W. 736; *Becker v. Wilcox*, 81 Neb. 476, 116 N. W. 160 16 L. R. A. (N. S.) 571; *Manchester R. Co. v. Concord R. Co.*, 66 N. H. 100 131, 20 Atl. 383; *Schermerhorn v. Talmann*, 14 N. Y. 93, 123; *Tracy v. Talmage*, 14 N. Y. 162, 181, 199, 67 Am. Dec. 132; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Irwin v. Curie*, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343; *Webb v. Fulchire*, 3 Ired. L. 485, 40 Am. Dec. 419; *Reinhard v. City*, 49 Ohio St. 257, 31 N. E. 35; *Insurance Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 46 Am. St. Rep. 571; *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922.

⁷⁴ See *supra*, § 1679.

§ 1790. Where one party is a fiduciary.

If the illegal transaction was entered into by a trustee or guardian so that any penal consequences visited upon the transaction will fall, not upon the guilty fiduciary, but upon his beneficiary, relief would be afforded either by the enforcement of the agreement because of the innocence of the beneficial plaintiff,⁷⁵ or if in the particular case this seemed against public policy as amounting to allowance of ratification of an illegal transaction, the innocent beneficiary or the fiduciary in his behalf would at least be allowed to rescind and recover any consideration paid.⁷⁶ Creditors, however, have no such large rights. The transfer of money or property under an unlawful act "does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside. If it is not, they cannot."⁷⁷ And a trustee in bankruptcy cannot for the benefit of the estate enforce an illegal contract, as a wager, under which the bankrupt, and, therefore, his trustee, would be entitled to money or property had the contract been legal.⁷⁸

§ 1791. Where one party was induced by fraud to enter into the illegal contract.

Where one party to a bargain has been fraudulently induced to enter into the transaction, it is frequently said he is not *in pari delicto*, and the case has sometimes been classed with duress or coercion, but a distinction is to be observed. If the fraud consisted in deceiving the plaintiff as to the unlawful character of the transaction, doubtless the analogy with duress is sound.⁷⁹ And even though the fraud consisted in depriving the plaintiff of the use of his faculties or judgment, the same principle might apply.⁸⁰ But if the only fraud consisted in rep-

⁷⁵ See *supra*, § 1631.

⁷⁶ *Lee v. Boyd*, 86 Ala. 283, 5 So. 489.

⁷⁷ *Traders' Nat. Bank v. Steere*, 165 Mass. 389, 43 N. E. 187, quoted with approval and followed in *Johns v. Reed*, 77 Neb. 492, 109 N. W. 738.

⁷⁸ *Shoolbred v. Roberts*, [1899] 2 Q. B. 560 [1900] 2 Q. B. 497.

⁷⁹ *Fears v. United &c. Bank*, 172 Ky. 255, 189 S. W. 226.

⁸⁰ In *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357, the defendant fraudulently induced the plaintiff to become intoxicated and then induced

representations inducing the plaintiff to believe that the proposed illegal transaction would be more profitable than it actually turned out to be, it seems hard to discover any reason which should induce a court to favor him.⁸¹ It has been indeed decided by the Supreme Court of the United States⁸² that a fraudulent illegal transaction might be rescinded on the broad ground that "a person does not become an outlaw and lose all rights by doing an illegal act. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that, as between the parties one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed." While the decision of the case may be supported on the ground of the slight guilt of the plaintiff, it is believed that the broad statement just quoted cannot be accepted as a statement of general principle. Certainly where the illegality is of a serious character its consequences may well be expressed by saying that as to that transaction the parties engaged in it become outlaws. For instance, if a purchase of stolen silver known by both parties to be such was induced by fraudulent misrepresentations of circumstances affecting its value, it is submitted that not only could the bargain not be enforced if executory, but it could not be rescinded if executed, nor would an action of tort for deceit lie in favor of the defrauded party. The broad principle *ex dolo malo non oritur actio* is not confined in its terms nor in its reason to an action on the contract.⁸³

him to make a sale of his horse on Sunday. The seller was allowed to recover. See also *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

⁸¹ See decisions under Sunday laws, *supra*, § 1710, *ad fin.*

⁸² *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 S. Ct. 512, 47 L. Ed. 879. In this case the plaintiff bought bonds of the National Bank & Loan Co., the defendant below. The court assumed that the transaction was forbidden by law. The plaintiff

alleged that the sale was induced by fraud and sought in the action to rescind the sale and recover the money paid for the bonds, tender of which was made and kept good. The court held the action maintainable.

⁸³ In *Tracy v. Talmage*, 14 N. Y. 162, 181, 67 Am. Dec. 132, Selden, J., said: "The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto* form an independent class entirely distinct from those cases which rest upon a disaffirmance of the con-

§ 1792. Conflict of laws.

The legality of a contract depends upon the law of the place where it is made.⁸⁴ If the contract was illegal (as distinguished from merely unenforceable) where made it is invalid everywhere⁸⁵ and if valid where made it is generally enforceable everywhere.⁸⁶ The latter rule, however, is qualified by the doctrine that no State will enforce a contract though valid where made, if its enforcement is contrary to the policy of the forum.⁸⁷

tract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se* the courts will in no case interfere to relieve either party from any of its consequences." Whatever may be said in regard to any absolute distinction between a bargain which is *malum prohibitum*, and one which is *malum in se*, it is certainly true that some consequences flow from the comparative enormity of illegal transactions.

⁸⁴ The Miguel Di Larrinaga, 217 Fed. 678; Illustrated Postal Card, etc., Co. v. Holt, 85 Conn. 140, 81 Atl. 1061; Altland v. Atchison, T. & S. F. R. Co., 151 Ill. App. 291; Western Life Indemnity Co. v. Rupp, 147 Ky. 489, 144 S. W. 743; Bond v. Cummings, 70 Me. 125; Tremain v. Dyott, 161 Mo. App. 217, 142 S. W. 760; Lovell v. Boston & M. R. Co., 75 N. H. 568, 78 Atl. 621, 34 L. R. A. (N. S.) 67; Williamson v. Postal Telegraph-Cable Co., 151 N. C. 223, 65 S. E. 974; Carpenter v. Hanes, 167 N. C. 551, 83 S. E. 577; Marx v

Hefner, 46 Okla. 453, 149 Pac. 207, Ann. Cas. 1917 B. 656; Davis v. Chicago, M. & St. P. Ry. Co., 93 Wis. 470, 67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935.

⁸⁵ Orr's Adm. v. Orr, 157 Ky. 570, 163 S. W. 757; Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606; and see cases in the preceding note.

⁸⁶ The Miguel Di Larrinaga, 217 Fed. 678; International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774; and see cases cited *supra*, n. 84.

⁸⁷ Union Trust Co. v. Grosman, 245 U. S. 412, 38 S. Ct. 147, 62 L. Ed. 368; Vandalia R. Co. v. Kelly (Ind., 1918), 119 N. E. 257; Corbin v. Houlehan, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57; Thompson v. Taylor, 66 N. J. L. 253, 49 Atl. 544, 54 L. R. A. 585, 88 Amer. St. Rep. 485; People v. Martin, 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628; Marx v. Hefner, 46 Okla. 453, 149 Pac. 207, Ann. Cas. 1917 B. 656.

BOOK VIII

DISCHARGE OF CONTRACTS

CHAPTER XLIX

METHODS OF DISCHARGE—APPLICATION OF PAYMENTS; TENDER

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§ 1793. Methods of discharge.

A contract may be discharged in the following ways:

1. Performance according to its terms.
2. A breach of such a nature as to justify the innocent party in treating the contract as rescinded or as giving rise to a right of action for breach of the entire contract.

3. Rescission of a voidable contract, at the will of one party, as for fraud, mistake, duress.

4. Release.

5. Rescission or renunciation by parol agreement.

6. Accord and satisfaction, including accounts stated and novation.

7. Cancellation and surrender.

8. Alteration.

9. Merger.

10. Impossibility.

To these may be added two defences which generally are held merely to bar the remedy on the contract.

11. Bankruptcy.

12. Statutes of Limitation.

A right of action upon a contract may be discharged in any of these ways except the second and the eleventh.

§ 1794. Treatment of these methods.

The first three methods here specified have been treated with more or less fulness in earlier parts of this work, but something may here be added regarding a division of the first method—payment—so far as concerns application of payments and tender; and it then remains to consider the other methods. A distinction may be taken between the discharge of a contract and the discharge of a right of action that has arisen from breach of a contract, but as the principles applicable to the two cases are in general the same, it has been thought simpler to treat the questions together. Where the requirements of law differ according as the contract has or has not been broken, attention is called to the difference.

§ 1795. Application of payments; debtor has primary right.

When a debtor owes money on several accounts and makes a payment of less than the total amount due from him, it becomes important to determine to which debt or to which item the payment is to be credited. This determination is called the application or the appropriation or sometimes the imputation of payments.

If the debtor specifies the application which is to be made of

his payment, this direction must be followed.¹ The creditor's assent is immaterial; if he takes the payment he must apply as directed.² The debtor may direct the application to the principal of a debt, though interest is overdue;³ and to a particular debt though the application is in violation of a contract previously made by him that the money should be otherwise applied.⁴ He may even direct the application of the payment to an illegal and unenforceable claim.⁵ It is not essential that the debtor's intent shall be manifested in express words. Here, as elsewhere in the law of contracts, a manifestation of intent deduced from acts or from the circumstances of the case is as effective as if expressed in words;⁶ and the fact that or

¹ *Bois v. Cranfield*, Styles, 239; *Anonymous*, Cro. Eliz. 68; *Manning v. Western*, 1 Vernon, 606, 607; *Buchanan v. Findlay*, 9 B. & C. 738; *Waugh v. Wren*, 9 Jur. (N. S.) 365; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *Lynn v. Bean*, 141 Ala. 236, 37 So. 515; *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. 124; *Augusta Cooperative Co. v. Parham* (Ark.), 213 S. W. 737; *Pétroutsas v. H. C. Schrader Co.* (Fla.), 80 So. 486; *Massengale v. Pounds*, 108 Ga. 762, 33 S. E. 72; *Graff v. Fox*, 204 Ill. App. 598; *Robson v. McKoin*, 18 La. Ann. 544; *Treadwell v. Moore*, 34 Me. 112; *Hussey v. Manufacturers' &c. Bank*, 10 Pick. 415; *Spinney v. Freeman*, 230 Mass. 356, 119 N. E. 798; *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 93 N. W. 766; *Bean v. Brown*, 54 N. H. 395; *Herold v. Hill* (N. Dak.), 169 N. W. 592; *Patterson v. Van Loon*, 186 Pa. 367, 40 Atl. 495; *Kann v. Kann*, 259 Pa. 583, 103 Atl. 369; *Pindall v. Bank of Marietta*, 10 Leigh, 481; *Simpson v. Combes* (Wash.), 182 Pac. 566; *Farr v. Weaver* (W. Va.), 99 S. E. 395; *Miles v. Ogden*, 54 Wis. 573, 12 N. W. 81; *Hassard v. Tomkins*, 108 Wis. 186, 84 N. W. 174. The rule is applicable only to voluntary payments. The effect of payments made in judicial proceedings is not governed by the debtor's wishes.

Wetmore & Morse Granite Co. v. Ryle (Vt.), 107 Atl. 109.

² *The Memnon*, 62 Fed. 482, 10 C. A. 502; *Lynn v. Bean*, 141 Ala. 236, 37 So. 515; *Hanson v. Cordano*, 8 Cal. 441, 31 Pac. 457; *Massengale v. Pounds*, 108 Ga. 762, 33 S. E. 72; *Mitchell v. Dall*, 4 Gill & J. 361; *Wetherell v. Joy*, 40 Me. 325; *Reed v. Boardman*, 20 Pick. 441; *Rosenbaur v. Meridian Nat. Bank*, 73 Miss. 267, 18 So. 549; *Goodman v. Snow*, 81 Hun 225, 30 N. Y. S. 672; *Reid v. Wells*, 56 S. Car. 435, 34 S. E. 401, 939; *Rugeley v. Smalley*, 12 Tex. 238; *Eylar v. Read*, 60 Tex. 387. The situation is the same as that arising when a debtor sends a check as full payment for an unliquidated or disputed account. The creditor if he accepts the check is bound by the terms of the debtor's offer. See *infra*, §§ 1854 *et seq.*

³ *Kann v. Kann*, 259 Pa. 583, 103 Atl. 369; *Pindall v. Bank of Marietta*, 10 Leigh, 481.

⁴ *Stewart v. Hopkins*, 30 Ohio St. 502.

⁵ *Rohan v. Hanson*, 11 Cush. 44; *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277.

⁶ *Peters v. Anderson*, 1 Marshall, 238; *Newmarch v. Clay*, 14 East, 239; *Shaw v. Picton*, 4 B. & C. 715; *Nash*

application is obviously more advantageous to the debtor than another, may itself be some evidence (but not of itself sufficient) that the former was intended. If the debtor always directed the application of his payments there would be no occasion for rules of law peculiar to the subject—elementary principles of contractual law would suffice; but debtors frequently do not define their purpose in making a payment and as some disposition must be made of the credit, the law has devised rules which are more or less artificial that are applicable in the absence of an expression of intention by the debtor.

§ 1796. The creditor may direct the application if the debtor does not.

The right of the debtor to direct the application ceases as soon as the payment is made,⁷ because having once made payment unconditionally he cannot thereafter revoke his act and

v. Hodgson, 6 D. M. & G. 474; *Thompson v. Hudson*, L. R. 6 Ch. 320; *Korbly v. Springfield Inst. for Sav.*, 245 U. S. 330, 38 S. Ct. 88, 62 L. Ed. 000; *Manning v. The Peerless*, 80 Fed. 942; *Pearce v. Walker*, 103 Ala. 250, 15 So. 568; *Hanson v. Cordano*, 96 Cal. 441, 31 Pac. 457; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; *Cavanaugh v. Marble*, 80 Conn. 389, 68 Atl. 853, 15 L. R. A. (N. S.) 127; *Plain v. Roth*, 107 Ill. 588; *Terhune v. Colton*, 12 N. J. Eq. 232; *Koehler v. Bierbaum* (Ky.), 122 S. W. 524; *Lauten v. Rowan*, 59 N. H. 215; *Stone v. Seymour*, 15 Wend. 19; *Moose v. Marks*, 116 N. C. 785, 21 S. E. 561; *Pardee v. Markle*, 111 Pa. 548, 5 Atl. 36, 56 Am. Rep. 299; *Mulherin v. Stansell*, 70 S. Car. 568, 50 S. E. 497; *Robinson v. Doolittle*, 12 Vt. 246; *Roakes v. Bailey*, 55 Vt. 542.

In *Adams Express Co. v. Black*, 62 Ind. 128, it was held that the fact that the debtor's payment was the exact sum due on one account was not of itself sufficient to show a direction by the debtor to apply the payment to that account. But this coincidence

between the amount of the payment and one of the debts is certainly a strong circumstance tending to show the debtor's intention. *Marryatts v. White*, 2 Stark. 102; *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384; *Boyd v. Watertown Agricultural Ins. Co.*, 20 Col. App. 28, 76 Pac. 986; *Robert v. Garnie*, 3 Caines, 14.

⁷ *Anonymous*, 8 Mod. 236; *Goddard v. Cox*, 2 Strange, 1194; *Manning v. Western*, 1 Vernon, 606; *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; *In re Lindau*, 183 Fed. 608; *McCurdy v. Middleton*, 82 Ala. 131, 2 So. 721; *Pearce v. Walker*, 103 Ala. 250, 15 So. 568; *Lasarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; Cal. Civ. Code, § 1479; Mont. Rev. Codes (1908), § 4928; *California Bank v. Webb*, 94 N. Y. 467; *Wanamaker v. Powers*, 102 N. Y. App. D. 485, 93 N. Y. S. 19; *Long v. Miller*, 93 N. C. 233; S. Dak. Comp. L. (1913), § 1150; *St. John v. Rykert*, 10 Can. Sup. Ct. 278, and cases in this section *passim*. But see *Petty v. Dill*, 53 Ala. 641; *Huffman v. Cauble*, 86 Ind. 591.

make it conditional. If, on a fair construction of the circumstances, the debtor has given no indication how a payment voluntarily made by him should be applied the presumption is made that he thereby assents to such application as the creditor may desire to make, the creditor may then apply the payment to any debt which is due,⁸ or he may distribute among all or several of such debts or items.⁹ The creditor is allowed to make the appropriation in the way most advantageous for himself without regard to the interest of the debtor. Thus the payment may be applied to an unsecured claim,¹⁰

⁸ *Wilkinson v. Sterne*, 9 Mod. 427; *Hall v. Wood*, 14 East, 243, note; *Mills v. Fowkes*, 5 Bing. N. C. 455, 461; *Boanquet v. Wray*, 2 Marshall, 319; *Williams v. Griffith*, 5 N. & W. 300; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *Marye v. Strouse*, 6 Sawyer, 204; *Hendricks v. Schmidt*, 68 Fed. 425, 15 C. C. A. 504; *Holloway & Bro. v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; *Cremer v. Higginson*, 6 Fed. Cas. No. 3,383; *Callahan v. Boazman*, 21 Ala. 246, 251; *McCurdy v. Middleton*, 82 Ala. 131, 2 So. 721; *Lyon v. Bass*, 76 Ark. 534, 89 S. W. 849; *Byrnes v. Claffey*, 69 Cal. 120, 10 Pac. 321; *Petroutsa v. H. C. Schrader Co. (Fla.)*, 80 So. 486; *Horne v. Planters' Bank*, 32 Ga. 1; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Shull v. Lawrence (Ida.)*, 186 Pac. 246; *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Keairnes v. Durst*, 110 Iowa, 114, 81 N. W. 238; *First Presb. Church v. Santy*, 52 Kans. 462, 34 Pac. 974; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. 635; *People v. Grant*, 139 Mich. 26, 102 N. W. 226; *Hawver v. Ingalls*, 93 Minn. 371, 101 N. W. 604; *Cox v. Sloan*, 158 Mo. 411, 430, 57 S. W. 1052, 1134; *Bean v. Brown*, 54 N. H. 395; *Mack v. Colleran*, 136 N. Y. 617, 32 N. E. 604; *Long v. Miller*, 93 N. C. 233; *Swisher v. McWhinney*, 64 Ohio St. 343, 350, 60 N. E. 565; *Chest-*

nut St. Trust, etc., Co. v. Hart, 217 P. St. 506, 66 Atl. 870; *Sanborn v. Col*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 20; *Simpson v. Combes (Wash.)*, 182 Pa. 566; *Hanly v. Potts*, 52 W. Va. 263, 4 S. E. 218; *Farr v. Weaver (W. Va.)*, 9 S. E. 395; *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174; *McDonald v. Peel*, 17 U. C. Q. B. 270; *Mayberry v. Hunt*, 34 N. Brunsw. 628. In Louisiana the appropriation made by the creditor will not be binding on the debtor unless it has been accepted by him. *Slaughter v. Milling*, 15 La. Ann. 526.

⁹ *Blackman v. Leonard*, 15 La. Ann. 59; *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310; *Beck v. Haas*, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; *Young v. Alford*, 118 N. C. 215, 23 S. E. 973; *Bishop v. T. Ryan Const. Co. (Wash.)*, 180 Pac. 126. But see *Sanborn v. Cole*, 53 Vt. 590.

¹⁰ *Re Sherry*, 25 Ch. D. 692; *Smith v. Vaughan*, 78 Ala. 201; *Lewis v. Hartford Silk Mfg. Co.*, 56 Conn. 25, 12 Atl. 637; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Wilkes v. Kitchen (Ky.)*, 218 S. W. 718; *Upham v. Lefavour*, 11 Mete. 174; *Harding v. Tift*, 75 N. Y. 461; *Vick v. Smith*, 83 N. C. 80; *Wagner's Appeal*, 103 Pa. 185; *Wardlaw v. Troy Oil Mill*, 74 S. Car. 368, 54 S. E. 658, 114 Am. St. Rep. 1004; *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422; *Stephens v. Boisseau*, 26 Can. Sup. Ct. 437.

to one which is unenforceable because of the Statute of Frauds,¹¹ or the Statute of Limitations.¹²

§ 1797. Limitations of the creditor's right.

"Where one debt is due to the creditor in his own right and another to him as trustee or agent for another, and neither is secured, the creditor cannot apply the whole of a general payment to his own debt, but must apply it *pro rata* to both debts; for this is a part of his duty as trustee, to take the same care of the debts of his *cestui que trust* as of his own."¹³ And if the non-payment of one debt (as rent due under a lease) will cause a forfeiture, the creditor cannot appropriate a payment to other claims.¹⁴ Of course, application cannot be made by the creditor to a claim which has no validity,¹⁵ and while it is unnecessary to prove that the debtor in terms admitted the validity of the claim to which the creditor applied a payment,¹⁶ it seems clear that since the debtor, though not directing the exact application of a payment, may exclude a particular application; and since it should be the primary principle that no violence is done to the intention of the debtor as expressed to the creditor by words or acts or circumstances, the creditor cannot appropriate the payment to a claim which he knows is disputed however little ground there may be for the dispute.¹⁷ Appropriation cannot be made by the creditor to an illegal claim.¹⁸

¹¹ *Mayfield v. Wadsley*, 3 B. & C. 357, 362, per Abbott, C. J.; *Murphy v. Webber*, 61 Me. 478; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109; *Mueller v. Wiebracht*, 47 Mo. 468. See also *Arnold v. Mayor*, 4 Man. & G. 860.

¹² *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffith*, 5 M. & W. 300; *Armistead v. Brooke*, 18 Ark. 521; *Ramsay v. Warner*, 97 Mass. 9; *Leach v. Curtin*, 123 N. C. 85, 31 S. E. 269; *Moore v. Kiff*, 78 Pa. 96; *Hopper v. Hopper*, 61 S. Car. 124, 39 S. E. 366; *Rowell v. Lewis' Est.*, 72 Vt. 163, 47 Atl. 783. As to the effect of such an application in removing the bar of the statute, see *supra*, § 178.

¹³ 2 Parsons on Contracts, *631, note

(a) citing *Scott v. Ray*, 18 Pick. 360; *Barrett v. Lewis*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325. Of course if there is appropriation by the debtor to the individual claim the payment is applicable to that. *Artificial Ice Co. v. Pratt* (S. Dak.), 176 N. W. 45.

¹⁴ *Lowther v. Heaver*, 41 Ch. D. 248.

¹⁵ *Scheffer v. Tomier*, 25 Minn. 478.

¹⁶ *McLendon v. Frost*, 57 Ga. 448.

¹⁷ *Burn v. Boulton*, 2 C. B. 476; *Perot v. Cooper*, 17 Col. 80, 28 Pac. 391, 31 Am. St. Rep. 258. See also *Stone v. Talbot*, 4 Wis. 442.

¹⁸ *Armour Packing Co. v. Vinegar Bend Lumber Co.*, 149 Ala. 205, 42 So. 866; *Phillips v. Moses*, 65 Me. 70;

Nor can the creditor apply a payment to a debt not mature if other debts to which the payment might be applied are due. Neither debtor nor creditor can direct the application of voluntary payments, such as those enforced by judicial proceedings.²⁰

§ 1798. Time allowed the creditor to make application.

Unlike the debtor, the creditor is not confined to the time when the payment is made for his appropriation. It is well settled that he is not required to make his choice immediate except in a few jurisdictions where the rule of the Civil law is applied, which requires the creditor to make an immediate election or lose his choice.²¹ The length of time allowed him varies, however, in different jurisdictions. In some, no delay seems excessive;²² in others, he may make his choice before controversy arises;²³ in others, before the bringing of an action.

Rohan v. Hanson, 11 Cush. 44; *Bondy v. Hardina*, 216 Mass. 44, 102 N. E. 935; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb. 847, 51 N. W. 232; *Dunbar v. Garrity*, 58 N. H. 575; *Adams v. Mahnken*, 41 N. J. Eq. 332, 7 Atl. 435; *Greene v. Tyler*, 39 Pa. 361; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187. But see *Philpott v. Jones*, 2 Ad. & El. 41.

²⁰ *McWhorter v. Bluthenthal*, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Schwartz v. Dashiff*, 92 Conn. 135, 101 Atl. 580; *Richardson v. Coddington*, 49 Mich. 1, 12 N. W. 886; *Missouri Central Lumber Co. v. Stewart*, 78 Mo. App. 456; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Niagara Bank v. Roosevelt*, 9 Cow. 409; *Law v. Sutherland*, 5 Gratt. 357. A payment cannot be appropriated to advances not then made. *Petroutsas v. H. C. Schrader Co. (Fla.)*, 80 So. 486.

²¹ *Citizens & Southern Bank v. Armstrong* (Ga. App.), 95 S. E. 729; *Wetmore & Morse Granite Co. v. Ryle* (Vt.), 107 Atl. 109.

²² See *Gass v. Stinson*, 3 Sumner, 98;

Pattison v. Hull, 9 Cow. 747; *Gastco v. Barney*, 11 Ohio St. 506, 512.

²³ *Peters v. Anderson*, 5 Taunt. 596; *Philpott v. Jones*, 2 A. & E. 41; *Cory v. Steamship Mecca*, [1897] A. C. 286; *Seymour v. Pickett*, [1905] 1 K. B. 715; *Pearce v. Walker*, 103 Ala. 250, 1 So. 568; *California Bank v. Webb*, 9 N. Y. 467; *Brice v. Hamilton*, 12 S. Car. 32.

²⁴ *United States v. Kirkpatrick*, 4 Wheat. 720, 6 L. Ed. 199; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *In re American Paper Co.*, 255 Fed. 121; *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; *Battle v. Jennings Naval Stores Co. (Fla.)*, 75 So. 949; *Austin v. Southern Home Building, etc., Assoc.*, 122 Ga. 439, 50 S. E. 382; *Applegate v. Koons*, 74 Ind. 247; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Milliken v. Tufts*, 31 Me. 497; *Grasser & Co. Brewing Co. v. Rogers*, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389; *Benson v. Reinshagen*, 75 N. J. Eq. 358, 72 A. 954; *Chapman v. Commonwealth*, 25 Gratt. 721, 21 Am. Rep. 320; *Norris v. Beatty*, 6 W. Va. 477.

tion.²⁴ In California and a few States which have copied its legislation the creditor must act within a "reasonable time."^{24a} After application has once been made, neither party can change it without the assent of the other,²⁵ which may be given by ratifying an application theretofore unwarranted,²⁶ and the debtor's long continued silence after receiving notice from the creditor of such an application may amount to ratification.²⁷

§ 1799. What amounts to an appropriation by the creditor.

What constitutes a final appropriation by the creditor is not wholly clear. There is no doubt that if the creditor communicates to the debtor in any way a decision to make a particular appropriation, his right is completely and finally exercised.²⁸ So bringing an action on the remaining debts or items necessarily is an election to appropriate a payment to the claims omitted from the suit.²⁹ But where the creditor makes a book entry which is not communicated to the debtor, the matter is not so clear. The English law is well settled that in such a case the creditor is not bound by his own entry and may, if it subsequently is for his interest so to do, make a different applica-

²⁴ *Haynes v. Waite*, 14 Cal. 446 (Cf. Cal. Civ. Code, § 1479); *Plummer v. Erskine*, 58 Me. 59; *People v. Grant*, 139 Mich. 26, 28, 102 N. W. 226; *Sanford v. VanArsdall*, 53 Hun, 70, 6 N. Y. S. 494; *Jenkins v. Beal*, 70 N. C. 440; *Thatcher v. Tillory*, 30 Tex. Civ. App. 327, 70 S. W. 782; *Pierce v. Knight*, 31 Vt. 701; *Fraser v. Miller*, 7 Wash. 521, 35 Pac. 427.

^{24a} Cal. Civ. Code, § 1479; *Los Angeles Trust & Sav. Bank v. Forve* (Cal. App.), 187 Pac. 438; *Mont. Rev. Codes* (1908), § 4928; *S. Dak. Comp. L.* (1913), § 1150.

²⁵ *Hutchinson v. Heyworth*, 9 A. & E. 375; *Yates v. Hoppe*, 9 C. B. 541; *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325; *Pearce v. Walker*, 103 Ala. 250, 15 So. 568; *Flynn v. Seale*, 2 Cal. App. 665, 84 Pac. 263; *Plummer v. Erskine*, 58 Me. 59; *People v. Grant*, 139 Mich. 26, 102 N. W. 226; *Pond v.*

O'Connor, 70 Minn. 266, 73 N. W. 159, 248; *Louis v. Bauer*, 33 N. Y. App. D. 287, 53 N. Y. S. 985; *Kann v. Kann*, 259 Pa. 583, 103 Atl. 369; *Wait v. Homestead Bg. Assoc.* (W. Va.), 95 S. E. 203.

²⁶ *Steiner v. Jeffries*, 118 Ala. 573, 24 So. 37; *Bird v. Benton*, 127 Ga. 371, 56 S. E. 450; *Flarsheim v. Brestrup*, 43 Minn. 298, 45 N. W. 438.

²⁷ *Sweeney v. Pratt*, 70 Conn. 274, 39 Atl. 182, 66 Am. St. 101; *Baker v. Smith*, 44 La. Ann. 925, 11 So. 585; and see cases in the preceding note.

²⁸ *Simson v. Ingham*, 2 B. & C. 65; *Hooper v. Keay*, 1 Q. B. D. 178; *Cory Bros. & Co. v. The Mecca*, [1897] A. C. 286, 292; *United States v. Bradbury*, 2 Ware, 146; *People v. Grant*, 139 Mich. 26, 102 N. W. 226; *Reynolds v. Patten*, 10 N. Y. Misc. 155, 30 N. Y. S. 1050.

²⁹ *Haynes v. Waite*, 14 Cal. 446; *Starrett v. Barber*, 20 Me. 457.

tion;³⁰ but this principle, though also stated in one or two American cases,³¹ does not seem to be universally admitted.³² Though the creditor may not be conclusively bound by an entry not communicated to the debtor, it does not follow that such an entry may not be evidence in the creditor's favor that he made an application before controversy.³³

§ 1800. Where neither debtor nor creditor directs application.

If neither party has manifested an intention concerning the application of a payment, the court is compelled to make the application itself. In doing this the court endeavors to reach an equitable result, and if there were no inconsistency in the interests of the debtor and of the creditor, there would be no difficulty in reaching a conclusion. Generally, however, the interests of the parties are diverse, and in considering what is just the court is compelled to choose between what is most favorable for the debtor and what is most favorable for the creditor. In the Civil law, the interest of the debtor is preferred;³⁴ and the rule of the Civil law influenced some of the earlier English decisions, which are quite contradic-

³⁰ *Simson v. Ingham*, 2 B. & C. 65; *Cory Bros. & Co. v. The Mecca*, [1897] A. C. 286, 292. In the latter case Lord Herschell said: "It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise."

³¹ *Lau v. Blomberg*, 3 Neb. (Unof.) 124, 91 N. W. 206; *Allen v. Culver*, 3 Denio, 284. See also *Wanamaker v. Powers*, 102 N. Y. App. Div. 485, 492, 93 N. Y. S. 19.

³² In *Missouri Central Lumber Co. v. Stewart*, 78 Mo. App. 456; *Grasser, etc., Brewing Co. v. Rogers*, 112 Mich.

112, 70 S. W. 445, 67 Am. St. Rep. 389; *Chapman v. Commonwealth*, 25 Gratt. 721, 21 Am. Rep. 320, it was decided or assumed that an entry by a creditor uncommunicated to the debtor was evidence against the creditor of an election.

³³ In New York though it was held in *Allen v. Culver*, 3 Denio, 284, that the creditor was not bound by an uncommunicated entry, it was decided in *Van Rensselaer v. Roberts*, 5 Denio, 470, that the creditor's books were evidence in his favor that an application had been made. So also in *Johnson v. Thomas*, 77 Ala. 367, it is said that the creditor need not give the debtor any notice of the act by which an appropriation is made. See also *Jones v. The United States*, 7 How. 681, 12 L. Ed. 870; *Wanamaker v. Powers*, 102 N. Y. App. Div. 485, 93 N. Y. S. 19.

³⁴ See *infra*, § 1803.

tory in principle.³⁵ In a few of the United States, even though the Civil law does not there prevail, the same tendency may be observed.³⁶ The basis of the rule is that the debtor's intention is the controlling element, and that it is fair to assume that he intended or would have intended the application most favorable to himself. Reasonable as this argument is, it goes so far that if logically carried out it would destroy the well-settled right of the creditor to make such application as he pleases if the debtor fails to give directions. That rule rests upon the assumption, perhaps a little artificial, that if the debtor gives no instructions, it may fairly be supposed that he assents to the creditor making any application he pleases. If such an assent is implied, the debtor can hardly complain if the court in the absence of action by the creditor makes the application most favorable to the latter. Certainly it is true that in most jurisdictions the interest of the creditor is preferred. Sometimes this is stated as the guiding principle of the court and even where it is not, and the court professes to make such application as is most equitable, it is the interest of the creditor that seems in fact chiefly considered.

§ 1801. Illustrations of application by the law.

In accordance with the principle just stated, payments will be applied by the court to an unsecured or precarious debt, rather than to a secured one.³⁷ It is also held, certainly if all

³⁵ They are collected and discussed in *Pattison v. Hull*, 9 Cow. 747.

³⁶ *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926; *Frazier v. Lanahan*, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516; *Neal v. Allison*, 50 Miss. 175; *Pierce v. Sweet*, 33 Pa. 151; *Stanley v. Westrop*, 16 Tex. 200; *Paschall v. Pioneer Sav., etc., Co.*, 19 Tex. Civ. App. 102, 47 S. W. 98; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109.

³⁷ *Schuelenburg v. Martin*, 2 Fed. 747; *In re American Paper Co.*, 255 Fed. 121; *McCurdy v. Middleton*, 82 Ala. 131, 137, 2 So. 721, 724; *Bell v. Bell*, 174 Ala. 446, 56 So. 926, 37 L. R. A. (N. S.) 1203; *California Nat. Bank*

v. Ginty, 108 Cal. 148, 41 Pac. 38; *Chester v. Wheelwright*, 15 Conn. 562, 567; *Monson v. Meyer*, 93 Ill. App. 94, affd. 195 Ill. 142, 62 N. E. 827; *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589; *Boyd v. Greer* (Ind. App.), 123 N. E. 122; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *First Nat. Bank v. Hollinsworth*, 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92; *Illaly v. Grayson*, 105 Ia. 685, 687, 75 N. W. 518; *United States &c. Co. v. State*, 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *Bank of New Roads v. Kentucky Refining Co.*, 27 Ky. L. Rep. 645, 85 S. W. 1103; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597;

the claims or items of account are equally secured or unsecured, and in some jurisdictions apparently without regard to differences in security, a payment unappropriated otherwise by debtor or creditor is applied to the earliest claim or item.³⁸ A

Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; *Case Threshing Machine Co. v. Matthews*, 188 Mo. App. 429, 174 S. W. 198; *Smith v. Lewiston Steam Mill*, 66 N. H. 613, 34 Atl. 153; *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366; *Union Credit Assoc. v. Corson*, 77 Or. 361, 149 Pac. 318. See also, *Sanborn v. Stark*, 31 Fed. 18; *Stone Co. v. Rich*, 160 N. C. 161, 75 S. E. 1077, Ann. Cas. 1914 C. 244. Cf. *Cavanaugh v. Marble*, 80 Conn. 389, 68 Atl. 853, 15 L. R. A. (N. S.) 127.

The contrary rule of the Civil law, which is supported by Story's Eq. Juris. Sec. 459c, is followed in some States. *Gillard v. Huval*, 22 La. Ann. 426; *Clark v. Boorman*, 89 Md. 428, 43 Atl. 926; *Frazier v. Lanahan*, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516; *Windsor v. Kennedy*, 52 Miss. 164; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229. See also *Pardee v. Markle*, 111 Pa. St. 548, 555, 56 Am. Rep. 299. In *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. 430, it was held that a running account was so far a single debt that a payment would be applied to the items in the order of their priority and the creditor had no election.

³⁸ *Clayton's Case*, 1 Meriv. 529, 572; *Toulmin v. Copland*, 2 Cl. & F. 681; *Clayton's Case*, 1 Meriv. 605; *Goddard v. Hodges*, 1 Crompt. & M. 33; *Hooper v. Keay*, 1 Q. B. D. 178; *Kinnaird v. Webster*, 10 Ch. Div. 139; *Re Stenning*, [1895] 2 Ch. 433; *Jones v. United States*, 7 How. 681, 12 L. Ed. 870; *Marye v. Strouse*, 6 Sawyer, 204, 215; *In re American Paper Co.*, 255 Fed. 121; *Moses v. Noble*, 86 Ala. 407, 5 So. 181; *Golden v. Conner*, 89 Ala. 598, 8 So. 148; *Mayer v. Gewin* (Ala.), 76

So. 307; *Lasarus v. Freidheim*, 51 Ark. 371, 378, 11 S. W. 518; *Goldsmith v. Lewine*, 70 Ark. 516, 69 S. W. 308; *Duncan v. Thomas*, 81 Cal. 56, 22 Pac. 297; *Ady & Crowe Merc. Co. v. Howard* (Colo.), 176 Pac. 328; *Tapper v. New Home Sewing Mach. Co.*, 22 Ind. App. 313, 53 N. E. 202; *Allen v. Brown*, 39 Ia. 330; *First Nat. Bank v. Hollinworth*, 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92; *Sternberger v. Gowdy*, 93 Ky. 146, 19 S. W. 186; *Houey v. Henkel*, 115 La. 1066, 40 So. 460; *Milliken v. Tufts*, 31 Me. 497, 500; *Lehigh Coal & Nav. Co. v. McLeod*, 114 Me. 427, 96 Atl. 736; *Worthley v. Emerson*, 116 Mass. 374; *Egremont v. Benjamin*, 125 Mass. 15; *Grasser, etc., Co. v. Rogers*, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389; *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N. W. 36; *Board of County Commissioners v. Citizens' Bank*, 67 Minn. 236, 69 N. W. 912; *Duffy v. Kilroe* (Miss.), 76 So. 681; *Goets v. Piel*, 26 Mo. App. 634, 642; *Smith v. Lewiston Steam Mill*, 66 N. H. 613, 34 Atl. 153; *Doherty v. Cotter*, 68 N. H. 37, 38 Atl. 499; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 333, 21 N. E. 57; *National, etc., Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; *Perry v. Booth*, 67 N. Y. App. D. 235, 73 N. Y. S. 216; *Stanwix v. Leonard*, 125 N. Y. App. D. 299, 109 N. Y. S. 804; *Raymond v. Newman*, 122 N. C. 52, 54, 29 S. E. 353; *Patterson v. Bank of British Columbia*, 26 Ore. 509, 521, 38 Pac. 817, 820; *Hollister v. Davis*, 54 Pa. St. 508; *Briggs v. Titus*, 7 R. I. 441; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229; *Willis v. McIntyre*, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574; *Pierce v.*

payment will be applied to the interest rather than to the principal of a debt.³⁹ A sole debt rather than a joint debt of the debtor will be treated as paid.⁴⁰ Somewhat illogically it has been held, though most of the courts so holding, have been those which are generally disposed to favor the tendency of the Civil law to make the interest of the debtor the controlling principle, that where there has been made a payment, unappropriated by either party, to a creditor holding an interest bearing claim and one not bearing interest, the law will apply the payment to the former,⁴¹ and if the creditor holds two interest-bearing claims, to the one bearing the higher rate.⁴²

A payment will never be applied to illegal items or claims unless such application is directed by the debtor.⁴³

§ 1802. Effect of allowing creditor indefinite time to make application.

It is obvious that under the English rule allowing the creditor a right to direct the application of a payment even after litigation has begun, there is small place for the rule that in the

Knight, 31 Vt. 701; *Gifford v. Thomas' Estate*, 62 Vt. 34, 19 Atl. 1088; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561; *Rowan v. Chenoweth*, 55 W. Va. 325, 47 S. E. 80; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Paris Board of Education v. Citizens, etc., Ins. Co.*, 30 Up. Can. C. P. 132.

³⁹ *Coleman v. Smith*, 55 Ala. 368; *Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Becker v. Shaw*, 120 Ga. 1003, 48 S. E. 408; *McCormick v. Mitchell*, 57 Ind. 248; *Keigher v. St. Paul*, 69 Minn. 78, 72 N. W. 54; *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92; *Armijo v. Henry*, 14 N. Mex. 181, 89 Pac. 305, 25 L. R. A. (N. S.) 275; *Shepard v. New York*, 216 N. Y. 251, 110 N. E. 435, Ann. Cas. 1917 C. 1062; *Merchants' Bank v. Freeman*, 15 Hun, 359; *Langton v. Kops (N. Dak.)*, 171 N. W. 334; *Moore v. Kiff*, 78 Pa. 96.

⁴⁰ *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783; *Livermore v. Claridge*,

33 Me. 428; *Hutches v. J. I. Case Threshing Mach. Co. (Tex. Civ. App.)*, 35 S. W. 60. But where the money comes from two persons and both owe one debt and one owes another debt, application must be to the former debt. *Swisher v. McWhinney*, 64 Ohio St. 343, 350, 60 N. E. 565.

⁴¹ *Blanton v. Rice*, 5 T. B. Mon. 253; *Pargoud v. Griffing*, 10 La. 356; *McTavish v. Carroll*, 1 Md. Ch. 160; *Bussey v. Gant*, 10 Humph. 238.

⁴² *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109.

⁴³ *Wright v. Laing*, 3 B. & C. 165; *Armour Packing Co. v. Vinegar Bend Lumber Co.*, 149 Ala. 205, 42 So. 866; *Quigley v. Duffey*, 52 Ia. 610, 3 N. W. 659; *Phillips v. Moses*, 65 Me. 70; *Solomon v. Dreschler*, 4 Minn. 278; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. St. Rep. 781; *Dunbar v. Garritty*, 58 N. H. 575; *Huffstater v. Hayes*, 64 Barb. 573; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

absence of appropriation by the debtor or by the creditor, the court itself will make the application. In the case of current accounts, however, the English law seems almost though not quite conclusively to appropriate payments to the oldest items. Whether this is due to an assumption that such an intention on the part of the debtor is necessarily to be implied or whether the court deems that application the only one consistent with equity in the absence of express direction from the debtor, is not very clear, and is perhaps not material.⁴⁴

§ 1803. The rule of the Civil law.

The Civil law differs from the common law in its rules concerning the application or imputation of payments, especially

"In *Cory Bros. & Co. v. The Mecca*, [1897] A. C. 286, there were two debts in question and the Court of Appeal had held that on the authority of *Clayton's Case*, 1 Mer. 585, the payment must be appropriated to the earlier debt. In reversing this opinion Lord Herschell said: "I do not think the present case is governed by *Clayton's Case*, 1 Mer. 585, 608. It was there decided that where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made no account had been delivered by the appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct; they had never been brought into a common account." Lord Macnaughten said (pages 295, 296), "It is, I think, important to observe that even in cases *prima facie* falling within the doctrine of *Clayton's Case*, 1 Mer. 585, 608, the account between the parties, however it may be kept and rendered, is not conclusive on the question of appropriation. In a case in the Exchequer Chamber in 1874 (*City Discount Co. v. McLean*, L. R.

9 C. P. 692), where there was a current and unbroken account between the parties, *Clayton's Case*, 1 Mer. 585, 608, was pressed upon the court. 'I quite agree,' said Bramwell, B., 'with the principle of the cases cited, such as *Clayton's Case*, 1 Mer. 585, 608, and *Bodenham v. Purchas*, 2 B. & Ald. 39, and I think we ought to follow them when applicable. . . . But we must decide every case according to its own circumstances.' 'The true rule,' added Blackburn, J., 'is laid down in *Henniker v. Wigg*, 4 Q. B. 792, which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that they may be rebutted by evidence to the contrary.' The rule in *Clayton's Case*, 1 Mer. 585, 608, was very much considered in *Hallett's Case* in 1880, 13 Ch. D. at pp. 728, 738, by the Court of Appeal, consisting of Sir George Jessel, M. R., and Baggallay and Thesiger, L. J. 'It is a very convenient rule' said the Master of the Rolls, 'and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other considerations.'"

in the case where neither debtor or creditor have made an appropriation. In the Civil law in such a case the debtor is favored, while the tendency, in most jurisdictions where the common law prevails, is to favor the creditor. The rules derived from the Digest as stated by Pothier⁴⁶ were adopted in substance by the French Civil Code, the provisions of which have in turn been copied in Louisiana and Quebec.⁴⁸

§ 1804. Interests of third persons.

The debtor and creditor have ordinarily the exclusive power to determine the application of a payment and in exercising this power are not obliged to consider the interests of third persons such as sureties,⁴⁷ unless the source from which the pay-

⁴⁶ 1 Evans' Pothier on Obligations (2d Am. ed.), 285.

⁴⁷ The provisions of the code of Louisiana which are a free translation from the French Code and are in substance identical with corresponding provisions of the code of Lower Canada are as follows:

Art. 2163 (2159). The debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge.

Art. 2164 (2160). The debtor of a debt which bears interest or produces rent, cannot, without the consent of the creditor, impute to the reduction of the capital any payment he may make, when there is interest or rent due.

Art. 2165 (2161). When the debtor of several debts has accepted a receipt, by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there have been fraud or surprise on the part of the creditor.

Art. 2166 (2162). When the receipt bears no imputation, the payment must be imputed to the debt, which the debtor had at the time most interest in discharging, of those that are equally

due, otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable.

If the debts be of a like nature, the imputation is made to the less burdensome; if all things are equal, it is made proportionately.

⁴⁸ Kirby v. Marlborough, 2 M. & S. 18; Wright v. Hickling, L. R. 2 C. P. 199; *In re Sherry*, 25 Ch. D. 692; Turner v. Yates, 16 How. 14, 14 L. Ed. 824; Boyd v. Watertown Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Hansen v. Rounsavell, 74 Ill. 238; Graff v. Fox, 204 Ill. App. 598; Wyandotte Coal &c. Co. v. Wyandotte Paving &c. Co., 97 Kan. 203, 154 Pac. 1012, Ann. Cas. 1917 C. 580; Robson v. McKoin, 18 La. Ann. 544; Irving v. Mutual Trust Co., 82 N. J. Eq. 629, 90 Atl. 274; State v. Sooy, 39 N. J. L. 539; Allen v. Culver, 3 Denio, 284; Harding v. Tift, 75 N. Y. 461, 464; Woods v. Sherman, 71 Pa. 100; Philadelphia v. Tradesmen's Trust Co., 38 Pa. Super. 286; Pope v. Transparent Ice Co., 91 Va. 79, 20 S. E. 940; Kline v. Miller's Adm., 107 Va. 453, 59 S. E. 386. See also Wetmore & Morse Granite Co. v. Ryle, (Vt. 1919), 107 Atl. 109, and cases cited *infra*, n. 50. Cf. Drake v. Sherman, 179 Ill. 362, 53 N. E. 628; and Farmers' Sav. Bank v.

ment is derived (and perhaps the creditor's knowledge of that derivation) imposes a duty on the debtor or creditor or both. In this connection several situations must be differentiated.

1. The payment may be made with money impressed with a trust in favor of the third person, as where a trustee, or a partner pays one to whom he owes money both individually and in his fiduciary capacity with trust or partnership funds; or money may be paid to a debtor for the express purpose of satisfying a particular claim and he may pay it to the creditor without indicating that one claim rather than another is to be satisfied.

2. Where a payment is made from funds in the hands of a principal debtor, to which a surety would be subrogated on payment of the debt; and where, therefore, a destruction of this right by the creditor's application of the fund with knowledge of its derivation to other debts of the principal than that in which the surety is interested will discharge the latter.⁴⁸

3. The case must also be distinguished where, though there is no trust in favor of a third person affecting the money paid, the obligation of a surety by its very terms when fairly construed guarantees only that the principal debtor shall pay over certain sums collected by him. This obligation is fulfilled if these sums are paid over, however the debtor and creditor may agree to apply them.⁴⁹

Jameson, 175 Ia. 676, 157 N. W. 460, L. R. A. 1916 E. 362. In the latter case the court held that where a bank was induced by fraudulent misrepresentation to lend a certain amount to another, and the bank afterwards largely increased the loan of its own motion, a payment in excess of the amount first lent must be applied to the sum first lent and that the fraudulent person was freed from liability.

⁴⁸ See *supra*, § 1232.

⁴⁹ In *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 426, 71 N. W. 624, the action was brought by an insurance company against an agent, Herber, and his surety for failure to pay over premiums. The court held an agreement to apply these premiums to

other indebtedness ineffectual, saying:

"All moneys received by Herber in payment of premiums, less commissions and charges, were the property of the plaintiff, and for their payment the surety, Wright, was bound. He was therefore equitably entitled to have all money received for premiums for which he was liable applied in extinguishment of such liability, notwithstanding the agreement of the creditor and his principal to apply them on the latter's prior indebtedness." See also *Drake v. Sherman*, 179 Ill. 362, 53 N. E. 628; *Ida County Savings Bank v. Seidenticker*, 128 Ia. 54, 64, 102 N. W. 821, 111 Am. St. 189. Cf. *Boyd v. Watertown Agricultural Ins. Co.*, 20 Colo. App. 28, 76 Pac. 986.

4. The money with which the payment is made may be obtained from one who is interested in having it applied to one debt rather than another, but makes no bargain that it shall be. This has frequently happened where a contractor owing a sub-contractor or material man on various accounts has received from the owner of a building money with all or a part of which he pays the sub-contractor or material man, who seeks to apply the payment to a debt less well secured and to enforce a lien against the building from whose owner the money came.

With cases involving such facts should be compared decisions holding that money received from a tax collector by a municipality in ignorance of the taxes from which it was derived and without special direction, may be applied by the municipality to the payment of any indebtedness due from him, though this is detrimental to sureties on his bond for the year in which the taxes that were the source of the payment were assessed.⁵⁰

The first and last of the four classes enumerated above need particular examination in view of the decisions.

§ 1805. Payment of trust money.

Where the money paid is trust money the general principles of trusts must be applied. The original beneficiary may insist on the trust against any one but a purchaser for value without notice; and the question resolves itself into this: Is the creditor such a purchaser? Clearly he cannot be if when he received the money he was aware of the trust on which it was held by the debtor. There can be no doubt that the money must be applied in payment of the claim in which the beneficiary was especially interested.⁵¹ If the creditor was not aware of the facts, the question is whether cancellation of an antecedent debt is such giving of value as to cut off equities. It is generally so held in the law of commercial paper;⁵² and the result

⁵⁰ *Colerain v. Bell*, 9 Met. 499; *Chapman v. Commonwealth*, 25 Gratt. 721; *Grafton v. Reed*, 34 W. Va. 172, 12 S. E. 767.

⁵¹ *Peterson v. Shain*, 4 Calif. Unrep. 122; *American Express Co. v. Lesem*, 39 Ill. 312; *Harding v. Tift*, 75 N. Y. 461, 465; *Farr v. Weaver* (W. Va.), 99 S. E.

395. See also *Korbly v. Springfield Inst. for Sav.*, 245 U. S. 330, 38 S. Ct. 88, 62 L. Ed. 326.

⁵² See *supra*, § 1146. The New York Court which has (until the question was settled by the Negotiable Instruments Law) declined to treat the transfer of commercial paper for an

should *a fortiori* be the same where money is paid instead of negotiable paper transferred, if the debtor in terms agreed to an improper application. Where, however, no agreement is made between the debtor and creditor for a specific application of the payment, the only reason for allowing the creditor by his own application of the money to put himself in the position of a purchaser for value is that in reliance on his supposed right to make any application he sees fit he may have changed his position unfavorably in reference to the collection of his claims. This argument is also all that can be said in favor of treating a transfer of property or negotiable paper to secure an antecedent debt as a transfer for value; but the Negotiable Instrument Law, adopting the view previously prevailing in a majority of jurisdictions, has enacted that such a transfer is a transfer for value;⁵³ and if the argument is sound for negotiable paper, it should more clearly be so for money. This view is supported by decisions which hold that even though the debtor received the money in question from a third person for the express purpose of paying a particular debt, the creditor may apply it to another, if he was ignorant of the trust.⁵⁴

On the other hand, it may be argued that the right of a creditor to apply a payment as he pleases in the absence of directions from the debtor is a somewhat artificial rule of law devised to enable the courts to dispose of a difficulty arising where no directions is given; and that the rule should not be applied where it works injustice to third persons. It may even be supposed that a contractor by whom the money is directly paid intends to pay it, as he has agreed with the owner of a building to do, in discharge of a claim of a sub-contractor which is secured by a lien against the building. To allow the sub-contractor, if the contractor fails to express this intention, to apply the payment to another account and assert a lien against the building enables him not only to deprive the owner of the building of protection, but also to put the contractor in the position of a fraudulent and dishonest person; and some courts

antecedent debt as a transfer for value has gone very far in treating the payment of money for such a debt as cutting off equities. See *Harding v. Tift*, 75 N. Y. 461.

⁵³ See *supra*, § 1146.

⁵⁴ *Sheppard v. Steele*, 43 N. Y. 52, 60, 3 Am. Rep. 660; *Harding v. Tift*, 75 N. Y. 461.

do not allow the creditor to make such an application.⁵⁵ So where a partnership and an individual partner are indebted to the same creditor it has been held that a payment of money belonging to the partnership made without direction for its appropriation must be applied to the firm debt, though it did not appear that the creditor knew the source of the money.⁵⁶ Were it not for the fact that considerable time may elapse before the creditor discovers that the money was impressed with a trust, and that in the meantime his ability to collect one or more of his claims may have diminished, the reasoning supporting this result would be entirely convincing.

§ 1806. Payment with money derived from a particular source, but not held in trust.

It seems impossible to deny that the usual rules governing the application of payments should control the application of any payment, if the debtor who makes the payment did not hold it subject to a trust. Thus a contractor who received a payment from one interested in a particular application being made might have bought an automobile with the money, and the seller of the machine knowing all the facts could not have been subjected to any claim. Even a donee of the money could keep it, unless the donor were so nearly insolvent at the time of the gift that a gift of any of his property would be fraudulent against creditors. If this is true, a creditor of the contractor may surely take the money in satisfaction of any valid debt, even though he knows the source from which the money is derived. This may put him on inquiry whether there is a trust and, even if there is no trust, may sometimes have evidentiary value as indicating the debtor's intention; but if it be granted that no intention is manifested by the debtor, and that there is in fact no trust, the creditor should be allowed to apply the payments to any debt. Good authority supports this conclusion. Money paid by a contractor to a material

⁵⁵ *Clow v. Goldstein*, 147 Ill. App. 571; *Young v. Swan*, 100 Ia. 323, 328, 69 N. W. 566, and decisions cited *infra*, n. 58, 59 which favor the person making the original payment or his surety,

though there is no trust, necessarily are opposed to the text.

⁵⁶ *Thompson v. Brown, Moody & M.* 40; *Wiesenfeld v. Byrd*, 17 S. C. 106. See also *Fairchild v. Holly*, 10 Conn. 175.

man without direction may be applied by the latter to any debt due him from the contractor, though the money was derived from a payment under a contract, in the performance of which materials had been used for which an obligation with a surety had been incurred to the material man.⁵⁷ Nor should the mere fact that the creditor knows the source from which a payment is derived bind him to apply it towards the discharge of a surety or property connected with that source, unless it is a natural inference from such knowledge that it is a violation of duty by the debtor to apply it to any other debt.⁵⁸ Some cases, however, decide that though the debtor does not hold the money under any trust, the creditor will not be allowed to apply it to any other debt than that which its source renders appropriate, if the creditor when the payment is made has notice of that source;⁵⁹ and a few even hold that without regard to notice of the source the money must be applied to the satisfaction of the debt for

⁵⁷ *People v. Powers* 108 Mich. 339, 66 N. W. 215; *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, 158 Pac. 740, L. R. A. 1917 C. 630. See also. *Thacker v. Bullock Lumber Co.* 140 Ky. 463, 464, 131 S. W. 271. But see *contra* *Columbia Digger Co. v. Rector*, 215 Fed. 618, 227 Fed. 780, 142 C. C. A. 304; *Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co.*, 130 Mo. App. 474, 110 S. W. 24; *St. Louis Sash & Door Works v. Tonkins*, 188 Mo. App. 1, 173 S. W. 47; *W. H. Pipkorn Co. v. Evangelical & Co. Soc.*, 144 Wis. 501, 129 N. W. 516.

In *B. F. Sturtevant Co. v. Fidelity, etc., Co.*, 92 Wash. 52, 158 Pac. 740, 745, L. R. A. 1917 C. 630, the court said: "It is worthy of note that, while appellant, as surety, had in a sense an equity in the money with which the heating company paid respondent, yet it is not true that the heating company unqualifiedly held this money in trust. The conditions of the bond upon which appellant is surety do not require the heating company to pay the debts secured by the bond with money which it is to receive from the school dis-

trict. . . . Nor is there anything in its contract with the school district nor the statute requiring the heating company to pay its debts with that particular money." A similar decision is *Grace Harbor Lumber Co. v. Ortmann*, 190 Mich. 429, 157 N. W. 96. See also *Mack v. Collieran*, 136 N. Y. 617, 32 N. E. 604.

⁵⁸ In *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74, a check given by the owner of a building to a contractor was indorsed by him to the plaintiffs who were material men with no specific directions as to the debt to which it should be applied. It was held that the plaintiff, though knowing from the check, whence the money originally came might apply it to the oldest debts due from the contractor.

⁵⁹ *Williams v. Willingham-Tift Lumber Co.*, 5 Ga. App. 533, 63 S. E. 584; *Thacker v. Bullock Lumber Co.*, 140 Ky. 463, 464, 131 S. W. 271; *Bowles Co. v. Clark*, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613; *Hughes v. Flint*, 61 Wash. 460, 112 Pac. 633.

which is bound the property of the person who supplied the debtor with funds.⁵⁹

§ 1807. Application of collateral.

The creditor's right to apply the proceeds of collateral held for several debts is not limited by the fact that for one of the debts a surety also is bound. "The collateral is a trust fund which cannot be released except upon the discharge of all the obligations of the principal debtor it is pledged to secure, without releasing sureties on such obligations, but if it be applied solely to the discharge of the debtor's obligations, so far as it will extend, the surety has no vested right to have a preference in payment simply because his debt came into existence prior to another also entitled to the benefit of the collateral."⁶⁰ Obviously the proceeds of collateral must be applied to a debt for which the collateral was held, to the exclusion of other unsecured debts.⁶¹

§ 1808. Definition of tender.

Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of coöperation by the party to whom tender is made, the condition or obligation would be immediately satisfied. As the condition or obligation in question may require for its performance either the payment of money or the transfer of property, tender may relate either to money or property. In the strict sense of the word, there can be no tender of any services or other performance which takes time. Tender of an unliquidated amount of money is also in the

⁵⁹ *Sioux City, etc., Mfg. Co. v. Merten*, 174 Iowa, 332, 156 N. W. 367, L. R. A. 1916 D. 1247; *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, 53 N. W. 606; *Lee v. Storz Brewing Co.*, 75 Neb. 212, 106 N. W. 220. It does not clearly appear whether the Iowa court would reach the same result even though the debtor expressly directed an application unfavorable to the person furnishing the money. The

Nebraska court apparently would regard the direction as binding.

⁶⁰ *Irving v. Mutual Trust Co.*, 82 N. J. Eq. 629, 633, 90 Atl. 274, citing *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Fall River Nat. Bank v. Slade*, 153 Mass. 415, 26 N. E. 843, 12 L. R. A. 131. See also *Hansen v. Manley*, 72 Ia. 48, 33 N. W. 357.

⁶¹ *Young v. English*, 7 Beav. 10; *Johnson v. Thomas*, 77 Ala. 367; *Hicks*

strict sense impossible of performance, but by statute, in many States, one bound to pay an unliquidated amount may by offering a sum which is equal to or greater than the amount found due on subsequent liquidation, free himself from further liability for interest and costs.⁶²

§ 1809. Importance of tender.

Tender may be important in various aspects:—

1. As a total discharge from liability to perform an obligation. In this aspect the subject has previously been discussed in connection with excuses for non-performance of obligations.⁶³
2. As giving a right to performance by the other party or a right to an action of damages against him. In this aspect the subject has previously been discussed in connection with conditions and excuses for their non-performance.⁶⁴
3. As excusing damages for delay in performance. It is in this aspect that the subject remains to be treated.

The fundamental principles have been thus stated: "In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance, by refusing to receive

v. Bingham, 11 Mass. 300; *Thatcher v. Massey*, 20 S. Car. 542.

⁶² In *American Surety Co. v. Venner*, 183 Mass. 329, 332, 67 N. E. 331, the court said: "The only tender that can be made effectual under a contract is a tender of the whole amount due. The present contract was a single, indivisible undertaking, completely to indemnify the present plaintiff. Until there was a tender of entire relief from liability, the defendants continued liable. *Green v. Shurtliff*, 19 Vt. 592; *Dunning v. Humphrey*, 24 Wend. 31. No provision was made, nor attempted to be made, to relieve the plaintiff from its liability for the interest that was certain to accrue while the suit to

determine the disputed question was pending, and it does not appear that there was at any time any legal protection of the plaintiff from its liability for the costs of suit, or for the expenses of the litigation. . . . The principle is analogous to that which, in the absence of statutory authority, prevents an effectual tender in a case where the damages are unliquidated. *Dearle v. Barrett*, 2 A. & E. 82; *Davys v. Richardson*, 21 Q. B. D. 202; *McDowell v. Keller*, 4 Coldw. 258; *Lawrence v. Gifford*, 17 Pick. 366." See also *Southern Ry. Co. v. Harris* (Ala.), 80 So. 101.

⁶³ *Supra*, § 677.

⁶⁴ *Supra*, §§ 743, 744, 832, 833.

it. And as in ordinary cases, the debt is not discharged by such tender and refusal the plea must not only go on to allege that the defendant is still ready (*uncore prist*) but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt) for that would be inconsistent with the *uncore prist* and *profert in curiam*, (yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into court.”⁶⁵

§ 1810. Essential characteristics of tender.

As tender would amount to complete performance, if the offer were carried out, the requisites of a valid tender are indicated by the requisites of valid performance. There must be an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and a production of the subject-matter of the tender;⁶⁶ the amount tendered must not be less than what is due;⁶⁷ and if greater, there must be no demand for a

⁶⁵ Dixon v. Clark, 5 C. B. 365, 377.

⁶⁶ Camp v. Simon, 34 Ala. 126; Cothran v. Scanlan, 34 Ga. 555, 557; Angier v. Equitable Bldg. &c. Assoc., 109 Ga. 625, 35 S. E. 64; Chase v. Welsh, 45 Mich. 345, 7 N. W. 895; Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 N. W. 44; Lewis v. Mott, 36 N. Y. 395; Leask v. Dew, 102 N. Y. App. Div. 529, 92 N. Y. S. 891; Holladay v. Holladay, 13 Oreg. 523, 11 Pac. 260, 12 Pac. 821; Potter v. Thompson, 10 R. I. 1; Bowen v. Holly, 38 Vt. 574; Shank v. Groff, 45 W. Va. 543, 32 S. E. 248. In Iowa by statute an offer in writing is made the equivalent of actual production. Holt v. Brown, 63 Ia. 319, 19 N. W. 235.

⁶⁷ Dixon v. Clark, 5 C. B. 365; Ebersole v. Addington, 156 Ala. 575, 46 So. 849; Shafer v. Willis, 124 Cal. 36, 56 Pac. 635; Rauer's Law & Collection Co. v. Sheridan Proctor Co. (Cal. App.), 181 Pac. 71; Smith v. Pilcher, 130 Ga.

350, 60 S. E. 1000; Cheney v. Roodhouse, 135 Ill. 257, 25 N. E. 1019; Shuck v. Chicago, etc., R. Co., 73 Iowa, 333, 35 N. W. 429; Chapin v. Chapin (Mass.), 36 N. E. 746; Boyden v. Moore, 5 Mass. 365; Thurber v. Jewett, 3 Mich. 295; Kingsley v. Anderson, 103 Minn. 510, 115 N. W. 642, 116 N. W. 112; Graham v. Linden, 50 N. Y. 547; Equitable Life Assur. Co. v. Von Glahn, 107 N. Y. 637, 13 N. E. 793; Barreda v. Merchants' Nat. Bank (Tex. Civ. App.), 206 S. W. 726; Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564.

In Krauss v. Potts, 53 Okla. 379, 156 Pac. 1162, 5 A. L. R. 1213, it was held that where the amount due is within the exclusive knowledge of the creditor and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender is nevertheless good.

return of the excess.⁶⁸ The medium of payment must be that which the contract specifies or in the absence of contractual definition that which the law has made legal tender;⁶⁹ the time must be that fixed by the contract or by law;⁷⁰ it must not be before maturity;⁷¹ and the hour of the day must be reasonable.⁷² But at the present time in case of a liquidated debt a valid tender may be made subsequent to the day of maturity by adding legal interest to the amount of the debt.⁷³

§ 1811. By whom and to whom tender must be made.

Tender must be made by the debtor or by his agent.⁷⁴ Whatever may be the effect of payment by a stranger when accepted by the creditor,⁷⁵ it is clear that the creditor is under no obligation to accept such a payment. It is even more obvious that no valid tender can be made except to the creditor or some one authorized to receive payment on his behalf.⁷⁶ Under this principle a tender to a shopkeeper's clerk is sufficient, in the absence of circumstances tending to show lack of authority; and the fact that the claim has been previously put in the hands of an attorney for collection does not alter the rule.⁷⁷

§ 1812. Place of tender.

Tender must also be at the place provided in the contract

⁶⁸ *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365; *Dean v. James*, 4 B. & Ad. 546; *Perkins v. Beck*, 19 Fed. Cas. No. 10,984.

⁶⁹ *Juilliard v. Greenman*, 110 U. S. 421, 28 L. Ed. 204, 4 S. Ct. 122.

⁷⁰ *Whitlock v. Squire*, 10 Mod. 81; *Dixon v. Clark*, 5 C. B. 365, 378; *Dobie v. Larkin*, 10 Exch. 776; *Maynard v. Hunt*, 5 Pick. 240.

⁷¹ *Brown v. Cole*, 9 Jur. 290; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700; *Portland v. Atlantic, etc., R. Co.*, 74 Me. 241; *Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394; *Moore v. Kime*, 43 Neb. 517, 61 N. W. 736.

⁷² See *supra*, § 857.

⁷³ *Leftley v. Mills*, 4 T. R. 170; *Rudolph v. Wagner*, 36 Ala. 698; *Loughborough v. McNeven*, 74 Cal.

250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; and see *infra*, § 1817, *ad fin.*

⁷⁴ *Bac. Abr. Tender (A)*; *Watkins v. Ashwicke*, Cro. Eliz. 132; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571; *McDougald v. Dougherty*, 11 Ga. 570; *Rowell v. Jewett*, 73 Me. 365; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *Harris v. Jex*, 66 Barb. 232.

⁷⁵ See *infra*, §§ 1857-1861.

⁷⁶ *Moffat v. Parsons*, 5 Taunt. 307; *Mahan v. Waters*, 60 Mo. 167, 170; *Garnett v. Meyers*, 65 Neb. 280, 287, 91 N. W. 400, 94 N. W. 803; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

⁷⁷ *Moffat v. Parsons*, 5 Taunt. 307; *Hoyt v. Byrnes*, 11 Me. 475. See also *Wilmot v. Smith*, 3 C. & P. 453; *Kirton v. Braithwaite*, 1 M. & W. 310.

for performance, or if no provisions is made, then at the place determined by law. There are special rules in regard to negotiable paper,⁷⁸ in regard to the transfer of chattel property,⁷⁹ and in regard to the payment of rent by a tenant of real estate;⁸⁰ but apart from such special rules the general principle of common law is that the debtor must seek the creditor and make tender to him wherever he is found;⁸¹ and even without reference to this principle, the creditor's place of residence at the time when the contract was made will often be deemed by fair implication of fact the place of performance contracted for.⁸² In bilateral contracts each party is both a debtor and a creditor, and where the performance is due concurrently from each,⁸³ it follows that either party wishing to put the other in default must seek him in order to make tender, unless the contract, custom or rule of law prescribes a place where both performances are to be made.⁸⁴

§ 1813. What money is legal tender.

Legal tender for the payment of pecuniary debts in the United States is by statute established as follows: Gold coins for any amount; silver dollars for any amount; subsidiary silver coins for sums not exceeding ten dollars; minor coins of the United States for any amount not exceeding twenty-five cents; gold certificates and silver certificates for any amount; United States notes and demand treasury notes and interest-bearing

⁷⁸ See *supra*, § 1166.

⁷⁹ See *supra*, § 956.

⁸⁰ "A tenant has to the last minute of the day to pay rent; if he tenders it to the lessor on the land, if he pays it before midnight, he is not liable to distress. As rent is issuing out of land, and is payable there, it is competent for the tenant to protect himself, by being ready on the land, at the door of the mansion house, or any place where it is convenient for the rent to be accounted for." *Startup v. Macdonald*, 12 L. J. Exch. 477, 483; *Chapman v. Harney*, 100 Mass. 353.

⁸¹ *Startup v. Macdonald*, 12 L. J. Exch. 477; *Cranley v. Hillary*, 2 M. & S.

120; *Borah v. Curry*, 12 Ill. 66; *Taylor v. Meek*, 4 Blackf. 388; *Morey v. Enke*, 5 Minn. 392; *Bates v. Bates*, Walk. (Miss.) 401, 12 Am. Dec. 572; *Miles v. Roberts*, 34 N. H. 245; *Hunter v. LeConte*, 6 Cow. 728; *LaFarge v. Rickert*, 5 Wend. 187, 21 Am. Dec. 209; *Wagers v. Dickey*, 17 Ohio, 439, 49 Am. Dec. 467; *Berley v. Columbia, etc., R. Co.*, 82 S. Car. 232, 64 S. E. 397; *Jones v. Main Island Creek Coal Co. (W. Va.)*, 99 S. E. 462.

⁸² *Borah v. Curry*, 12 Ill. 66; *Barker v. Jones*, 8 N. H. 413.

⁸³ See *supra*, § 835.

⁸⁴ See *supra*, § 836.

notes for any amount except for duties on imports and interest on the public debt.⁸⁵ Foreign gold or silver is not legal tender; nor National Bank notes; but such notes are by statute receivable for duties on imports, and for all debts owing by the United States, except interest on the public debt, and in redemption of the national currency.⁸⁶ The decisions prior to 1869 were much in conflict upon the question whether a contract to pay a sum of money in a particular kind of legal tender (as for instance gold coin) imposed any other obligation than to pay that sum of money in any kind of legal tender which the obligor might select, but in that year the Supreme Court of the United States upheld the enforceability of such a contract according to its terms and this decision has settled the law.⁸⁷ Though such a contract would not generally be specifically enforced judgment will be given at law for the promised sum in the medium of payment contracted for.⁸⁸

§ 1814. Tender must be unconditional.

A tender made as a basis for acquiring a concurrent right to an exchange due from the party to whom tender is made may be made conditional on the performance by the latter of his obligation;⁸⁹ but a tender of performance of an absolute obligation of the debtor must be unconditional, since the debt itself is unconditional. Therefore, a condition that a payment shall be taken in full discharge or as a compromise of the debtor's obligation,⁹⁰ or that the creditor shall give a receipt in full of all

⁸⁵ U. S. Comp. Stats., Secs. 6453, 6454, 6564, 6571-6577.

⁸⁶ U. S. Comp. Stat., Sec. 9721.

⁸⁷ *Bronson v. Rhodes*, 7 Wall. 229, 19 L. Ed. 141. The earlier conflicting decisions are collected in 29 L. R. A. 512, n..

⁸⁸ *Dewing v. Sears*, 11 Wall. 379, 20 L. Ed. 189.

⁸⁹ See *supra*, §§ 832-834.

⁹⁰ *Evans v. Judkins*, 4 Camp. 156; *Hough v. May*, 4 A. & E. 954; *Henwood v. Oliver*, 1 Q. B. 409; *Field v. Newport, etc., R. Co.*, 3 H. & N. 409; *Mitchell v. King*, 6 C. & P. 237; *Hess*

v. Peck, 111 Ill. App. 111; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151; *Latham v. Hartford*, 27 Kan. 249; *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223; *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526; *Henderson v. Cass County*, 107 Mo. 50, 18 S. W. 992; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703; *Wood v. Hitchcock*, 20 Wend. 47; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Elderkin v.*

demands,⁹¹ or even a receipt for the money tendered,⁹² invalidates a tender. Objection by the creditor on this ground, however, must be made at the time in order to be effective.⁹³ Moreover a debtor may, when making an absolute tender, protest that the amount claimed by the creditor and tendered by himself is excessive and thereby reserve a right to sue to recover a portion of what he tenders.⁹⁴

§ 1815. Conditional tender of secured debt.

So strict is the rule that a tender must be absolute that it has been said that a tender accompanied with a demand for collateral securities pledged for the debt is insufficient;⁹⁵ and that a tender by a mortgagor must not impose even the condition that the mortgage be discharged of record;⁹⁶ and even that demand for the surrender of a negotiable instrument in-

Fellows, 60 Wis. 339, 19 N. W. 101. Cf. *Kennedy v. Moore*, 91 Iowa, 39, 58 N. W. 1066.

⁹¹ *Bowen v. Owen*, 11 Q. B. 130; *Finch v. Miller*, 5 C. B. 428; *Hepburn v. Auld*, 1 Cranch, 321, 2 L. Ed. 122; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571, 1 So. 202; *Jacoway v. Hall*, 67 Ark. 340, 55 S. W. 12; *Butler v. Hinckley*, 17 Col. 523, 30 Pac. 250; *West v. Farmers' Mutual Ins. Co.*, 117 Iowa, 147, 90 N. W. 523; *Manhattan L. Ins. Co. v. Stubbs* (Tex. Civ. App.), 216 S. W. 896.

⁹² *Sanford v. Bulkley*, 30 Conn. 344; *Lindsay v. Matthews*, 17 Fla. 575, 591; *Holton v. Brown*, 18 Vt. 224, 226, 46 Am. Dec. 148. Otherwise by statute in California, Iowa, South Dakota and a few other States. *West v. Farmers' Mutual Ins. Co.*, 117 Iowa, 147, 90 N. W. 523; *Pittsburg Plate Glass Co. v. Leary*, 25 S. Dak. 256, 126 N. W. 271, 31 L. R. A. (N. S.) 746, Ann. Cas. 1912 B. 928.

⁹³ In *Richardson v. Jackson*, 8 M. & W. 298, 299, it was said: "The case of *Cole v. Blake*, Peake N. P. 179, is a sufficient authority to warrant the Court in disposing of this application.

There Lord Kenyon says undoubtedly, 'that it had been determined that a party tendering money could not in general demand a receipt for the money.' But where no objection is made on that account, but the creditor refuses the money because he considers the amount is not sufficient, Lord Kenyon held that he could not afterwards object to the tender because the party making it required a receipt."

⁹⁴ *Scott v. Uxbridge, etc., R. Co.*, L. R. 1 C. P. 596; *Sweny v. Smith*, L. R. 7 Eq. 324; *Peers v. Allen*, 19 Grant Ch. (U. C.) 98.

⁹⁵ *Jones, Collateral Securities*, Sec. 545, citing *Cass v. Higgenbotam*, 27 Hun, 406; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569. The latter case does not involve the question, and the decision in the first case was reversed on appeal, 100 N. Y. 248, 3 N. E. 189.

⁹⁶ *Lindsay v. Matthews*, 17 Fla. 575. See also *Storey v. Krewson*, 55 Ind. 397, 23 Am. Dec. 668; *Loring v. Cooke*, 3 Pick. 48; *Potts v. Plaisted*, 30 Mich. 149; *McCormick v. McDonald*, 70 Mo. App. 389.

validates a tender of money for its payment.⁹⁷ But such few decisions as may warrant these conclusions seem unreasonable, though in all these instances the creditor could maintain an action without alleging or proving a prior conditional offer on his part.⁹⁸ Enforcement by the creditor of a judgment, however, should not be allowed if he refuses or fails to perform an act obviously necessary to reinstate the debtor in complete security. Accordingly the sound principle is that a tender conditional on the return of collateral security,⁹⁹ or on the execution of the discharge of a mortgage¹ is sufficient; and in the case of negotiable paper, not only a party to the instrument who requires it for the enforcement of a right against a prior party in order to recover what he himself has paid, as an acceptor,² or an indorser,³ may require the surrender of the instrument contemporaneously with payment, but clearly also the maker of a demand note must be justified in imposing the condition of its surrender unless so long a time has elapsed since the making of the note as to preclude the subsequent transfer to a holder in due course; and even in such a case, or in the case of the party primarily liable on time paper already due, clearly the debtor has the right to be assured that the creditor has not previously transferred the instrument. To make sure of this it is necessary to impose at least the condition that the instrument be produced, and undoubtedly mercantile custom warrants the rule that in every case an obligor on negotiable paper

⁹⁷ *Baker v. Wheaton*, 5 Mass. 509, 512, 4 Am. Dec. 71; *Fales v. Russell*, 16 Pick. 315; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148.

⁹⁸ See *supra*, § 835.

⁹⁹ *Berry v. Bank of Bakersfield (Cal.)*, 170 Pac. 415; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *First Nat. Bank v. Gidden*, 175 N. Y. App. D. 563, 566, 162 N. Y. S. 317. Cf. *Robertson v. Sully*, 2 N. Y. App. D. 152, 37 N. Y. S. 935. See also *Ocean Nat. Bank v. Fant*, 50 N. Y. 474, holding a demand on the maker unaccompanied by a conditional tender of collateral security insufficient to charge an indorser; *Schlesinger v. Wise*, 106 N. Y. App. D. 587, 94 N. Y. S. 718, holding a refusal

to return collateral justifies non-payment of a note.

¹ *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482; *Wheelock v. Tanner*, 39 N. Y. 481. See also *Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394; *Salinas v. Ellis*, 26 S. Car. 337, 2 S. E. 121. A debtor who demands a release of his mortgage should, however, tender the release for execution. *Pettengill v. Mather*, 16 Abb. Pr. 399. See also *Laing v. Meader*, 1 C. & P. 257.

² *Hansard v. Robinson*, 7 B. & C. 90.

³ *Osterman v. Goldstein*, 32 N. Y. Misc. 676, 66 N. Y. S. 506.

is entitled to surrender of the instrument contemporaneously with payment. If so, he should be allowed to impose the condition of surrender on his tender, without making it ineffectual; and the law supports the custom.⁴

§ 1816. Tender must be kept good.

Where a tender does not discharge the debtor's obligation he must keep the tender good in order that it shall be effectual to bar damages for delayed performance, that is, he must continue ready and willing and able to carry out the tender, and must not thereafter use the money or property tendered for his own profit;⁵ and a right to damages on account of non-payment of a debt or non-performance of a duty after being taken away by a tender may, by a subsequent demand and refusal, be restored from the time of such demand.⁶ If, however, a lien or mortgage has once been discharged by a valid tender it is not revived by failure to keep the tender good.⁷

⁴ *Hansard v. Robinson*, 7 B. & C. 90; *Dozier v. Vizard Inv. Co. (Ala.)*, 83 So. 572; *Storey v. Krewson*, 55 Ind. 397, 400, 23 Am. Rep. 668; *Heywood v. Hartshorn*, 55 N. H. 476; *Strafford v. Welch*, 59 N. H. 46; *Bailey v. Buchanan County*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482. Otherwise of a non-negotiable note. *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668. There is no doubt that a valid demand of payment by the holder of a negotiable instrument, whenever demand is necessary cannot be made without production of the instrument and an offer to surrender it on receipt of payment. *Ocean Nat. Bank v. Fant*, 50 N. Y. 474, 476. See *Uniform Neg. Inst. Law*, Sec. 74, *supra*, § 1166.

⁵ *Gyles v. Hall*, 2 Peere Wms. 378; *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678; *Odum v. Rutledge, etc.*, R. Co., 94 Ala. 488, 10 So. 222; *Abbott v. Herron*, 90 Ark. 206, 118 S. W. 708; *Burlock v. Cross*, 16 Col. 162, 26 Pac.

142; *Matthews v. Lindsay*, 20 Fla. 962; *Fortson v. Strickland (Ga. App.)*, 99 S. E. 147; *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 763; *Wilson v. McVey*, 83 Ind. 108; *Saum v. LaShell*, 45 Kans. 205, 25 Pac. 561; *McPheters v. Kimball*, 99 Me. 505, 59 Atl. 853; *Maulsby v. Page*, 105 Md. 24, 65 Atl. 818; *National Machine &c. Co. v. Standard &c. Co.*, 181 Mass. 275, 281, 63 N. E. 900; *Nelson v. Loder*, 132 N. Y. 288, 30 N. E. 369; *Rogers v. Piland (N. C.)*, 100 S. E. 181; *Anderson v. Griffith*, 51 Or. 116, 93 Pac. 934; *Barron v. Thompson (S. Car.)*, 97 S. E. 840; *Miller v. Poff (Tex. Civ. App.)*, 217 S. W. 399. See also *Union Machinery &c. Co. v. Thompson (Wash.)*, 182 Pac. 573. *Cf. Hebblethwaite v. Flint*, 173 N. Y. S. 81.

⁶ *Bacon, Abr. Tender (F)*; *Kelly v. Keith*, 85 Ark. 30, 106 S. W. 1173; *Town v. Trow*, 24 Pick. 168.

⁷ *Mitchell v. Roberts*, 17 Fed. 776; *McPherson v. James*, 69 Ill. App. 337; *Weeks v. Roberts*, 152 Mass. 20, 24 N. E. 905; *Stewart v. Brown*, 48 Mich. 383, 12 N. W. 499; *Norton v. Baxter*, 41

§ 1817. Effect of tender in discharging obligations.

The effect of a tender in giving rise to a right under a bilateral contract has been elsewhere considered,⁸ and here there is only in question the effect of a tender upon an absolute obligation.⁹ Such an obligation may conceivably be performable only at one time, as a contract to work on a particular day, or the obligation though due on a particular day may be capable of performance on any day thereafter. A typical obligation of the latter sort is an obligation to pay money. A valid tender of performance of an obligation of the former sort necessarily discharges the obligation.¹⁰ But a tender of performance of an obligation to pay money or of any obligation which is capable of performance after the day when performance was due, has no such effect. A right of action on a pecuniary debt is not barred by a prior tender;¹¹ but the debtor is free from liability for interest and costs from the date of the tender.¹² Moreover, the right to any lien, pledge, or security held by the creditor is thereby lost by him.¹³ This is true at the present time though

Minn. 146, 42 N. W. 865, 4 L. R. A. 305, 16 Am. St. Rep. 679; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Christenson v. Nelson, 38 Or. 473, 63 Pac. 648; Thomas v. Seattle Brewing, etc., Co., 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945.

⁸ See *supra*, §§ 743, 744, 832, 833.

⁹ As to the effect on the obligation of sureties, see *supra*, § 1235.

¹⁰ See *supra*, § 832; *infra*, § 1970.

¹¹ Saunders v. Denison, 20 Conn. 521, 525; Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595; Sheriff v. Hull, 37 Iowa, 174; Town v. Trow, 24 Pick. 168; Memphis Mach. Works v. Aberdeen, 77 Miss. 420, 27 So. 608; Howard v. Hunt, 57 N. H. 467; Kelly v. West, 36 N. Y. Super. 304; Charlotte Bank v. Davidson, 70 N. C. 118; Loth-Hoffman Clothing Co. v. Schwartz (Okl.), 176 Pac. 916; Hays v. Bashor (Wash.), 185 Pac. 814. By Cal. C. C., Sec. 1500, a due offer of payment immediately

followed by deposit of the amount of the debt in a bank within the State in the creditor's name and notice to him, operates as payment. Colton v. Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225.

¹² Bacon, Abr. Tender (F), and see cases in the preceding note.

¹³ Ratcliff v. Davies, Cro. Jac. 244; Coggs v. Bernard, 2 Ld. Raym. 909; Ryall v. Rolle, 1 Atk. 165, 167; Mitchell v. Roberts, 17 Fed. 776; Latta v. Tutton, 122 Cal. 279, 54 Pac. 844; McCalla v. Clark, 55 Ga. 53; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Hill v. Carter, 101 Mich. 158, 59 N. W. 413; Norton v. Baxter, 41 Minn. 146, 42 N. W. 865, 4 L. R. A. 305, 16 Am. St. Rep. 679; Moyer v. Leavitt, 82 Neb. 310, 117 N. W. 698; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Davis v. Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 202, 205.

In First Nat. Bank of Seattle v.

the tender is made after maturity of the debt or after the law day of a mortgage.¹⁴

§ 1818. Tender of chattel property.

The effect of a tender of specific articles logically should depend on the ability of the debtor to transfer title to the creditor by tendering the goods to which the creditor is entitled and storing them on his behalf; for unless the creditor is made owner the debt should still persist.

As the supposition is that the creditor rejects the tender, this means that the debtor must be able to compel performance of the creditor's obligation against the latter's will. As has been seen,¹⁵ in many States the local law permits under a contract to sell such specific enforcement by the seller of the buyer's duty to take title, though in many jurisdictions this is not allowed. But where a unilateral obligation to transfer chattels exists it seems universally held at least in the United States that a tender if made and kept good operates as a complete satisfaction of the debtor's obligation, and in effect makes the creditor owner of the goods.¹⁶ The American decisions are based directly or indirectly on an early New York

Gidden, 175 N. Y. App. Div. 563, 566, 162 N. Y. S. 317, McLaughlin, J., speaking for the Court said: "It may be conceded that tender of the amount due discharged the plaintiff's lien on the salmon, and defendant could have replevied the same; or, if damages had been sustained, interposed a counterclaim, or maintained an action for conversion. (*Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Reusens v. Arkenburgh*, 135 N. Y. App. Div. 75, 119 N. Y. S. 821.) But the fact that the collateral was not surrendered when a tender of payment was made of the draft did not relieve the defendant from his obligation to pay. That obligation continued."

¹⁴ *Caruthers v. Humphrey*, 12 Mich. 270; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Thomas v. Seattle Brewing &c. Co.*, 48 Wash. 560, 94

Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945. And see *supra*, § 1810, *ad fin.*

¹⁵ *Supra*, §§ 1365 *et seq.*

¹⁶ *Garrard v. Zachariah*, 1 Stew. (Ala.) 272; *Smith v. Loomis*, 7 Conn. 110; *Saunders v. Denison*, 20 Conn. 521, 525; *Fannin v. Thomason*, 50 Ga. 614, 616; *Games v. Manning*, 2 Greene (Ia.), 251; *Hambel v. Tower*, 14 Iowa, 530; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Leballister v. Nash*, 24 Me. 316; *Robinson v. Batchelder*, 4 N. H. 40; *Slingerland v. Morse*, 8 Johns. 474, 478; *Sheldon v. Skinner*, 4 Wend. 525, 528, 21 Am. Dec. 161; *Hayden v. Demets*, 53 N. Y. 426; *Zinn v. Rowley*, 4 Pa. St. 169; *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330; *Gilman v. Moore*, 14 Vt. 457; *Curtiss v. Greenbanks*, 24 Vt. 536. See also *Robbins v. Luce*, 4 Mass. 474.

case,¹⁷ which found its chief support in a statement of the Civil law of consignment by Pothier.¹⁸

§ 1819. Waiver of objection to tender.

Under general principles, previously discussed,¹⁹ tender is excused by obstruction or prevention or imposition of unwarranted conditions by the person to whom it was to be made.²⁰ It is also generally held that a refusal of tender upon one ground precludes subsequent objection to its validity on other grounds;²¹ and even that a general refusal by the creditor failing to specify any cause waives any objection which could be then obviated by the debtor, and this is sometimes so provided by statute.²² Thus an objection to the actual production of

¹⁷ In *Slingerland v. Morse*, 8 Johns. 474, 478, the court said: "If a man [by bond] be bound to pay 100 quarters of wheat, and he tender it, at the day, he need not plead *uncore prist*, for the corn is *bonum periturum*, and it is a charge for the obligor to keep it. (Co. Lit. 207 a. *Peytoe's Case*, 9 Co. 79 a). So it was held, still more early (20 Edw. IV. 1 Bro. tit. *Tout Temps* Pr. st. pl. 31) that if an obligation be to enfeoff the plaintiff, by a day, or to deliver him a horse, tender and refusal is a bar forever. The delivery of the goods was a thing collateral to the obligation, as the books term it, and, by tender and refusal, the plaintiff shall never be entitled to the money. Here was no *precedent* debt or *duty*. He must resort to the specific articles tendered, and the person in whose possession they are, holds them as his bailee, and at his risk. The effect of a tender and refusal, correctly made, of a specific article, is analogous to the effect of a consignment under the French law. (Pothier, *Traité des Obligations*, No. 545.)"

¹⁸ In *Sheldon v. Skinner*, 4 Wend. 525, 529, 21 Am. Dec. 161, the New York Court referring to the earlier decision quoted from Pothier, *Obligations*, No. 545: "The effect of a con-

signation, if it is adjudged to be valid, is, that the debtor is thereby absolutely discharged; and although *subtilitate juris* he continues to be the owner of the things consigned until they are taken away by the creditor, they are no longer at his risque, but at that of the creditor, who, from being a creditor of a certain amount generally, becomes the creditor of the particular articles which are so consigned, *tantum certorum corporum*; and he is no longer the creditor of his original debtor, who is entirely liberated, but of the consignatory, who obliges himself by a *quasi* contract to deliver the articles in his custody to the creditor if the consignment is adjudged good, or to the debtor if it is declared to be null."

¹⁹ See *supra*, § 677.

²⁰ *Servel v. Jamieson*, 255 Fed. 892, 167 C. C. A. 212 *Smith v. Thomas* (Ala.), 78 So. 820; *Evans Furniture Co. v. Meyers* (Ala. App.), 81 So. 843; *Baird v. Union Mut. L. Ins. Co.* (Neb.), 173 N. W. 686. Cf. *Greenfield v. Taylor* (Minn.), 170 N. W. 345.

²¹ See *supra*, § 743; *Stanley v. Pilker* (S. Dak.), 167 N. W. 393.

²² Cal. Civ. Code, § 1501; Code Civ. Proc., Sec. 2076; *McWhirter v. Crawford*, 104 Ia. 550, 553, 73 N. W. 1021, 72 N. W. 505.

money is excused by a refusal to receive the money if produced.²³ An objection that the medium of payment is not legal tender is similarly waived not only by a refusal on other grounds but also by a general refusal not specifying the character of the medium of payment as the ground of refusal.²⁴ An objection to a deficiency in amount may be waived in the same way.²⁵

So where change is demanded from a tendered sum in excess of the debt, objection is waived if some other ground is stated.²⁶ It must be remembered, however, that in order to make out a waiver, it is necessary that there should be an existing capacity on the part of the debtor to perform and therefore to correct, if proper objection had been made, whatever defect there might be in his tender.²⁷ It seems also that the whole matter

²³ *Black v. Smith, Peake*, N. P. 88; *Odum v. Rutledge, etc.*, R. Co., 94 Ala. 488, 10 So. 222; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82; *Hall v. Norfolk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356; *Lamar v. Sheppard*, 84 Ga. 561, 10 S. E. 1084; *Ventres v. Cobb*, 105 Ill. 33; *Austin v. Smith (Iowa)*, 109 N. W. 289; *McStea v. Warren*, 26 Ia. Ann. 453; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773; *Baird v. Union Mut. L. Ins. Co. (Neb.)*, 173 N. W. 686; *Haney v. Clark*, 65 Tex. 93; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956. But see *Thomas v. Evans*, 10 East, 101; *Dunham v. Jackson*, 6 Wend. 22; *Farnsworth v. Howard*, 1 Coldw. 215. Cf. *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

²⁴ *Harriman v. Meyer*, 45 Ark. 37; *Snow v. Perry*, 9 Pick. 539. Thus where there are funds in the bank to meet it, a check is a good tender if no objection is taken on the ground that legal tender is desired. *Kitchell v. Schneider*, 180 Ind. 589, 103 N. E. 647; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *Ricketts v. Buckstaff*, 64 Neb. 851, 90 N. Y. 915;

Pershing v. Feinberg, 203 Pa. 144, 52 Atl. 22; *Schaeffer v. Coldren*, 237 Pa. 77, 85 Atl. 98; Ann. Cas. 1941 B. 175; *Wright v. Douglas (Wyo.)*, 183 Pac. 786. But see *Jennings v. Mendenhall*, 7 Ohio St. 257. If objection is made to that medium of payment, a check is not a valid tender. *Servel v. Jamieson*, 255 Fed. 892, 167 C. C. A. 212; *Roanoke R. R. & Lumber Co. v. Privette (N. C.)*, 100 S. E. 79; and see cases, *supra*. If there are insufficient funds in the bank the tender of a check though no good objection is made by the creditor is not a valid tender. *New York Utility Co. v. Williamsburg Steam Laundry Co.*, 187 N. Y. App. D. 110, 175 N. Y. S. 60.

²⁵ *Dozier v. Vizard Inv. Co. (Ala.)*, 83 So. 572; *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241; *Guengerich v. Smith*, 36 Ia. 587; *Sheriff v. Hull*, 37 Ia. 174. See also *Ricker v. Blanchard*, 45 N. H. 39.

²⁶ *Bevan v. Rees*, 7 Dowl. P. C. 510; *People's Furniture, etc., Co. v. Crosby*, 57 Neb. 282, 77 N. W. 658, 73 Am. St. Rep. 504; *Lohman v. Crouch*, 19 Gratt. 331.

²⁷ *Kofoed v. Gordon*, 122 Calif. 314,

should be dealt with rather as one of evidence justifying certain inferences to be drawn from the creditor's attitude in each case, than as an absolute rule of law. Thus where a debtor tendered \$10 in payment of a debt which the court found amounted to nearly \$20,000, the California Court, though confronted with a positive statutory provision and a previous decision of its own that a tender of less than the amount due was valid if no objection was taken on that ground,²⁸ was clearly unwilling to admit that a failure to make more than a general refusal to the tender operated as an admission of the correctness of the amount and discharged the creditor's lien or collateral security.²⁹

The more technical the objection to the tender, the more reasonable will be the inference from slight evidence that the objection is waived; and waiver of a particular objection will more readily be inferred where specific objections are taken by the creditor than where he simply declines the tender in general terms. A defect in the amount tendered should not so readily be deemed waived as a defect in time, place, manner, or medium of payment, because it is less reasonable to assume that the creditor assented to receive a deficient amount than that he assented to receive it in a different manner from that which his contract entitled him to. Moreover, even if the creditor should assent to receive a smaller amount than that to which he was entitled, if the amount of the debt was liquidated and undisputed his agreement, however express, to forego a portion of the claim would not deprive him of a right to recover it subsequently.³⁰ The defective tender might prevent interest and costs from accruing, and might discharge a lien, but it would have no further effect.³¹

54 Pac. 1115; *Smith v. Central &c. Imp. Co.* (Cal. App.), 187 Pac. 456; *Leask v. Dew*, 102 N. Y. App. Div. 529, 92 N. Y. S. 891, and see *supra*, §§ 743, 744.

²⁸ Cal. Code Civ. Proc., Sec. 2076; Cal. Civ. Code, Sec. 1501; *Oakland Sav. Bank v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476. See also *Latimer v.*

Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

²⁹ *Colton v. Oakland Bank*, 137 Cal. 376, 70 Pac. 225.

³⁰ See *supra*, § 120.

³¹ *Sheriff v. Hull*, 37 Ia. 174; *McWhirter v. Crawford*, 104 Ia. 550, 73 N. W. 1021; *Carpenter v. Welch*, 40 Vt. 251; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564.

CHAPTER L

RELEASE, RESCISSION, ACCORD, ACCOUNTS STATED, NOVATION

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§ 1820. Nature and effect of release.

A release, as the word is used technically in speaking of executory contracts, is a discharge under seal of an existing obligation or right of action. In the law of conveyancing, however, a release operates not only to destroy the right of the party executing the instrument but to create a similar right in the party to whom it is executed. In other words, it is a grant or conveyance, and such was the early theory of a release even when it related to a right of action. But, however important it may be to remember this in order to understand early decisions,¹ the instrument to-day is regarded in such case as having merely a destructive operation. Any contract either before or after breach may be discharged by release. Like other sealed instruments it needs no consideration.²

The word release is frequently used even by lawyers in an untechnical sense as including discharge from liability by any method, but to avoid ambiguity the word discharge should be used for this broad meaning, and the word release reserved for its narrow and technical sense. This is important because many transactions (for example covenants not to sue) which

¹ See, *e. g.*, *supra*, § 1309.

² *Tiger v. Lincoln*, 1 Col. 394; *Union Bank v. Call*, 5 Fla. 409; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Tyson v. Dorr*, 6 Whart. 256; *Benson v. Mole*, 9 Phila. 66; *Sheer v. Austin*, 2

Rich. L. 330. See also *Mills v. Larrance*, 186 Ill. 635, 58 N. E. 219; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319; *Winter v. Kansas City Ry. Co.*, 160 Mo. 159, 61 S. W. 606.

operate as a discharge do so because law or equity, with or without a suit for that purpose, in effect specifically enforces a promissory agreement, while a release is a direct and immediate destruction of the claim released.³

The same causes which justify rescission of an executed transfer of property will also justify the rescission of a release, and after such rescission the chose in action is revived. The party claiming to rescind is allowed to manifest his intention by bringing suit to enforce the chose in action and, on plea of release being made, by showing the invalidity of the release. The facts on this issue are generally submitted to the jury with the rest of the case.⁴

§ 1821. Early law.

In very early times it may be that a release did not operate as a legal discharge of a specialty,⁵ since payment⁶ or judgment⁷ did not. Even at the present day a negotiable instrument before maturity cannot be effectually discharged by release.⁸ Nothing but cancellation, destruction, or surrender of the instrument itself can fully discharge a negotiable instrument before maturity. But this is now the only exception to the efficacy of a release.

§ 1822. Effect of statutes in regard to seals.

The legislation in many of the United States,⁹ depriving a seal of the efficacy which it had at common law, has been un-

³ Thus where a release is executed on Sunday it is effectual since it is an executed transaction. *Williams v. Philadelphia Rapid Transit Co.*, 257 Pa. 354, 101 Atl. 748.

⁴ *St. Louis, I. M. & S. R. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803; *Chicago &c. R. v. Jennings*, 217 Ill. 494, 75 N. E. 560; *Reddington v. Blue*, 168 Ia. 34, 149 N. W. 933; *Malloy v. Chicago &c. R. Co. (Ia.)*, 170 N. W. 481; *Missouri Pac. R. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066; *Louisville &c. R. v. Helm*, 121 Ky. 645, 89 S. W. 709; *Connors v. Richards*, 230 Mass. 436, 119 N. E. 831; *Wheeler*

v. Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754; *Shaw v. Delaware & Hudson R.*, 126 N. Y. App. D. 210, 110 N. Y. S. 362; *Clark v. Northern Pac. R.*, 36 N. Dak. 503, 162 N. W. 406, L. R. A. 1917 E. 390. See also *infra*, § 1551.

⁵ See *Fowell v. Forrest*, 2 Wms. Saund. 47 n.

⁶ *Ames, Specialty Contracts and Equitable Defenses*, 9 Harv. L. Rev. 49, 54.

⁷ See *infra*, § 1920

⁸ *Dod v. Edwards*, 2 C. & P. 602; *Schoen v. Houghton*, 50 Cal. 528.

⁹ See *supra*, § 218.

fortunate in depriving the law of a simple and easy means for the voluntary discharge of liabilities. For a voluntary parol agreement to discharge a debtor from liability was not efficacious at common law,¹⁰ and in States where a seal is at most presumptive evidence of consideration, a release with or without a seal must be on the footing of a parol agreement.¹¹ In a few jurisdictions¹² statutes have qualified this result by giving an unsealed release in writing the effect which the common law gave to sealed writings only. The courts of a few other States by judicial legislation have given the effect of a sealed release to a written discharge or acknowledgment of receipt in full.¹³

§ 1823. Covenant to forbear.

A release properly is a present discharge; and a release of a right to be acquired in the future is, therefore, anomalous, and, in the view of early lawyers, an impossibility;¹⁴ but a covenant of perpetual forbearance has been from early times, in order to avoid circuity of action, a bar at law to an action, and if the

¹⁰ See *infra*, § 1829.

¹¹ A sealed release made in Michigan was disregarded on this ground in *Wabash Ry. v. Brow*, 65 Fed. 941, 13 C. C. A. 222. So in *Missouri*, *Winter v. Kansas City Ry. Co.*, 160 Mo. 159, 61 S. W. 606.

It should be noticed that in New York (and perhaps other States) the statute depriving a seal of its common-law effect applies only to executory contracts. Hence a voluntary release is good. *Homans v. Tyng*, 56 N. Y. App. Div. 383, 387, 67 N. Y. S. 792; *Finch v. Simon*, 61 N. Y. App. Div. 139, 70 N. Y. S. 361.

¹² See the statutes of California, Indiana, Montana, North Dakota, South Dakota, Tennessee, cited *supra*, § 218. An informal waiver or agreement does not come within these statutes. The instrument must purport to be a release. *Wheelock v. Pacific Gas Co.*, 51 Cal. 223; *Upper San Joaquin Co. v. Roach*, 78 Cal. 552, 21 Pac. 304. See also *Miller v. Fox*, 111 Tenn. 336, 76 S. W. Rep. 893.

But under the Alabama statute (Code, § 2774) a receipt in full if intended as a release is effectual as such. *Eufaula Nat. Bank v. Passmore*, 102 Ala. 370, 14 So. 683; *Stegall v. Wright*, 143 Ala. 204, 38 So. 844.

¹³ *Green v. Langdon*, 28 Mich. 221; *Holmes v. Holmes*, 129 Mich. 412, 89 N. W. 47; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251, 42 Am. Rep. 248. See *contra*, *Reynolds v. Reynolds*, 55 Ark. 369; *Warren v. Skinner*, 20 Conn. 559; *Stamper v. Hayes*, 25 Ga. 546; *Bingham v. Browning*, 197 Ill. 122, 64 N. E. 317; *Dennett v. Lamson*, 30 Me. 223; *First Bank v. Marshall*, 73 Me. 79; *Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248; *Gold Medal Sewing Mach. Co. v. Harris*, 124 Mass. 206. See the discussion by Professor Decker in 1 Ill. Law Bulletin, 166.

¹⁴ *Hoe v. Marshall*, Cro. Eliz. 579; *Hoe's Case*, 5 Rep. 70b, 71; *Neale v. Sheffield*, Brownl. 109; S. C., *Yelv.* 192; 18 Vin. Abr. *327.

covenantor or covenantors are the only defendants,¹⁵ a covenant of permanent forbearance is, therefore, as effective as a release.^{16a} The distinction between such a covenant and a release is nevertheless of importance, for a covenant not to sue one or any number less than all of several joint debtors does not have the consequences of a release, and is given only its literal meaning.¹⁶ Though the early law did not concern itself with implications, deeming the express words of a writing a conclusive limit of its meaning, there is no doubt in modern times that an attempted release of a future right must be construed as amounting at least to a covenant not to enforce the right whenever it arises.¹⁷

§ 1824. Conditional releases.

A release may be subject to the happening of a condition precedent,¹⁸ and it has been held that it may also be subject to a condition subsequent.¹⁹ There seems difficulty in this result, however. It was a settled doctrine of the common law that a cause of action once discharged was gone forever. If such a release can be successfully pleaded to the action before the condition subsequent happens, a court of law must give judgment for the defendant, and if after the condition subsequent has happened an action is again brought on the same cause of action, the plea of *res judicata* seems unanswerable.²⁰ The intention of the parties can be effectuated in great measure, however, by construing the so-called condition subsequent as

¹⁵ *Hodges v. Smith*, Cro. Eliz. 623; *Smith v. Mapleback*, 1 T. R. 441, 446; *Ford v. Beech*, 11 Q. B. 852.

^{16a} *Flinn v. Carter*, 59 Ala. 364; *Jones v. Quinnipiack Bank*, 29 Conn. 25; *Guard v. Whiteside*, 13 Ill. 7; *Peddicoord v. Hill*, 4 T. B. Mon. 370; *Foster v. Purdy*, 5 Met. 442; *Stebbins v. Niles*, 25 Miss. 267; *Line v. Nelson*, 38 N. J. L. 358; *Phelps v. Johnson*, 8 Johns. 54; *Thurston v. James*, 6 R. I. 103.

So a bond to indemnify against a debt will bar an action by the obligor on the debt. *Richards v. Fisher*, 2 Allen, 527; *Clark v. Bush*, 3 Cow. 151.

¹⁶ See *supra*, § 338.

¹⁷ *Pierce v. Parker*, 4 Metc. 80; *Reed v. Tarbell*, 4 Metc. 93. See also *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651; *Power's Appeal*, 63 Pa. 443.

¹⁸ *Gibbons v. Vouillon*, 8 C. B. 483; *Corner v. Sweet*, L. R. 1 C. P. 456.

¹⁹ *Slater v. Jones*, L. R. 8 Ex. 186; *Newington v. Levy*, L. R. 5 C. P. 607, L. R. 6 C. P. 180.

²⁰ See *Ford v. Beech*, 11 Q. B. 852. Therefore, in *Tyson v. Dorr*, 6 Whart. 256, the condition subsequent was held void and the release absolute.

a promise to pay the released claim in a given event. The creditor's right of action on the happening of that event would than be on the new promise contained in the release, not on the original cause of action. The seal on the release would support the promise, wherever seals still retain their efficacy.

§ 1825. Construction.

Most of the cases on releases involve questions of construction only, and some technical rules of construction have been established; but these, like most rules of construction, would be held subordinate to the broad rule that the intention which the words of the instrument express in the light of the circumstances existing at the time shall prevail.²¹ Thus "by a release of all actions, suits, and quarrels, a covenant before the breach of it is not released, because there is not any cause of action, nor any certain duty before the breach of it, but the breach of it ought to precede the action, and the cause of the duty. . . . But . . . by release of covenants, the covenant is discharged before the breach of it."²²

"If a man release to another all manner of demands, this is the best release to him to whom the release is made, that he can have, and shall enure most to his advantage. For by such release of all manner of demands all manner of actions reals, personals and actions of appeals are taken away and extinct, and all manner of executions are taken away and extinct."²³

The most important rule of construction relating to releases was thus expressed in an English case by Lindley, M. R.: "General words of release are always controlled by recitals and context which show that unless the general words are restricted,

²¹ See *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377.

²² *Hoe's Case*, 5 Coke, 70b, 71a.

²³ Litt., § 508; Co. Litt., 291a. See *Suit v. Suit*, 97 Md. 539, 55 Atl. 382.

The nicety of construction which the early law sanctioned may be illustrated by some other sections of Littleton. Thus, section 498, "If I have any cause to have a writ of detinue of my goods against another, albeit that I

release to him all actions personals, yet I may by the law take my goods out of his possession, because no right of the goods is released to him but only the action."

Again, section 504, "If a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet he may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *feri facias*; for execution upon such a writ cannot be said an action."

the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them." ²⁴

§ 1826. Elements of rescission by parol agreement.

The discharge of a contract by the parol agreement of the parties would seem on principle to require the same elements of mutual consent and consideration that are necessary for the formation of simple contracts; and certainly this is the general rule.

If the parties to a bilateral contract agree to rescind it there is no difficulty in regard to consideration, whether the agreement to rescind is made before or after the breach of the original contract, so long as neither party has completely performed or been discharged from his obligation. The promise of one party to forego his rights under the contract is sufficient consideration for the promise of the other party to forego his rights. ²⁵

The agreement to rescind need not be express. Mutual assent to abandon a contract, like mutual assent to form one, may be inferred from circumstances. ²⁶ Therefore, "If either

²⁴ *Re Perkins*, [1898] 2 Ch. 182, 190. To the same effect are *Payler v. Homersham*, 4 M. & S. 423; *Lindo v. Lindo*, 1 Beav. 496; *London &c. Ey. Co. v. Blackmore*, L. R. 4 H. L. 610; *Turner v. Turner*, 14 Ch. D. 829; *Texas & Pac. R. v. Dashiell*, 198 U. S. 521, 49 L. Ed. 1150, 25 Sup. Ct. 737; *Gold Hunter Min. &c. Co. v. Bowden*, 252 Fed. 388, 164 C. C. A. 312; *Tryon v. Hart*, 2 Conn. 120; *Seymour v. Butler*, 8 Ia. 304; *Rich v. Lord*, 18 Pick. 322; *Wiggin v. Tudor*, 23 Pick. 434; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Matlack's Appeal*, 7 Watts & S. 79; *Heiser v. Reynolds (Pa.)*, 106 Atl. 888. See also *Danby v. Coutts*, 29 Ch. D. 500, and *supra*, § 1551. Cf. especially with *Turner v. Turner*, *supra*, *Dorman v. Dorman*, 185 Mass. 153, 69 N. E. 1043.

²⁵ *King v. Gillett*, 7 M. & W. 55; *Farrar v. Toliver*, 88 Ill. 408; *Rollins v. Marsh*, 128 Mass. 116; *Brigham v. Herrick*, 173 Mass. 460, 467, 53 N. E. 906; *Blagborne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134; *Spier v. Hyde*, 78 N. Y. App. Div. 151, 158, 79 N. Y. S. 699; *Enderlien v. Kulaas*, 25 N. Dak. 385, 141 N. W. 511; *Dreifus v. Columbian Salvage Co.*, 194 Pa. 475, 486, 45 Atl. 370; *Blood v. Enos*, 12 Vt. 625; *Tacoma &c. Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360, 362; *Montgomery v. American Central Ins. Co.*, 108 Wis. 146, 159, 84 N. W. 175.

²⁶ *Green v. Wells*, 2 Cal. 584; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 41, 42, 115 N. E. 42; *Heinlin v. Fish*, 8 Minn. 70; *Fine v. Rogers*, 15 Mo. 315;

party without right claims to rescind the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent." ²⁷ Sometimes circumstances of a negative character, such as the failure to take any steps looking towards the enforcement or performance of the contract, justify the inference of mutual assent to rescind.²⁸ Also "a subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, substitutes, and is substituted for the earlier contract and becomes the only agreement of the parties on the subject." ²⁹ But the subsequent agreement must have sufficient consideration. Therefore if the undertaking by one party is simply to perform the whole or part of what he promised in the original contract, it

Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467; *Wheeden v. Fiske*, 50 N. H. 125; *Schwartzreich v. Bauman-Basch, Inc.*, 172 N. Y. S. 683. See also cases cited in the following two notes.

²⁷ *Woodard v. Willamette Valley &c. Land Co.*, 89 Ore. 10, 173 Pac. 262, 264, quoting 2 Parsons Cont. *678, and citing *Moline Jewelry Co. v. Crew*, 171 Ala. 415, 55 So. 144; *McKenna v. McKenna*, 118 Ill. App. 240; *Ralya v. Atkins*, 157 Ind. 331, 61 N. E. 726; *Kingman Colony v. Payne*, 78 Ore. 238, 152 Pac. 891. It should be observed that this is not an acceptance of the common but misleading expression that any material breach or a repudiation by a party to a contract is an offer to rescind. It is a pure question of fact whether such an inference can be drawn. See *supra*, § 1302.

²⁸ *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109, 31 N. E. 756; *Mowry v. Kirk*, 19 Ohio St. 375.

²⁹ *Housekeeper Pub. Co. v. Swift*, 97 Fed. 290, 38 C. C. A. 187. See in accord, *Patmore v. Colburn*, 1 C. M. & R. 65, 71; *McCabe Const. Co. v. Utah Const. Co.*, 199 Fed. 976; *Mobile*

Electric Co. v. Mobile (Ala.), 79 So. 39; *Stow v. Russell*, 36 Ill. 18, 30; *Harrison v. Polar Star Lodge*, 116 Ill. 279, 287, 5 N. E. 543; *Hayes v. Carey*, 287 Ill. 274, 122 N. E. 524; *Holbrook v. Electric Appliance Co.*, 90 Ill. App. 86; *Western Ry. Equipment Co. v. Missouri Iron Co.*, 91 Ill. App. 28, 37; *Thompson v. Elliott*, 28 Ind. 55; *Paul v. Meservey*, 58 Me. 419; *Howard v. Wilmington &c. R. Co.*, 1 Gill, 311, 340; *Smith v. Kelly*, 115 Mich. 411, 73 N. W. 385; *Chrisman v. Hodges*, 75 Mo. 413, 415; *Tuggles v. Callison*, 143 Mo. 527, 536, 45 S. W. 291; *McClurg v. Whitney*, 82 Mo. App. 625; *McDowell v. Hemming Mfg. Co.*, 91 N. J. L. 209, 102 Atl. 680; *Renard v. Sampson*, 12 N. Y. 561, 568; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134; *McKeogh v. Browning*, 125 N. Y. S. 368; *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959; *Robert Grace Contracting Co. v. Norfolk &c. Ry. Co.*, 259 Pa. 241, 102 Atl. 956; *Runnion v. Morrison*, 71 W. Va. 254, 76 S. E. 457. Cf. *Rhoades v. Chesapeake &c. R. Co.*, 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826.

will not support a promise by the other party to perform what he had previously agreed and something more.³⁰ Nor (what is substantially the same thing) can an existing contract be altered by mutual assent by an agreement merely to give one party a right or privilege, or subject the other party to a burden which he did not have previously.³¹

A contract not infrequently reserves to one of the parties a right to rescind it under certain circumstances or by certain action. For one party to exercise such a right without the assent of the other, it is essential that the provisions of the original reservation be strictly followed.³² But such a provision like any other term in a contract may itself be rescinded by mutual assent, and, therefore, no limitation is imposed by it on the power of the parties to rescind by mutual agreement.³³

§ 1827. Restoration of the status quo.

Where at the time of rescission of a bilateral contract it has been partly performed on one or both sides, the parties may agree simply to forego further performance and let past matters stand where they are, or they may agree not only to forego future performance but to restore the original status by returning payments already made or paying for other performance which has been rendered. Which of these contracts the parties in a particular case have made can depend on no rule of law, but on a determination of what the terms of their contract in

³⁰ *Brown v. Lowndes County (Ala.)*, 78 So. 815. See *supra*, § 130.

³¹ *Main St., etc., R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *McCrary v. Thompson*, 123 Mo. App. 596, 100 S. W. 535; *Patterson v. American Ins. Co.*, 164 Mo. App. 157, 148 S. W. 448; *Hasbrouck v. Winkler*, 48 N. J. L. 431, 6 Atl. 22; *Bishop v. Smith (N. J. L.)*, 57 Atl. 874; *Clark v. Ulster, etc., R. Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164, 121 Am. St. Rep. 848, 12 Ann. Cas. 883; *Purdy v. Rome, etc., R. Co.*, 52 Hun, 267, 5 N. Y. S. 217, *affd.* 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep.

736; *Fanger v. Caspary*, 87 N. Y. App. Div. 417, 84 N. Y. S. 410; *Thurston v. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 328; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Cotulla v. Barlow (Tex. Civ. App.)*, 115 S. W. 294; *Thomas v. Mott*, 74 W. Va. 493, 82 S. E. 325.

³² *King v. Towaley*, 64 Iowa, 75, 19 N. W. 859; *Avery Planter Co. v. Peck*, 80 Minn. 519, 83 N. W. 455, 1083; *Wright v. Bristol Patent Leather Co.*, 257 Pa. 552, 101 Atl. 844; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388.

³³ See *infra*, § 1828.

fact were;³⁴ and if that contract while providing for cessa of further performance, does not provide for the return of payments or compensation for past performance, there can no recovery of such payments or compensation, for the bur of proving any right is on one who asserts it.³⁵ When a c says:

"As a general rule when the contract for the sale of land been rescinded by the mutual assent and agreement of the parties, the contract is at an end, and, there being no agreem to the contrary, the vendee, not being at fault, may reco back the money paid on his contracts,"³⁶ it can only be repl that there is no reason why an agreement to rescind a contr for the sale of land should be subject to any other rule than agreement to rescind any other contract, and that to all recovery of such payments on rescission of any contract by agreement which does not provide for it is unwarrantably ad ing a term to the agreement of the parties. If the principle sound not only payments made but property transferred services rendered under any kind of contract should likewi form the basis of recovery where the parties agree to forego fu ther performance of a partially executed contract. Of cours a contract to restore the original status like any other co tract need not be in express terms, but to justify an action to restore that status on rescission of a contract by mutual assen, it must be found on a fair interpretation of the words or ac of the parties that they expressed an intention that that statu be restored.

§ 1828. Written contracts may be varied by subsequent oral agreement.

A contract in writing, but not required to be so by the Statute

³⁴ *Eames Vacuum Brake Co. v. Ferguson*, 88 Ill. App. 136, 150; *Bannister v. Read*, 1 Gilman (6 Ill.) 92, 100; *Bryson v. Crawford*, 68 Ill. 362; *Prentice v. Erskine*, 164 Cal. 446, 121 Pac. 585; *Cummings v. Rogers*, 30 Minn. 317, 30 N. W. 892; *Maffet v. Ore. & Cal. R. Co.*, 46 Oreg. 443, 457, 80 Pac. 489, 494. See also *Strang v. Person* (Wash.), 185 Pac. 944.

³⁵ *Ibid.*

³⁶ *Woodard v. Willamette, etc., Land Co.*, 89 Or. 10, 173 Pac. 262, 264, citing 2 Black on Rescission, § 535; 2 Warvelle on Vendors, § 826; 13 C. J., § 627, p. 602; 39 Cyc. 2029; *Vider v.*

Ferguson, 88 Ill. App. 136, 150; *Bannister v. Read*, 1 Gilman (6 Ill.) 92, 100; *Bryson v. Crawford*, 68 Ill. 362; *Prentice v. Erskine*, 164 Cal. 446, 121 Pac. 585; *Cummings v. Rogers*, 30 Minn. 317, 30 N. W. 892; *Maffet v. Ore. & Cal. R. Co.*, 46 Oreg. 443, 457, 80 Pac. 489, 494. See also *Strang v. Person* (Wash.), 185 Pac. 944.

of Frauds may be dissolved or varied by a new oral contract, which may or may not adopt as part of its terms some or all of the provisions of the original written contract.³⁷ It is also true that if the agreement to discharge or vary a contract is made after its breach, it is immaterial whether the original bargain was or was not in writing. The later agreement is an accord, and if the parties so intend will operate at once without performance to discharge the liability for breach of the original contract.³⁸

Unless the original contract was under seal (and the local law still preserves the common-law prohibition against varying sealed instruments by parol), or is required by the Statute of Frauds to be in writing, an executory oral agreement is as effectual to rescind the earlier contract or to substitute a new one as if it were executed.^{39a} A failure to observe the reason why neither sealed instruments nor contracts within the Statute of Frauds can be varied by oral executory agreements has sometimes led to broad statements that written contracts can be altered only by another written contract, or by an executed oral agreement,^{39b} and the California Civil Code so provides,^{39c}

³⁷ *Goss v. Lord Nugent*, 5 B. & Ad. 58, 64; *Swain v. Seamens*, 9 Wall. 254, 271, 19 L. Ed. 554; *Teal v. Bilby*, 123 U. S. 572, 578, 31 L. Ed. 263, 8 S. Ct. 239; *American Fine Art Co. v. Simon*, 140 Fed. 529, 72 C. C. A. 45; *Pioneer Savings Co. v. Nonnemacher (Ala.)*, 30 So. 79; *Calliope Min. Co. v. Herzinger*, 21 Col. 482, 42 Pac. 668; *Ward v. Walton*, 4 Ind. 75; *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 85, 50 Atl. 433; *Cummings v. Arnold*, 3 Metc. 486, 489, 37 Am. Dec. 155; *Freedman v. Gordon*, 220 Mass. 324, 107 N. E. 982; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Grand Traverse, etc., Exchange v. Thomas Canning Co.*, 200 Mich. 95, 166 N. W. 878; *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 121, 61 S. W. 644; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.)

1134; *Zanello v. Smith & Watson Iron Works*, 62 Ore. 213, 124 Pac. 660; *Robert Grace Contracting Co. v. Norfolk, etc., Ry. Co.*, 259 Pa. 241, 102 Atl. 956; *Bryan v. Hunt*, 4 Sneed, 543, 70 Am. Dec. 262; *Montgomery v. American Ins. Co.*, 108 Wis. 146, 159, 84 N. W. 175.

³⁸ See *infra*, § 1846.

^{39a} See cases cited *supra*, n. 37.

^{39b} See *Northern Wyoming Land Co. v. Butler*, 252 Fed. 971, 973, 164 C. C. A. 479. As the contract in this case was for the sale of land, the rule was there accurate.

^{39c} Sec. 1698. This unfortunate legislative adoption for written contracts of a rule borrowed from the law governing sealed instruments, and now generally relaxed even as to them (*infra*, § 1849) has led the California court to a somewhat difficult distinction. An oral variation of a written contract is held bad, but a new

and the provision has been copied in the statutes of (Columbia).^{38d}

Nor does it make any difference that the original writing contract provided that it should not subsequently be varied except by writing. This stipulation itself may be rescinded in part and any oral variation of the writing which may be agreed upon and which is supported by sufficient consideration is by necessary implication a rescission to that extent.³⁹ The effect of the Statute of Frauds upon attempts to rescind contracts within it has previously been considered.⁴⁰

§ 1829. Rescission of unilateral contracts.

If the original contract was unilateral or has since its formation become unilateral by the discharge of one party to the contract, either by his own performance or otherwise, a mutual agreement to rescind without more has no consideration. The question is not one of words, but of substance. Whether the parties talk of "rescission," "release," "discharge," "waiver," "gift," or "forgiveness" of the obligation is immaterial. If one party only was entitled to anything under the original contract at the time of the attempted rescission, he alone promises to give up anything by agreeing to rescind or discharge the obligation; and the invalidity of such an agreement is clearly recognized by the decisions⁴¹ except in three classes of cases:

oral contract in substitution of a prior written one is upheld. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154. Cf. *Bennett v. Potter* (Cal.), 183 Pac. 156; *Imperator Realty Co. v. Tull* (N. Y.), 127 N. E. 263, 265.

^{38d} *Rev. Laws* (1910), § 988. See *Levin v. Hunt* (Okl.), 172 Pac. 940; *Emerson-Brantingham Imp. Co. v. Ware* (Okl.), 174 Pac. 1066; *Hart v. Frost* (Okl.), 175 Pac. 257.

³⁹ *Tilley v. Bartow*, 8 Ala. App. 639, 62 So. 330; *Viele v. Germania Ins. Co.*, 26 Ia. 9, 96 Am. Dec. 83; *Nichols & Shepard Co. v. Maxson*, 76 Kan. 607, 92 Pac. 545; *Denoth v. Carter*, 85 N. J. L. 95, 88 Atl. 835; *Beatty v.*

Guggenheim Exploration Co., 2 N. Y. 380, 122 N. E. 378; *Pippy Winslow*, 62 Oreg. 219, 125 Pac. 29. See also *Brodie v. Cardiff Corp.* [1911] A. C. 337; *First National Bank v. Ducher*, 128 Ia. 413, 104 N. W. 497, 1 L. R. A. (N. S.) 142.

⁴⁰ *Supra*, § 592.

⁴¹ *Foster v. Dawber*, 6 Ex. 839, 851; *Edwards v. Walters*, [1896] 2 Ch. 157, 168; *Westmoreland v. Porter*, 75 Ala. 452; *Florence Cotton Co. v. Field*, 104 Ala. 471, 16 So. 538; *Mobile & R. R. Co. v. Owen*, 121 Ala. 505, 21 So. 612; *Swan v. Benson*, 31 Ark. 728; *Mendel v. Davies*, 46 Ark. 420; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514;

1. Agreements made before breach of a unilateral contract to discharge the promisor.

2. Agreements to discharge a party to a negotiable instrument, whether the agreement be made before or after maturity of the instrument.

3. Certain exceptional cases, ordinarily classified under the head of waiver, which have been discussed in an earlier chapter.⁴²

§ 1830. English decisions on parol discharge of unilateral contracts.

In several short cases decided about the year 1600, it was decided or said that an agreement made before breach of a unilateral simple contract to discharge the promisor was effectual.⁴³ The appropriate words for alleging such an agreement were that the plaintiff exonerated or discharged the defendant. The point seems not to have been again discussed until the nineteenth century, when several cases were decided which touch upon it. In the first of these "the plea to an action for breach of promise of marriage was that before any breach the plaintiff "absolved, exonerated, and discharged the defendant." On special demurrer it was urged that the plea should have alleged rescission by mutual assent. But the plea was held good on the strength of the early decisions. The court, however, said the question was merely as to a matter of form, for though the plea was good, "yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue

Metcalf v. Kent, 104 Ia. 487, 73 N. W. 1037; *George v. Lane*, 80 Kan. 94, 102 Pac. 55; *Garnsey v. Garnsey*, 116 Me. 295, 101 Atl. 447; *Averill v. Wood*, 78 Mich. 342, 354, 44 N. W. 381; *Young v. Power*, 41 Miss. 197; *Zerr v. King*, 121 Mo. App. 286, 98 S. W. 822; *Northwestern Nat. Bank v. Great Falls Opera House*, 23 Mont. 1, 57 Pac. 440; *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953; *Crawford v. Mills-paugh*, 13 Johns. 87; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10; *Whitehill v. Wilson*, 3 Pen. & Watts, 405, 413, 24 Am. Dec. 326; *Kidder v. Kidder*,

33 Pa. 268; *Marron v. Stieren*, 252 Pa. 185, 97 Atl. 181; *Ferries v. Brown*, 121 Va. 13, 92 S. E. 813; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Tacoma &c. Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

⁴² See *supra*, § 690.

⁴³ *Coniers and Holland's Case*, 2 Leon. 214; *Langden v. Stokes*, Cro. Car. 383; *Milward v. Ingram*, 2 Mod. 43; *Edwards v. Weeks*, 2 Mod. 259. See also *Treswall v. Keyne*, Cro. Jac. 620; *May v. King*, 12 Mod. 537; *Weston v. Mowlin*, 2 Burr. 969, 978.

⁴⁴ *King v. Gillett*, 7 M. & W. 55.

be taken upon it, unless he proves a proposition to exonerate the part of the plaintiff, acceded to by himself, and this in itself will be a rescinding of the contract previously made." It was apparently thought by some writers ⁴⁵ that the decision in some way discredits the early authorities, but this seems a mistake. The court simply said that mutual assent was necessary to make out the defence, but this is not saying that consideration was necessary. In later cases the English courts have never considered this decision. As the contract in question was bilateral, there was, undoubtedly, consideration if there was an agreement to rescind. The question was merely whether mutual assent was alleged with sufficient certainty. In a subsequent case ⁴⁶ an action was brought for breach of an independent obligation to pay a deposit to an auctioneer as security for future performance of a contract for the sale of property, the defendant pleaded leave and license. On demurrer the court held the plea bad as not equivalent to "exonerated and discharged," but the implication is clear that a plea in the latter form would have been held good, and one member of the court, Bramwell, B., not only said so, but expressed the opinion that even in its actual form the plea was good, saying:

"In an action on a simple contract, a plea of exoneration before breach is good." ⁴⁷ There is a dictum to the same effect by Lindley, L. J., in a more recent case. ⁴⁸ It is true that Parke, B., in the meantime had said *obiter* ⁴⁹ "an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." It is to be noticed, however, that Parke is not speaking of the situation before breach and though his remark is applicable both to broken and unbroken contracts, cases arise far more commonly in regard

⁴⁵ Anson on Contracts (13th ed.), 321; *Id.* (Corbin's Ed.), 480; Clark on Contracts, 609.

⁴⁶ *Dobson v. Espie*, 2 H. & N. 79.

⁴⁷ Bramwell adds in support of his statement: "The law is thus laid down in Byles, on Bills, p. 168 (7th ed.) 'It is a general rule of law, that a simple contract may, before breach, be waived or discharged, without a deed

and without consideration; but a breach there can be no discharge except by deed or upon sufficient consideration." So in 16th ed., p. 311 Smith's Leading Cases (12th Ed. ed.), 388, (9th Am. ed.) 614.

⁴⁸ *Edwards v. Walters*, [1896] 2 Q.B. 157, 168.

⁴⁹ In *Foster v. Dawber*, 6 Ex. 885.

the former. In any event, Parke was speaking without having the authorities before him and with his mind addressed to another matter. In view of the later cases already referred to the English law seems still to be that exoneration before breach is good without consideration.

§ 1831. American decisions.

In the United States there are a few dicta ⁵⁰ to the same effect, and there is a decision in Wisconsin ⁵¹ involving the point, which held exoneration good. But there are authorities of contrary effect,⁵² and in view of this as well as the opinion of American text writers,⁵³ and the absence of any underlying principle to support the English doctrine, it seems probable that as a general rule consideration will, in most States, be held essential. Cases may be suggested, however, where the promisor should clearly be held discharged. Suppose the promisee informs the promisor that performance will not be required, and relying on this the promisor is not ready to perform at the day, or has so altered his position that he cannot perform at all. Though promissory estoppel is not ordinarily a substitute for consideration,⁵⁴ justice demands that in the cases supposed the promisee should not be allowed to hold the promisor liable for his non-performance.

It may well be that a recognition of the possibility of the injustice here suggested led the early judges to hold exoneration good without consideration. At the present day it would seem better to apply, when necessary, the doctrines previously considered under the head of waiver,⁵⁵ but subject to this modification to require consideration.

⁵⁰ *Robinson v. McFaul*, 19 Mo. 549; *Seymour v. Minturn*, 17 Johns. 169, 175, 8 Am. Dec. 380; *Kelly v. Bliss*, 54 Wis. 187, 191, 11 N. W. 488.

⁵¹ *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

⁵² *Hale v. Dressen*, 76 Minn. 183, 78 N. W. 1045; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 164, 86 Am. Dec. 362. See also *Metcalf*

v. Kent, 104 Ia. 487, 73 N. W. 1037. *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *Purdy v. Rome, etc., R. Co.*, 125 N. Y. 209, 26 N. E. 255.

⁵³ *Clark on Contracts*, 608; *Harriman on Contracts* (2d ed.), § 505; 24 Am. & Eng. Encyc. of Law (2d ed.), 287.

⁵⁴ See *supra*, § 139.

⁵⁵ See *supra*, § 690.

**§ 1832. Parol discharge of a party to a negotiable instrument
English law.**

The following extract from the opinion of Parke, B., in leading case on the subject ⁵⁶ sufficiently expresses the English law prior to the enactment of the Bills of Exchange Act in 1852. "The rule of law has been so often laid down and acted upon although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule. In the passage referred to in the work of my brother Byles, the words 'it is said' are used, but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are immediate or distant parties the liability turns on the law merchant, no person is liable on a bill of exchange except through the law merchant; and, probably, the law merchant being introduced into this country, and differing very much from the simplicity of the common law, at the same time was introduced that rule quoted from Pailliet ⁵⁷ as prevailing in foreign countries, viz. that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or any solemn instrument. Such appears to be the law of France, and probably it was for the reason above stated that it has been adopted here with respect to bills of exchange. But Mr. Willes further contended, that though the rule might be true with respect to bills of exchange, it did not apply to promissory notes, inasmuch as they are not put upon the same footing as bills of exchange by the statute law. . . . Now bills of exchange and promissory notes differ from other contracts at common law in two important particulars: first, they are assignable, whereas choses in action at common law are not; and secondly, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars promissory notes are put on the same footing as bills of exchange by the statute of Anne, and, therefore, we think the same law

⁵⁶ Foster v. Dawber, 6 Ex. 839.

⁵⁷ Manuel de Droit Civil, Code de Commerce, liv. 3, tit. 3. s. 3.

applies to both instruments. This court was of this opinion in a case of *Mayhew v. Cooze*,⁵⁸ in which there was a plea similar to the present, although the expression of that opinion was not necessary for the decision of that case."⁵⁹

It is evident from this statement that in this class of cases the English law borrowed from the French law a rule which is applicable in that law to negotiable instruments,⁶⁰ but is not in any sense peculiar to them, applying as it does to all obligations. Since the English requirement of consideration is unknown to the Civil law, any obligation may be gratuitously discharged in countries whose law is derived from that source. The English Bills of Exchange Act⁶¹ now provides:

"62 (1) When the holder of a bill⁶² at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

The requirement of a writing effected a change in the English law. It was adopted from the Scotch law.⁶³

§ 1833. American law.

The English doctrine stated in the preceding section was never adopted by the American courts and it was uniformly held that consideration was necessary to make effectual an agreement to discharge a party to a negotiable instrument.⁶⁴

⁵⁸ 23d November, 1849, not reported.

⁵⁹ In *White v. Bluett*, 23 L. J. Ex. (N. S.) 36, the defendant, when sued upon a promissory note, pleaded an agreement by the payee to discharge it in consideration of an agreement by the defendant to forbear to make certain complaints. The court held the alleged consideration insufficient and gave judgment for the plaintiff, but as the forbearance asked for was in fact given and as there was nothing illegal in the bargain, it is difficult to

see why the doctrine of *Foster v. Dabber*, to which Parke, B., alluded, should not have been applied.

⁶⁰ Nougier, *Lettres de Change*, §§ 1043-1052.

⁶¹ 45 & 46 Vict., ch. 61.

⁶² The provisions of this section are made applicable to promissory notes by section 89.

⁶³ Chalmers' *Bills of Exchange* (7th ed.), 234.

⁶⁴ *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Scharf v. Moore*, 102 Ala.

The case was not distinguished from ordinary unilateral obligations. The draftsman of the American Negotiable Instruments Law,⁶⁵ however, copied the provisions of the English act, and as this law has been enacted, almost universally throughout the United States,⁶⁶ a written renunciation or discharge of a bill or note or of the liability of any party thereon is now good without consideration.⁶⁷

§ 1834. Rescission of contracts under seal.

If the original contract was under seal the same questions are presented as where the contract is expressed by an unsealed writing, with the additional difficulty, which at common law was insuperable, that an obligation by deed could not be discharged or varied by anything of inferior nature.⁶⁸ This rule was applicable to any discharge attempted either before breach of the deed or after the breach of the deed if the obligation created by the deed was to pay a fixed sum of money. If, however, a covenant was for the performance of anything other than the payment of a fixed sum of money, breach of the covenant gave rise merely to a right of action for unliquidated damages, and such a right of action was subject to the same rules as to discharge that are applicable to simple contracts.⁶⁹

468, 14 So. 879; Upper San Joaquin Co. v. Roach, 78 Cal. 552, 21 Pac. 304; Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648; Heckman v. Manning, 4 Col. 543; Adamson v. Lamb, 3 Blackf. 446; Denman v. McMahan, 37 Ind. 241; Carter v. Zenblin, 68 Ind. 436; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Franklin Bank v. Severin, 124 Ind. 317, 24 N. E. 977; Shaw v. Pratt, 22 Pick. 305; Smith v. Bartholomew, 1 Met. 276, 35 Am. Dec. 365; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Hale v. Dressen, 76 Minn. 183, 78 N. W. 1045; Henderson v. Henderson, 21 Mo. 379; Irwin v. Johnson, 36 N. J. Eq. 347; Crawford v. Millspaugh, 13 Johns. 87; Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380; *In re Campbell's Est.*, 7 Pa. 100, 101, 47 Am. Dec. 503; McGuire v.

Adams, 8 Pa. 286; Kidder v. Kidder, 33 Pa. 268; Horner's App., 2 Pennypacker, 289; Corbett v. Lucas, 4 McCord L. 323. See, however, Nolan v. Bank of New York, 67 Barb. 24, 34.

⁶⁵ Neg. Inst. Law, sec. 122; Brannan, Neg. Inst. Law (3d ed) p. 344; and see *supra*, § 1192.

⁶⁶ See *supra*, § 1135.

⁶⁷ In *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, it was held that under the Negot. Inst. Law an oral discharge supported by consideration was ineffectual, the court regarding the statute as requiring every discharge to be in writing. But this is clearly unsound.

⁶⁸ See cases in the following section, *passim*.

⁶⁹ *Blake's Case*, 6 Coke, 342.

§ 1835. Variation of covenant by subsequent contract or waiver.

Accordingly, if an obligation under seal created reciprocal rights, a mutual agreement before breach of the obligation to surrender such rights or to substitute others for them did not discharge or alter the effect of the deed.⁷⁰ The suggested mutual agreement by parol evidently might contain all the requisite elements of a contract, but there seems no recognition of its validity as a contract in any decision until about the beginning of the nineteenth century, and it is hard to distinguish it from an unexecuted accord which was held not valid as a contract.⁷¹ There seem early instances, however, where the obligation of a sealed instrument was in effect varied by excusing performance of an obligation where the obligee had actually prevented the obligor from performing.⁷² [It seems but a step from such decisions to hold that a permission or parol agreement which induces the obligor to refrain, amounts in effect to prevention and is an excuse.] Prior to the Judiciary Act, however, the English court declined to take this step;⁷³ but some American courts did so at an earlier date without statutory authority.⁷⁴

⁷⁰ *Rogers v. Payne*, 2 Wils. 376; *Braddick v. Thompson*, 8 East, 344; *West v. Blakeway*, 2 Man. & G. 729; *Ellen v. Topp*, 6 Ex. 424; *Chapman v. McGrew*, 20 Ill. 101; *Herzog v. Sawyer*, 61 Md. 344, 352. See also *infra*, § 1849.

⁷¹ *Allen v. Harris*, 1 Ld. Raym. 122; *Lynn v. Bruce*, 2 H. Bl. 317; *Reeves v. Hearne*, 1 M. & W. 323. In *Braddick v. Thompson*, 8 East, 344, 346, the court said *obiter*, in denying that a parol agreement could discharge a bond: "His only remedy was by bringing a cross-action upon the agreement against the plaintiff, for suing upon the bond in breach of such agreement."

⁷² See cases cited in the quotation from *Fleming v. Gilbert*, 3 Johns. 528, *infra*, n. 74.

⁷³ *Thompson v. Brown*, 1 Moore,

358; *Sellers v. Bickford*, 1 Moore, 460; *Gwynne v. Davy*, 2 Scott's N. R. 29.

⁷⁴ In *Fleming v. Gilbert*, 3 Johns. 528, the court thus dealt with such a case:—"The condition of the bond substantially is, that the defendant should, by a certain day, procure and deliver to the plaintiff, a bond and mortgage which he had given to Isaiah Gilbert, and to discharge the same from the record. The defendant, within the time limited, did procure the bond and mortgage, and tendered and offered them to the plaintiff; and did also offer to do whatever the plaintiff should require for the further discharge of the bond and mortgage, or the record thereof; but the plaintiff, not knowing at that time what was further necessary, did discharge the defendant from the strict and literal performance of the bond, and entered

§ 1836. Modern relaxation of early rule.

After the passage of the Common Law Procedure Act of 1854 in England, permitted the use of equitable pleas at law,⁷⁵ it was not only held that such a parol agreement if supported by valid consideration was in itself a binding contract, but it was also said that the performance of the contract would "be ground for an unconditional perpetual injunction against proceeding upon the deed," and consequently would be the basis of a good equitable plea in an action at law.⁷⁶ At the present day this doctrine would be generally accepted. Indeed, many modern authorities go farther than this. Even though the parol agreement has not been performed, if it was intended in substitution of the earlier sealed contract, this intention is frequently given full effect. In jurisdictions where by statute the

into another engagement respecting the further proceedings. The plaintiff's conduct can be viewed in no other light than as a waiver of a compliance with the condition of the bond, so far as it related to a discharge of the mortgage on record; and I see no infringement of any rule or principle of law, in permitting parol evidence of such waiver. It is a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond. We find the rule above alluded to, recognized in ancient as well as in modern decisions. Thus, where the condition of a bond was to raise a mill, the obligor came to the obligee, and told him everything was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it, and discharged

him entirely of the erecting of the mill, and that was held sufficient to excuse him from the performance. (1 Roll. Abr. 453; pl. 5, Year Book, 2 Hen. VI. 37).

"So also, in an action of covenant upon a charter-party, for demurrage, where it appeared that the ship-owner had waived all claim to demurrage, and consented that the time should be enlarged within which the cargo was to be discharged, Lord Kenyon said, that if the matter had been properly pleaded, it would have been a good and legal defence against any claim for demurrage. (1 Esp. Cas. 35.)

"Upon the same principle, it is held that a tender and refusal, or waiver, (which must always rest in parol), is equivalent to an actual performance; (1 Stra. 535, Doug. 661), and in *Keating v. Price* (1 Johns. Cas. 22), this court allowed evidence of a parol agreement to enlarge the time of performance of a written contract." See also *Baker v. Whiteside*, Breese (Beecher's ed.), 174.

⁷⁵ Section 83.

⁷⁶ *Nash v. Armstrong*, 10 C. B. (N. S.) 259.

effect of a seal has been abolished or seriously diminished, this result is based on clear principle, for if a contract under seal is reduced to the level of a mere written contract in other respects, there is no reason why it should not be discharged or varied by subsequent written or oral bargains.⁷⁷ But in leading jurisdictions, where seals still have in most respects their old value, the rule forbidding discharge or variation by parol has been done away with.⁷⁸ In some jurisdictions, however, this rule still persists,⁷⁹ and as it has the support of the whole early law, English and American, the matter cannot be considered settled in any jurisdiction unless the court of that jurisdiction has either abrogated the rule, in which case it is not likely to recede, or has expressly considered it in a recent case. But even in jurisdictions most strongly disposed to adhere to the early law, it seems probable that the early authorities (alluded to in the previous section) giving effect to a parol permission after it had been acted on would nearly or quite universally be extended to cover a case where a parol agreement supported by sufficient consideration to vary a sealed instrument has been executed.⁸⁰

⁷⁷ So held in *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Blagborne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *McIntosh v. Miner*, 37 N. Y. App. Div. 483, 55 N. Y. S. 1074.

⁷⁸ *Steeds v. Steeds*, 22 Q. B. D. 537; *Canal Co. v. Ray*, 101 U. S. 522, 25 L. Ed. 792; *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776; *Tuson v. Crosby*, 172 Mass. 478, 52 N. E. 744; *Steels v. Leonard*, 20 Minn. 494; *McGrann v. North Lebanon R. Co.*, 29 Pa. 82; *Hamilton v. Hart*, 109 Pa. 629; *Hydeville Co. v. Eagle R. R. Co.*, 44 Vt. 395. See also *Imperator Realty Co. v. Tull*, (N. Y.), 127 N. E. 263; *Phelps v. Seely*, 22 Gratt. 573.

⁷⁹ *Miller v. Hemphill*, 9 Ark. 488; *Levy v. Very*, 12 Ark. 148; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 833; *L. R. A.* 1915 E. 800; *Tischler v. Kurtz*, 35 Fla. 323, 17 So.

661; *Sinard v. Patterson*, 3 Blackf. 353; *McMurphy v. Garland*, 47 N. H. 316; *Armijo v. Abeytia*, 5 N. Mex. 533; *Delacroix v. Bulkley*, 13 Wend. 71; *Eddy v. Graves*, 23 Wend. 82; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *McKenzie v. Harrison*, 120 N. Y. 260, 263 (but see *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; *McIntosh v. Miner*, 37 N. Y. App. Div. 483, 55 N. Y. S. 1074; *Imperator Realty Co. v. Tull*, (N. Y.) 127 N. E. 263); *Bond v. Jackson*, Cooke, 500; *Sherwin v. Rutland &c. R. Co.*, 24 Vt. 347. Some of these decisions would not perhaps now be followed in their own jurisdictions.

⁸⁰ This has been clearly stated in Illinois in a number of cases: *Starin v. Kraft*, 174 Ill. 120, 50 N. E. 1059; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Brettmann v.*

The doctrine of exoneration or discharge of a contract be breach without consideration never applied to sealed instruments.⁸¹

§ 1837. Accords and similar agreements.

If an agreement for the discharge of a sealed obligation contemplates not an immediate mutual surrender of rights the performance of something other than the duty imposed the deed in satisfaction of that duty, and further contemplates that until such performance the deed shall remain in force, agreement is one of accord if made after a right of action on deed has arisen; if made before a right of action has arisen agreement is not properly called an accord but such agreements are more conveniently considered in connection with accords

§ 1838. Definition of accord and satisfaction.

"From time immemorial the acceptance of anything satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer."⁸² As this doctrine arose long before the validity of simple contracts was recognized, it is obvious that it was not by virtue of any preliminary agreement or accord between the parties, but only by virtue of the ultimate acceptance of the satisfaction that the discharge was effected. The only importance of the accord was as an

Fischer, 216 Ill. 142, 74 N. E. 777; *Lanum v. Harrington*, 267 Ill. 57, 107 N. E. 826; *Yockey v. Marion*, 269 Ill. 342, 110 N. E. 34, 37. These earlier Illinois decisions are discussed by Professor Decker in 1 Ill. Law Bull. 152.

In New York the same distinction was taken in *Imperator Realty Co. v. Tull*, 179 N. Y. App. D. 761, 167 N. Y. S. 210, but the decision was reversed in 127 N. E. 263, the court holding that the executory parol agreement estopped the parties from asserting the violation of the original covenant. The California Civil Code, § 1698, in terms adopts for all written contracts the same rule, that they "may be altered by a contract in

writing, or by an executed oral agreement, and not otherwise;" and the provision is copied in *Oklahoma Re Laws* (1910) § 988. See *supra*, § 182

⁸¹ *Irwin v. Johnson*, 36 N. J. E. 437; *Traphagen v. Voorhees*, 44 N. E. 21, 12 Atl. 895; *Tulane v. Clifton*, 47 N. J. Eq. 351, 20 Atl. 1086; *Jackson v. Stackhouse*, 1 Cow. 122, 13 An Dec. 514; *Albert's Ex. v. Ziegler's Ex* 29 Pa. 50; *Horner's App.*, 2 Penny packer, 289; *Ewing v. Ewing*, 2 Leigh 337.

⁸² 9 Harv. L. Rev. 55, by Ames citing Y. B. 21 & 22 Edw. I. 586 (Roll series); Y. B. Hen. VI. 25-13; Y. B. 34 Hen. VI. 43, 44; *Andrew v. Boughey Dyer*, 75a, pl. 23.

dence to prove that the performance relied upon by the defendant as satisfaction was actually received by the plaintiff as such. This would be proved as well by the plaintiff's offer to receive the thing as satisfaction as by a bilateral agreement between the parties by which the plaintiff promised to receive the thing as satisfaction and the defendant promised to give it. There was, therefore, no occasion to distinguish between a mere offer on the part of the plaintiff and a bilateral contract. Either showed assent to receive the performance as satisfaction if actually rendered, and neither was binding until performance. The distinction is now, however, of great importance. If there is a mere offer or promise by the creditor to accept something or by the debtor to give something as satisfaction and the other party makes no promise in return, the offer is revocable at pleasure and the rights of the parties are unchanged until the agreed satisfaction is actually given and received, or the offer otherwise accepted in accordance with its terms. This distinction is not always observed in the cases.⁸³ The word "accord," to avoid confusion, should be used only to designate a bilateral contract, by which the defendant promises to give the proposed satisfaction, and the plaintiff promises to accept it.⁸⁴

§ 1839. Accord held not a valid contract—Peytoe's Case.

It might well be supposed that an accord as just defined, would have been regarded as a valid contract as soon as the validity of other bilateral contracts was recognized, but such was not the case. The courts were doubtless led astray by the assumption that if the contract of accord was valid, it necessarily would be a defence to the original cause of action. Even burdened with this assumption, the Court of King's Bench said, in 1681,⁸⁵ that "though in *Peytoe's Case*, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed,⁸⁶ yet of late it hath been held that upon

⁸³ Cases in which there seems to have been merely an offer by the creditor are: *Wray v. Milestone*, 5 M. & W. 21; *Francis v. Deming*, 59 Conn. 108, 21 Atl. 1006; *Harbor v. Morgan*, 4 Ind. 158; *Burgess v. Denison Mfg. Co.*, 79 Me. 266, 9 Atl. 726;

Cannon River Assoc. v. Rogers, 46 Minn. 376, 49 N. W. 128; *Hawley v. Foote*, 19 Wend. 516; *Keen v. Vaughan's Extrs.*, 48 Pa. 477.

⁸⁴ *Langdell, Summ. Cont.*, § 87.

⁸⁵ *Case v. Barber*, T. Ray. 450.

⁸⁶ Citing 9 Co., 79 b, 3 Cro. 46, pl. 2.

mutual promises an action lies, and consequently, there being an equal remedy on both sides, an accord may be pleaded with execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was given for mutual promises, which now is given."

But this *dictum* being urged in the Common Pleas twenty years later⁸⁷ as a reason for holding an accord unexecuted a defence to an action, the court gave judgment for the plaintiff, saying: "If arbitrament be pleaded with mutual promises to perform, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous that an accord ought to be executed that it is not impossible to overthrow all the books. But if it had been a rule of point, it might be worthy of consideration." Here it will be seen that the court not only denies that an executory accord is a defence to the original cause of action, but says that it has no validity as a contract.

§ 1840. Later decisions.

Accordingly in 1794⁸⁸ breach of a bilateral agreement to give and receive a specified sum of money as satisfaction for a previous cause of action was held to give the plaintiff no right. Eyre, C. J., quoted from the preceding decision, and gave his approval of the result for a reason not mentioned in the earlier cases. "*Interest reipublicæ ut sit finis litium*. Accord executory is satisfaction, accord executory is only substituting one cause of action in the room of another, which might go on to any extent."

The decision of this case was correct upon its facts, since the accord was in that case merely an agreement to pay part of an admitted debt in satisfaction of the whole,⁸⁹ but no such explanation is possible of a case decided in 1836.⁹⁰ Though

⁸⁷ *Allen v. Harris*, 1 Ld. Ray. 122.

⁸⁸ *Lynn v. Bruce*, 2 H. Bl. 317.

⁸⁹ See *supra*, § 120.

⁹⁰ *Reeves v. Hearn*, 1 M. & W. 32.

To the same effect is *Elliott v. Dase*, 3 T. B. Mon. 268.

the declaration in that case set forth mutual promises, each to do something of detriment to the promisor, and a breach of the defendant's promise, the court held on demurrer that no cause of action was stated. These cases have never been in terms overruled, and the fourth edition of Leake on Contracts⁹¹ on their authority says: "The accord is in the nature of a mere offer which either party may refuse or withdraw; and upon which no action will lie."

Nevertheless it is hardly credible that the decision last referred to would now be followed even in England. A later case⁹² though not purporting to overrule it, is in fact inconsistent with it, since recovery of damages was allowed for breach of a contract to settle an existing liability by an agreed payment. Other decisions show clearly enough that if an agreement by way of accord is broken, an action may be maintained on the ordinary principles of contract.⁹³

§ 1841. Effect of accord on previous cause of action—intention of parties.

The more difficult question is, what effect does the unexecuted accord have upon the previous cause of action? So far as it is possible for the law to reach this result, the effect should be that which the parties intend. Generally no intention is definitely expressed, and it is necessary to resort to inference. A creditor who agrees to accept from his debtor something in satisfaction of the debt in consideration of the debtor's promise to give the satisfaction, on the one hand, does not thereby agree that he will take the debtor's mere promise as immediate satisfaction, but on the other hand it can hardly be supposed that the parties intended that the creditor should immediately have the right to proceed on his original claim, without giving the debtor a chance to give the agreed satisfaction. Temporary forbearance at least must have been contemplated, though

⁹¹ P. 623.

⁹² *Crowther v. Farrer*, 15 Q. B. 677.

⁹³ *Nash v. Armstrong*, 10 C. B. (N. S.) 259; *Very v. Levy*, 13 How. 345, 349, 14 L. Ed. 173; *White v. Gray*, 68 Me. 579, 580; *Chicora Fertilizer Co. v.*

Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587; *Hartwig v. American Malting Co.*, 74 N. Y. App. D. 140, 77 N. Y. S. 533, *affd.* 175 N. Y. 489, 67 N. E. 1083; *Palmer v. Bosley*, 62 S. W. Rep. 195 (Tenn. Ch.).

not expressly promised. So that if no time is fixed by the parties for the performance of the accord, it is a natural inference that the parties intended that the creditor should for-] bear for a reasonable time. If a date is fixed by the parties for the performance of the accord, the inference is that the parties intended forbearance upon the original claim to last until that date. In some cases the circumstances show that the parties intended more than a temporary forbearance. They may and sometimes do, in effect, agree that the original liability shall be immediately extinguished and the accord substituted in its place. But this is exceptional.

§ 1842. Accord no defence at common law.

After the true construction of the accord is determined, its legal effect must be considered. Let it be supposed, first, that the accord was not intended immediately to satisfy and destroy the original cause of action, and further that the creditor, in violation of his agreement, brings action on the original cause before the time has arrived for the debtor to give the agreed satisfaction. If the debtor pleads the accord, the defence cannot be sustained.⁹⁴

⁹⁴ *Parker v. Ramsbottom*, 3 B. & C. 257; *Crow v. Kimball Lumber Co.*, 69 Fed. 61, 16 C. C. A. 127; *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, 150 C. C. A. 223; *Crass v. Scruggs*, 115 Ala. 258, 22 So. 81; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377; *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624; *Chamblee v. Davie*, 88 Ga. 205, 14 S. E. 195; *Long v. Scanlan*, 105 Ga. 424, 31 S. E. 436; *Bradley v. Palen*, 78 Iowa, 126, 42 N. W. 623; *Graham v. Crisman*, 169 Ia. 91, 146 N. W. 756; *Sawyer v. Hawthorne*, 167 Ia. 410, 149 N. W. 512; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820; *Clifton v. Litchfield*, 106 Mass. 34; *Prest v. Cole*, 183 Mass. 283, 67 N. E.

246; *Cannon River Mfg. Ass'n v. Rogers*, 46 Minn. 376, 49 N. W. 128; *Yasoo, etc., R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271; *Slover v. Rock*, 96 Mo. App. 335, 70 S. W. 268; *Goble v. American Nat. Bank*, 46 Neb. 891, 65 N. W. 1062; *Frederick v. Moran*, 90 Neb. 86, 132 N. W. 935; *Gowing v. Thomas*, 67 N. H. 399, 40 Atl. 184; *Campbell v. Hurd*, 74 Hun, 235, 26 N. Y. S. 458; *Rubin v. Siegel*, 181 N. Y. App. D. 181, 168 N. Y. S. 744; *Moers v. Moers*, 176 N. Y. S. 277; *Arnett v. Smith*, 11 N. Dak. 55, 88 N. W. 1037; *Braunn v. Keally*, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811; *Babcock v. Huntoon*, 37 R. I. 526, 93 Atl. 911; *Gulf, etc., R. Co. v. Gordon*, 70 Tex. 80, 7 S. W. 695; *Whitney v. Richards*, 17 Utah, 226, 53 Pac. 1122; *Rising v. Cummings*, 47 Vt. 345; *Rogers v. Spokane*, 9 Wash.

To sustain it would lead to the result that even though the debtor subsequently failed to perform the accord, the creditor's claim would be barred, for judgment having once been given for the defendant on that very cause of action the matter has become *res judicata*. It may indeed be urged that the claim had not matured when the first action was brought, and that therefore judgment in that action would not bar a subsequent suit. But *ex vi termini* the right of action had accrued prior to the making of the accord, and though judgment on an action brought before maturity of a claim does not bar an action after maturity, the common law did not allow a right of action once arisen to be temporarily suspended.⁹⁵ Of course, if the accord were held a defence to the creditor's original claim, he could sue upon the accord, but to limit his rights to this would in effect put him in the same position that he would have occupied if he had agreed to accept the accord and not its performance as the satisfaction of the debt. The rule of the common law, therefore, that an unexecuted accord is no defence is based on sound principles, unless the court can give the equitable relief hereafter suggested.⁹⁶

§ 1843. Even though full performance tendered, or part performance rendered.

The case may be carried a step further. Suppose the debtor within the time agreed or if no time was specified within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his claim, and brings suit on the original cause of action. Even here, the unexecuted accord is no defence.⁹⁷

168, 37 Pac. 300; *Boston & Maine R. v. Union Mut. F. Ins. Co.*, 83 Vt. 554, 77 Atl. 874; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126. The decisions cited in the first paragraph of note 97, *infra*, are *a fortiori* in point to the same effect.

⁹⁵ See *infra*, § 1844.

⁹⁶ *Ibid.*

⁹⁷ *Shepherd v. Lewis*, T. Jones, 6; *Lynn v. Bruce*, 2 H. Bl. 317; *Carter v.*

Wormald, 1 Ex. 81; *Gabriel v. Dresser*, 15 C. B. 622; *Humphreys v. Third Nat. Bank*, 75 Fed. 852, 859; *Long v. Scanlan*, 105 Ga. 424, 31 S. E. 436; *Woodruff v. Dobbins*, 7 Blackf. 582; *Deweese v. Cheek*, 35 Ind. 514; *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279; *White v. Gray*, 68 Me. 579; *Clifton v. Litchfield*, 106 Mass. 34; *Hayes v. Allen*, 160 Mass. 286, 35 N. E. 852, 39 Am. St. Rep. 474; *Prest v. Cole*, 183 Mass. 283,

The creditor's claim is not satisfied. Tender is not the as performance. To assert the contrary is to say tha debtor after making his tender has satisfied his debt, th he is still the owner of the thing which was agreed upon a satisfaction. Even in the rare case where the tender is only made, but kept good by setting aside as the cred the proposed satisfaction, to give relief involves an exten of the powers of a court of law. If the court holds tha debt was satisfied and that the tendered property became property of the creditor by setting it aside for him, the c is doing more than merely ordering specific performance. holding that the debtor himself by his own action in ap propriating the property to the creditor, in spite of the lat express refusal to receive it, has himself specifically enfo the bargain transferring title to the creditor and extinguish the original obligation. Doubtless the law of sales furnish certain analogy for such a result. In many jurisdiction seller may, if the buyer in breach of his contract refuse receive the goods agreed upon, set them aside for him and him for the full price, instead of damages for loss of the gain,⁹⁸ and if there were no other way of enforcing an acc as the parties intended, this analogy should be follow Courts of equity have declined to take jurisdiction freely contracts for the sale of chattels and have therefore dri courts of law to endeavor to give the equivalent of spec performance where they deemed this appropriate; but cou

67 N. E. 246; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 549, 43 N. W. 476; *Clark v. Dinsmore*, 5 N. H. 136; *Rochester v. Whitehouse*, 15 N. H. 468; *Kidder v. Kidder*, 53 N. H. 561; *Gowing v. Thomas*, 67 N. H. 399, 40 Atl. 184; *Russell v. Lytle*, 6 Wend. 390, 22 Am. Dec. 537; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 Am. Dec. 569; *Tilton v. Alcott*, 16 Barb. 598; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472; *Blackburn v. Ormsby*, 41 Pa. 97; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. 52; *Clarke v. Hawkins*, 5 R. I. 219; *Carpenter v.*

Chicago, etc., Ry. Co., 7 S. Dak. 64 N. W. 1120; *Gleason v. Allen*, 27 364.

But see *contra*, *Bradley v. Gregor* Camp. 383; *Very v. Levy*, 13 H. 345, 14 L. Ed. 173; *Latapee v. Peal* lier, 2 Wash. C. C. 180; *Whitset* Clayton, 5 Col. 476; *Jenness v. La* 26 Me. 475; *Heirn v. Carron*, 19 M 361, 49 Am. Dec. 65; *Coit v. Houst* 3 Johns. Cas. 243 (overruled); *Br* shaw v. Davis, 12 Tex. 336; *Johnson* Portwood, 89 Tex. 235, 239, 34 S. 596, 787.

⁹⁸ See *supra*, § 1365.

of equity have no rule which prohibits giving relief where accords are concerned.

Part performance of the accord is of no more avail than tender. The old claim is still undischarged.⁹⁹

§ 1844. Equitable relief for breach of promise to forbear.

It is clear that the debtor has just reason to complain if the law allows the creditor to proceed at once with his original cause of action without giving the debtor an opportunity to satisfy it as the parties agreed in the accord. Recognized principles, however, suffice to protect the debtor. His grievance is that the creditor has broken the promise of temporary forbearance necessarily implied from the accord, and he should be entitled to the same redress that is allowed for breach of contracts for temporary forbearance where there is no agreement of accord. A covenant or other contract for temporary forbearance is not a good plea at law to an action brought in violation of the contract, if the maxim of the common law is sustained, as it usually has been, that a cause of action once suspended after it has arisen is permanently gone.¹ Some decisions, however, find no difficulty in allowing the defence at law,² and there seems no intrinsic reason why the procedure

⁹⁹ First Nat. Bank v. Leech, 94 Fed. 310, 36 C. C. A. 262; Crouch v. Quigley, 258 Mo. 651, 167 S. W. 978; Cooke v. McAdoo, 85 N. J. L. 692, 90 Atl. 302.

¹ Ford v. Beech, 11 Q. B. 852; Ray v. Jones, 19 C. B. (N. S.) 416; Thimbleby v. Barron, 3 M. & W. 210; Howland v. Marvin, 5 Cal. 501; Walling v. Warren, 2 Col. 434; Archibald v. Argall, 53 Ill. 307; Ralph v. Baxter, 66 Ill. 416; Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Habert v. Dumont, 3 Ind. 346, 348; Newkirk v. Neild, 19 Ind. 194, 81 Am. Dec. 383; Greely v. Dow, 2 Met. 176, 178; Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Perkins v. Gilman, 8 Pick. 229; Rodocanachi v. Buttrick, 125 Mass. 134; Winans v. Huston, 6 Wend. 471; Black Hills Trust & Sav. Bank v.

Plunkett (S. Dak.), 166 N. W. 527; Austin v. Dorwin, 21 Vt. 33, 44; State Bank v. Corwith, 6 Wis. 551. In Illinois the defence may be pleaded in abatement, though not as a bar. Archibald v. Argall, 53 Ill. 307; Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156.

² Walker v. Nevill, 3 H. & C. 403; Slater v. Jones, L. R. 8 Ex. 186; Newington v. Levy, L. R. 5 C. P. 607, 6 C. P. 180; Tatlock v. Smith, 6 Bing. 339; Stracy v. Bank of England, 6 Bing. 754; Leslie v. Conway, 59 Cal. 442; Robinson v. Godfrey, 2 Mich. 408; Strobbridge Lithographing Co. v. Randall, 78 Mich. 195, 44 N. W. 134; Blair v. Reed, 20 Tex. 310; Staver v. Missimer, 6 Wash. 173. In Robinson v. Godfrey, 2 Mich. 408, 412, the

of a court at law should be inadequate for the purpose, of giving a temporary suspension of the action. If, however, the plea is held bad as a legal defence, the facts afford no better ground for an equitable plea to the action, since equity would not grant a permanent injunction against the creditor's action, and, therefore the same difficulty that forbids upholding the plea as a legal defence is equally insuperable to an equitable defence. The defendant is entitled to delay, not to a defence on the merits, and, relief not being obtainable at law, he must apply to a court of equity powers for a temporary injunction against the prosecution of the action, and such an injunction should be granted.³

§ 1845. Accord should be specifically enforced.

In the case of an accord there is a further difficulty. It will not greatly help the debtor to get a temporary injunction on the express or implied promise of the creditor to forbear if the creditor is permitted ultimately to refuse to accept the agreed satisfaction, and then to enforce his original cause of action. In order to give effectual relief, therefore, equity must specifi-

court said:—"It was anciently a maxim of the English Court, that where the remedy was once suspended by act of the party, it was gone forever. This maxim, if it did not originate with, was at least formerly made the ground and reason of the doctrine, that if the obligor made the obligee his executor, or if a man married his debtor, it was in either case, a release of the debt. (Plowd, 8 Coke R. 136; 1 Salk. 299; Cr. Chas. 373; 2 Will. on Ex. 1124.) And it was also applied to explain other analogous cases, where by the concurrence of the right and obligation in the same legal person, there was an extinguishment of the debt. (Dyer, 140, a). Except in this class of cases, I cannot find that it was ever applied, though it may have been. . . .

"At length in *Deux v. Jefferies*, (Cro. Eliz. 352), decided in 1594, a

debtor being sued upon his bond, pleaded that the plaintiff, by indenture, etc., did covenant that he would not sue the bond before Michaelmas.

" . . . This case, although it merely determined that a temporary covenant not to sue, was not a release, opened the way for the direct adjudication in *Ayloff v. Scrimshaw*, decided nearly a century later, that such a covenant does not even suspend the right to sue, until the time specified has expired. The latter case is reported in (2 Salk. 573)."

³ *Compleat Attorney* (1st ed.), 325; *Blake v. White*, 1 Y. & C. Ex. 420, 424, 426; *Greely v. Dow*, 2 Met. 176, 178. See also *Billington v. Wagoner*, 33 N. Y. 31; *Bomeisler v. Forster*, 154 N. Y. 229, 48 N. E. 534. But see *Hall v. First Nat. Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255.

cally enforce the performance of the accord. As a court of law cannot give adequate relief, and as the promise of temporary forbearance necessarily included in the accord gives equity jurisdiction of the matter, there seems good reason for equity to deal with the whole matter by granting specific performance. Though there is strangely little authority upon the matter, and though in the few cases on the point the reasoning is not very full or satisfactory, the result here advocated seems to be justified by the decisions.⁴

It is on this principle that an antenuptial agreement of a wife to accept money or property instead of such interest in her husband's estate as the law might otherwise give her may be enforced in equity, although for lack of compliance with statutory requirements it is no bar to an action at law for the wife's dower or statutory interest in the estate.⁵

§ 1846. Accord may itself be taken as satisfaction and is then a bar.

Though an executory promise to give something in satisfaction of a cause of action cannot while unperformed be a legal bar to an action upon the original cause, the parties may, as has already been said, agree that an executory promise shall itself be the satisfaction of the old right; and if the claimant accepts a promise with that agreement, his original claim is at once extinguished. Unless he can find reasons justifying rescission of the transaction, he must thereafter find his only remedy upon the new promise. This doctrine is modern,⁶ and it may well be doubted whether early courts would have admitted the possibility, under any circumstances, of an executory simple contract, other than the negative one of per-

⁴ *Very v. Levy*, 13 How. 345, 349, 14 L. Ed. 173; *Apperson v. Gogin*, 3 Ill. App. 48; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Babcock v. Huntoon*, 37 R. I. 526, 93 Atl. 911; *Boston & Maine R. v. Union Mut. F. Ins. Co.*, 83 Vt. 554, 77 Atl. 874 (Vt.), 101 Atl. 1012. But see *Rubin v. Siegel*, 181 N. Y. App. D. 181, 168 N. Y. S. 744. See also *Re Hatton*, L. R. 7 Ch. 723.

⁵ *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756; *McAlpine v. McAlpine*, 116 Me. 321, 101 Atl. 1021; *Freeland v. Freeland*, 128 Mass. 509; *Riegar v. Schaible*, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866.

⁶ *Good v. Cheesman*, 2 B. & Ad. 328, is regarded as the leading case on the point, but the doctrine was not clearly stated until after that decision.

petual forbearance,⁷ extinguishing an existing cause of action;⁸ but the principle seems logically correct, and is now well-settled law.⁹ So far indeed has the doctrine been carried that a contract unenforceable because of the Statute of Frauds has been held operative as a satisfaction of a prior enforceable contract.¹⁰

§ 1847. Presumption that accord is not intended as satisfaction.

It is often extremely difficult to determine as matter of fact whether the parties agreed that the new promise should be itself the satisfaction of the original cause of action, or whether they contemplated the performance of the accord as the satisfaction. Unless there is clear evidence that the former was

⁷ See *supra*, § 338.

⁸ The reason given by Eyre, C. J., in *Lynn v. Bruce*, 2 H. Bl. 317, against the validity of unexecuted accords generally, that they are merely "substituting one cause of action in the room of another," is obviously as applicable to an agreement which is itself to be satisfaction of a cause of action as to an agreement where the performance is to be the satisfaction.

⁹ *Evans v. Powis*, 1 Exch. 601; *Buttigieg v. Booker*, 9 C. B. 689; *Edwards v. Hancher*, 1 C. P. D. 111, 119; *Frankfurt-Barnett Co. v. Wm. Prym Co.*, 237 Fed. 21, 27, 150 C. C. A. 223; *Acker v. Bender*, 33 Ala. 230; *Smith v. Elrod*, 122 Ala. 269, 24 So. 994; *Mama v. Rout* (Ark.), 215 S. W. 610; *Heath v. Vaughn*, 11 Col. App. 384, 53 Pac. 229; *Warren v. Skinner*, 20 Conn. 559; *Goodrich v. Stanley*, 24 Conn. 613; *Brunswick, etc. Ry. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84; *Byrd Printing Co. v. Whitaker Paper Co.*, 135 Ga. 865, 70 S. E. 798; *Simmons v. Clark*, 56 Ill. 96; *Hall v. Smith*, 10 Iowa, 45, 15 Iowa, 584; *Sawyer v. Hawthorne*, 167 Ia. 410, 149 N. W. 512; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820; *Tuttle v. Metz Co.*, 229 Mass. 272,

118 N. E. 291; *Whitney v. Cook*, 53 Miss. 551; *Yazoo, etc., R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271; *Worden v. Houston*, 92 Mo. App. 371; *Gerrhart Realty Co. v. Northern Assur. Co.*, 94 Mo. App. 356, 68 S. W. 86; *Perdew v. Tillma*, 62 Neb. 865, 88 N. W. 123; *Lorentowicz v. Bowers* (N. J. Eq.), 102 Atl. 630; *Frick v. Joseph*, 2 N. Mex. 138; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Nassoij v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Spier v. Hyde*, 78 N. Y. App. Div. 151, 79 N. Y. S. 699; *Goffe v. Jones*, 132 N. Y. App. Div. 864, 866, 117 N. Y. S. 407; *Gunn v. Fryberger* (Okl.), 176 Pac. 248; *Babcock v. Huntoon*, 37 R. I. 528, 93 Atl. 911; *Babcock v. Hawkins*, 23 Vt. 561; *Hard v. Burton*, 62 Vt. 314, 20 Atl. 269. See also *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134; *Schwartzfager v. Pittsburg, etc., R.*, 238 Pa. 158, 85 Atl. 1115, Ann. Cas. 1914 C. 149. Cf. *Campbell v. Hurd*, 74 Hun, 235, 26 N. Y. S. 458; *Wentz v. Meyersohn*, 59 N. Y. App. Div. 130, 68 N. Y. S. 1091; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. 52.

¹⁰ *Morris v. Baron*, [1918] A. C. 1. See *supra*, § 593.

intended, the latter kind of agreement must be presumed, for it is not a probable inference that a creditor intends merely an exchange of his present cause of action for another. It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was performed. The earliest decision in which it was held that the accord itself might operate as an extinguishment of the creditor's claim was on an agreement of composition;¹¹ and it is in such instruments perhaps that it is most frequently and naturally inferred that the intention of the parties was to substitute at once the right to the agreed composition for the old claims.

§ 1848. Consequence of non-performance of accord.

If such is the construction of the agreement, it might seem that even though the accord is never performed the creditor's right to sue on the old claim is lost; and so it has been held.¹² The conclusion seems, however, unwarranted. The debtor's breach of promise should justify rescission at the creditor's option instead of an action on the promise.¹³ If money had been paid for the debtor's new promise, and the promise had been broken, the money could be reclaimed;¹⁴ and where a discharge of a claim is given for the promise, the same principle can be and should be effectuated by cancelling or disregarding the discharge.

Where it is the performance of the accord which is to be the satisfaction of the claim, there can be no doubt that the creditor may, on default in performance of the accord by the debtor, sue either on the original cause of action;¹⁵ or, it would seem, if he prefers to do so, on the contract of accord.

¹¹ *Good v. Cheesman*, 2 B. & Ad. 328.

¹² See *Beckwith v. Sheldon*, 165 Cal. 319, 131 Pac. 1049; *Byrd Printing Co. v. Whitaker Paper Co.*, 135 Ga. 865, 70 S. E. 796, Ann. Cas. 1912 A. 182; *Sioux City Stock Yards Co. v. Sioux City Packing Co.*, 110 Ia. 396, 81 N. W. 712; *Dean v. Skiff*, 128 Mass. 174; *Howard v. Scott*, 98 Mo. App. 509, 72 S. W. 709; *Spier v. Hyde*, 78 N. Y. App.

D. 151, 79 N. Y. S. 699; *Babcock v. Hawkins*, 23 Vt. 561.

¹³ See *supra*, § 1454.

¹⁴ See *supra*, § 1457.

¹⁵ *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Shubert v. Rosenberger*, 204 Fed. 934, 123 C. C. A. 256, 45 L. R. A.(N. S.) 1062; *Stanly v. Buser* (Kans.), 185 Pac. 39; and this follows *a fortiori* from the decisions cited *supra*, §§ 1842, 1843.

Similarly, if the creditor, contrary to his agreement, sues on the original claim without giving opportunity for the performance of the accord, the debtor need make no attempt to use the accord as a ground for injunction, even though the local law permits him to do so, but may suffer judgment to go against him and resort to a separate action on the accord.¹⁴

§ 1849. Sealed contracts.

A contract under seal presented some peculiar difficulties. The maxim "*Nihil tam conveniens est naturali æquitate, ut unumquodque dissolvi eo ligamine quo ligatum est,*" seemed to forbid discharge by accord and satisfaction as completely as by mere parol agreement. *Blake's case*,¹⁵ however, decided that a right of action for unliquidated damages for breach of covenant could be discharged in this way. The Court distinguished the case from that of a covenant to pay a sum of money. "For there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing, and therefore it ought to be avoided by a matter of as high a nature, although the duty¹⁶ be merely in the personality, but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personality, for such wrong or default, accord with satisfaction is a good plea."¹⁷

Before breach of a covenant, not only was a parol agreement ineffectual to discharge it, but even though property were accepted in satisfaction the covenant was not discharged, whether the covenant was for the payment of money,¹⁸ or for the performance of some duty, breach of which would sound

¹⁴ *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587.

¹⁵ 6 Coke, 43b.

¹⁶ *Neal v. Sheffield*, 3 Croke, 254; *Preston v. Christmas*, 2 Wils. 86. Therefore, payment after the day was not a good plea to an action on a bond until made so by statute of 4 Anne Ch. 16. Sec. 12. At an earlier time pay-

ment even on the day of maturity was not sufficient to protect the obligor. See *supra*, § 1821.

¹⁷ See to the same effect, *Webb v. Hewitt*, 3 K. & J. 439, 443; *Herzog v. Sawyer*, 61 Md. 344, 352; *Cabe v. Jameson*, 10 Ired. L. 193, 51 Am. Dec. 386; *Smith v. Brown*, 3 Hawks, 580.

¹⁸ *Spence v. Healey*, 8 Ex. 668.

in damages.¹⁹ Doubtless equity would, if necessary, enjoin the enforcement of any kind of bond ²⁰ where satisfaction had been given either before or after maturity. The acceptance of property in satisfaction necessarily imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect as a defence, even by courts of law. The reason sometimes given is that such a covenant amounts to a release.²¹ The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided.²² This latter reason is as applicable to the case of a parol contract never to sue as to the case of a covenant not to sue, so that it would seem that even a court of law might well have held satisfaction before breach a defence. There can now be no doubt that wherever equitable defences are allowed at law, an executed accord would be a good defence to an action at law on the covenant, and probably few courts would hesitate to accept such a defence, even though no statute had authorized the general use of equitable pleas.²³ If an executory accord were agreed upon as absolute satisfaction probably the same is true;²⁴ and even if an accord is not itself satisfaction an injunction should be granted on principles elsewhere stated.²⁵

¹⁹ *Kaye v. Wagborne*, 1 Taunt. 428; *Berwick v. Oswald*, 1 E. & B. 295; *Harper v. Hampton*, 1 H. & J. 622, 673; *Smith v. Brown*, 3 Hawks, 580.

²⁰ *Steeds v. Steeds*, 22 Q. B. D. 537; *Nash v. Armstrong*, 10 C. B. (N. S.) 259; *Hurlbut v. Phelps*, 30 Conn. 42; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793.

²¹ *Deux v. Jefferies*, Cro. Eliz. 352.

²² *Hodges v. Smith*, Cro. Eliz. 623; *Lacy v. Kynaston*, 2 Salk. 575; S. C., 1 Ld. Ray. 688; 12 Mod. 548; *Ford v. Beech*, 11 Q. B. 852, 871. See also *Smith v. Mapleback*, 1 T. R. 441, 446; *Ledger v. Stanton*, 2 Johns. & H. 687.

²³ *Frankfurt-Barnett Co. v. Wm. Prym Co.*, 237 Fed. 21, 27, 150 C. C. A. 223; *Green v. Wells*, 2 Cal. 584; *McDonald v. Mountain Lake Co.*, 4

Cal. 335; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673. See also *Starin v. Kraft*, 174 Ill. 120, 50 N. E. 1059; *Jones v. Chamberlain*, 97 Ill. App. 328; *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396; *Siebert v. Leonard*, 17 Minn. 433, 436; *Armijo v. Abeytia*, 5 N. Mex. 533, 545, 25 Pac. 777; *Reichel v. Jeffrey*, 9 Wash. 250, 37 Pac. 296.

Cases where a parol agreement to rescind or discharge a sealed contract is held effectual, also *a fortiori* imply that accord and satisfaction would be good.

²⁴ See, however, the authorities from California, Illinois and Oklahoma, cited *supra*, § 128, n. 38b, 39d, and § 1836, n. 80.

²⁵ *Supra*, § 1845.

§ 1850. Debts of record.

A debt of record presented a difficulty similar to that of a debt by specialty. Accordingly it could not be discharged at common law even by payment. By Statute of 4 Anne, c. 11, § 12, this was changed in England. The English statute may now be regarded as part of the American common-law inheritance, but it did not cover the case of accord and satisfaction, a doctrine that has been held within comparatively recent times to constitute no defence to an action on the judgment.²⁴ It may be doubted, however, whether these decisions would now be followed anywhere. The Supreme Court of the United States has even when holding itself obliged to preserve the distinction between law and equity as they existed a century ago, held the defence good,²⁵ and other decisions are to the same effect.²⁶

§ 1851. Requisites of satisfaction like those of consideration.

Though the defence of accord and satisfaction was recognized long before the doctrine of consideration was developed, the requirements for a legally effective satisfaction became confused and regarded as identical with the requirements for the consideration of a promise. As an accord and satisfaction is an executed transaction, and as the validity of the satisfaction as a discharge of the previous cause of action cannot originally have rested on any view that the satisfaction was rather the consideration of a promise of perpetual forbearance than the technical extinction of the old cause of action, the essentials of consideration and of satisfaction might well have varied. But it was not unnatural that what had been regarded as inadequate to work a satisfaction of a cause of action should also have been regarded as insufficient consideration to support a promise, and later that whatever was insufficient consideration to sup-

²⁴ *Riley v. Riley*, 20 N. J. L. (Spencer) 114; *Mitchell v. Hawley*, 4 Denio, 414; *Garvey v. Jarvis*, 54 Barb. 179.

²⁵ *Boffinger v. Tuyes*, 120 U. S. 198, 205, 7 S. Ct. 529, 30 L. Ed. 649.

²⁶ *Re Freeman*, 117 Fed. 680, 684; *Jones v. Ransom*, 3 Ind. 327; *McCullough v. Franklin Coal Co.*, 21 Md.

256; *Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396; *Weston v. Clark*, 31 Mo. 568, 572; *Fowler v. Smith*, 15 Pa. 639, 25 Atl. 744; *Reid v. Hibbard*, 6 Wis. 175. Accord and satisfaction was held a good plea to an action on a foreign judgment in *Hardwick v. King*, 1 Stew. (Ala.) 312.

port a promise should be inadequate also for the satisfaction of a cause of action. Brian, C. J., said in 1455 of an attempted satisfaction by part payment: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand."²⁷ This soon became settled law as to satisfaction, but the doctrine of consideration was expressly distinguished by Coke at least, who held that though part payment of a debt could not in the nature of things be a satisfaction of the debt, it might be consideration for a promise.²⁸ Lord Ellenborough, however, made no such distinction; and regarded, apparently, the same requirements of consideration as applicable both to satisfaction and to executory contracts. "There must be some consideration for the relinquishment of the residue; something collateral to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."²⁹

§ 1852. Reasonableness of satisfaction.

In *Cumber v. Wane*,³⁰ Pratt, C. J., said: "It must appear to the Court to be a reasonable satisfaction; or at least the contrary must not appear." But in modern cases no such test is applied. The same rule that governs the formation of contracts—that the adequacy of the consideration is for the parties—governs the satisfaction of causes of action. Thus in *Cooper v. Parker*,³¹ Parke, B., said: "The Court cannot enter into a consideration of the value of the satisfaction, which upon the face of it is uncertain." So in *Curlew v. Clark*,³² an incomplete bill of exchange was held a good satisfaction; Alderson, B., saying: "We cannot value the signature of the Earl of

²⁷ Y. B. 33 Hen. VI. 48 A. pl. 32; 12 Harv. L. Rev. 521.

²⁸ *Bagge v. Slade*, 3 Bulst. 162.

²⁹ *Fitch v. Sutton*, 5 East, 230, 232. The early cases are stated and discussed by Professor Ames in 12 Harv. L. Rev. 524.

³⁰ 1 Stra. 426.

³¹ 15 C. B. 822, 828.

³² 3 Ex. 375, 379. See also *Reed v. Bartlett*, 19 Pick. 273; *First Nat. Bank v. Latham*, 37 Okl. 286, 132 Pac. 891.

Mexborough; possibly it may be worth something as an autograph."

§ 1853. Cases where satisfaction ineffectual.

Though the common case where an agreed satisfaction is held ineffectual for lack of consideration arises when part of a liquidated and undisputed debt has been paid,³³ doubtless decisions on other facts would turn on similar principles. Thus where performance of a duty other than a debt is held insufficient consideration to support a promise, such performance would also be held insufficient to satisfy any cause of action.³⁴ The legal requirements in this respect for a valid satisfaction should, therefore, be sought under the heading of consideration. And where the consideration received in satisfaction is not what it purports to be as in the case of counterfeit money or forged securities, the fundamental mistake justifies the creditor in treating as a nullity the agreement to accept what he received as satisfaction of his claim.³⁵

§ 1854. Check sent in payment of disputed claim.

It seems obvious that nothing can operate as a satisfaction, without the mutual assent of debtor and creditor;³⁶ but here as always in the formation of contracts this does not necessarily involve mental assent, as is shown by one commonly recurring state of facts. The case is this: A debtor sends to a creditor whose claim is unliquidated or in good faith disputed³⁷ a check with a letter stating that the check is

³³ See *supra*, § 120.

³⁴ *Mance v. Hossington*, 205 N. Y. 33, 98 N. E. 203.

³⁵ See *supra*, § 1572.

³⁶ Thus where the defendant in dividing a crop added to the plaintiff's share without his knowledge a quantity to satisfy a liability, there was no accord and satisfaction. *Brekken v. Wensel* (Minn.), 174 N. W. 831.

³⁷ If the claim is liquidated or undisputed, no matter how clearly the parties agree by writing on a check or otherwise that the claim shall be

fully satisfied by an amount less than that due, the agreement is ineffectual and the creditor can recover the balance of his claim. See *supra*, § 124; also *Abercrombie v. Goode*, 187 Ala. 310, 65 So. 816; *Louisiana Lumber Co. v. J. W. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788; *State v. Keating* (Mont.), 185 Pac. 706; *National Ark Co. v. Ellery*, 145 N. Y. S. 277; *Baccaria v. Landers*, 84 N. Y. Misc. 396, 146 N. Y. S. 158; *Beecroft v. Carey*, 179 N. Y. S. 249; *Schumacher v. Moffitt*, 71 Ore. 79, 142 Pac. 353;

sent in full satisfaction, and that the creditor if unwilling to accept it as such must return it; or it is stated on the check itself that it is full satisfaction. The creditor takes the check, but immediately writes a letter stating that he refuses to accept the check as full satisfaction, but will apply it in reduction of the indebtedness. Upon these facts the English Court of Appeal first held that there was no satisfaction of the cause of action,³⁷ but later practically overruled the decision.³⁸ A few jurisdictions in the United States have sustained the creditor's contention that the question of his assent to the debtor's proposition is to be dealt with as one of fact.³⁹ But the great weight of authority in the United States is to the contrary.⁴⁰ It is said that the acceptance of the check neces-

Johnson v. Hoover (Tex. Civ. App.), 165 S. W. 900; *Lone Star Shipbuilding Co. v. Larsen* (Tex. Civ. App.), 217 S. W. 227. But in *American Seedling Mach. Co. v. Baker*, 55 Ind. App. 625, 104 N. E. 524, the court held that even the debtor's own check might satisfy a liquidated claim for a larger amount, on the ground that a negotiable instrument should be treated as different from the money it represents.

³⁷ *Day v. McLea*, 22 Q. B. D. 610.

³⁸ *Hirachand-Punamchand v. Temple* [1911] 2 K. B. 330. In this case the payment was made by a third person, but it is difficult to see that this or any other fact in the case distinguishes it from the earlier decision.

³⁹ *Louisville, etc., Ry. Co. v. Helm*, 22 Ky. L. Rep. 964, 59 S. W. 323 (but see *Cunningham v. Standard Const. Co.*, 134 Ky. 198, 119 S. W. 765); *Rosenfield v. Fortier*, 94 Mich. 29, 53 N. W. 930; *Goldsmith v. Lichtenberg*, 139 Mich. 163, 102 N. W. 627; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2 (Cf. *Marion v. Heimbach*, 62 Minn. 214, 215, 64 N. W. 386); *Pike v. Buzzell*, 75 N. H. 436, 76 Atl. 642; *St. Pierre v. Peerless Casualty Co.*, 77 N. H. 599, 92 Atl. 840 [Cf. *Pike v.*

Buzzell, 76 N. H. 120, 79 Atl. 992; *Bisbee v. Pulpit Farm Dairy* (N. H.), 100 Atl. 672]; *Harby v. Henes*, 45 N. Y. Misc. 366, 90 N. Y. S. 461. See also *McKeen v. Morse*, 49 Fed. 253, 1 C. C. A. 237; *Kistler v. Indianapolis R. Co.*, 88 Ind. 460; *Shull v. McCrum*, 179 Ia. 1232, 162 N. W. 759; *Tompkins v. Hill*, 145 Mass. 379, 14 N. E. 177; *Mortlock v. Williams*, 76 Mich. 568, 43 N. W. 592; *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774; *Canadian Fish Co. v. McShane*, 80 Neb. 551, 114 N. W. 594; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61; *Mitterwallner v. Supreme Lodge*, 86 N. Y. S. 786; *Krauser v. McCurdy*, 174 Pa. 174, 34 Atl. 518; *Amaler v. McClure*, 238 Pa. 409, 86 Atl. 294 (Cf. *Société Anonyme &c. v. Loeb*, 239 Pa. 264, 86 Atl. 798); *Rapp v. Giddings*, 4 S. Dak. 492, 57 N. W. 237.

⁴⁰ *Barham v. Bank of Delight*, 94 Ark. 158, 126 S. W. 394, 27 L. R. A. (N. S.) 439; *Cunningham Commission Co. v. Rauch-Darrach Grain Co.*, 98 Ark. 269, 135 S. W. 831; *Pekin Coöperage Co. v. Gibbs*, 114 Ark. 559, 170 S. W. 574; *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac.

sarily involves an acceptance of the condition upon which it was tendered. A retention of a check, even for an unreasonable

- 989; *Colorado Tent & Awning Co. v. Denver Country Club* (Colo.), 178 Pac. 494; *Stanley-Thompson Liquor Co. v. Southern Colo. Merc. Co.* (Colo.), 178 Pac. 577; *Potter v. Douglass*, 44 Conn. 541; *Hamilton v. Stewart*, 108 Ga. 472, 34 S. E. 123; *Elrod v. Kiser*, 13 Ga. App. 471, 79 S. E. 375; *Ryan v. Progressive Retailer Pub. Co.*, 16 Ga. App. 83, 84 S. E. 834; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717; *Bingham v. Browning*, 197 Ill. 122, 64 N. E. 317; *Canton Union Coal Co. v. Parlin*, 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162; *Talbott v. English*, 156 Ind. 299, 313, 59 N. E. 857; *Sparks v. Spaulding Mfg. Co.*, 158 Ia. 491, 139 N. W. 1083; *Frame v. Cassell* (Ia.), 75 N. W. 521; *Cunningham v. Standard Const. Co.*, 134 Ky. 198, 119 S. W. 765; *Neely v. Thompson*, 68 Kans. 193, 75 Pac. 117; *Anderson v. Standard Granite Co.*, 92 Me. 429, 432, 43 Atl. 21, 69 Am. St. 522; *Chapin v. Little Blue School*, 102 Me. 415, 86 Atl. 838, 840; *Scheffenacker v. Hoopes*, 113 Md. 111, 77 Atl. 130; *Worcester Color Co. v. Henry Wood's Sons Co.*, 209 Mass. 105, 95 N. E. 392; *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915 A. 949; *Beck Electric Const. Co. v. National Contracting Co.* (Minn.), 173 N. W. 413; *Cooper v. Yazoo*, etc., R., 82 Miss. 634, 35 So. 162; *Lightfoot v. Hurd*, 113 Mo. App. 612, 88 S. W. 128; *Pollman, etc., Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Freemont Foundry Co. v. Norton*, 3 Neb. (Unof.) 804, 92 N. W. 1058, 1060; *Partridge Lumber Co. v. Phelps-Buruss, etc., Co.*, 91 Neb. 396, 136 N. W. 65; *Rose v. American Paper Co.*, 83 N. J. L. 707, 85 Atl. 354; *Decker v. Smith*, 88 N. J. L. 630, 96 Atl. 915; *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; *Logan v. Davidson*, 162 N. Y. 624, 57 N. E. 1115; *Lewinson v. Montauk Theatre Co.*, 60 N. Y. App. Div. 572, 69 N. Y. S. 1050; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489, 75 N. Y. S. 106; *De Lorenzo v. Hughes*, 84 N. Y. S. 857; *John J. Daly, etc., Co. v. United States, etc., Mfg. Co.*, 137 N. Y. S. 150; *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208; *Seeds, Grain & Hay Co. v. Conger*, 83 Ohio, 169, 93 N. E. 892; *Schumacher v. Moffitt*, 71 Oreg. 79, 142 Pac. 353; *Washington, etc., Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182; *Silcander v. Ploc* (S. Dak.), 176 N. W. 516; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56; *Thomas v. Columbia Phonograph Co.*, 144 Wis. 470, 129 N. W. 522. See also *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. Ed. 299, 25 S. Ct. 108; *Bull v. Bull*, 43 Conn. 455; *Pollman Coal Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *McCormick v. St. Louis*, 166 Mo. 315, 335, 65 S. W. 1038; *Perkins v. Hedley*, 49 Mo. App. 556. As to the necessity of an explicit statement that the check sent is intended as full payment, *Cf. Hillestad v. Lee*, 91 Minn. 335, 97 N. W. 1055; *Fremont Foundry Co. v. Norton*, 3 Neb. (Unof.) 804, 92 N. W. Rep. 1058; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489, 75 N. Y. S. 106; *Amer v. Folk*, 28 N. Y. Misc. Rep. 508, 59 N. Y. S. 532; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407; *Van Dyke v. Wilder*, 66 Vt. 579, 29 Atl. 1016.
- In *General Fireproof Const. Co. v.*

length of time has not always been given this effect,⁴¹ but as the creditor has no more right to retain the check an unreasonable time than he has to cash it, unless he accepts it as full satisfaction, there seems no propriety in distinguishing the two situations.

§ 1855. Principles governing the question.

If the parties are dealing orally with one another and the debtor offer the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms. If the creditor refuses to receive the check in full satisfaction and yet takes it, either he must have assented to the terms, or the debtor must have assented to the creditor's refusal, for the voluntary giving of the check by one, and the taking it by the other, if neither misunderstood the words that were spoken, necessarily indicate assent,⁴² and it becomes a question of fact, what the bargain was to which they assented. So if the debtor laid down the check and departed, saying, if this is taken it is full satisfaction, (and similarly if the debtor sends the check with a like notice), and the creditor takes it, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent;⁴³ and if he in-

Butterfield, 143 N. Y. App. D. 708, 128 N. Y. S. 407; *Wolfe v. Mack*, 81 Misc. 185, 142 N. Y. S. 433, the court refused to apply the principle in favor of an attorney against his client.

And where a debtor knows that he is dealing with a careless person and purposely obtains the indorsement of a check containing a receipt in full, of which the creditor has no knowledge, this is no defence, in an action on the claim. *Williams v. Western Travelers' Accident Ass'n*, 97, Neb. 352, 149 N. W. 822.

⁴¹ *Patten v. Lynett*, 133 N. Y. App. D. 746, 118 N. Y. S. 185; *Wilkesbarr Realty Co. v. Atkins*, 142 N. Y. S. 324; *Frank v. Frost* (Wis.), 174 N. W. 911. But if a check is once taken as satisfaction, a subsequent refusal to treat it as such and a failure to cash

it will not revive the cancelled indebtedness. *Rose v. Lilly* (Ark.), 170 S. W. 483; *Columbus Mut. L. Ins. Co. v. National L. Ins. Co.* (Ohio), 125 N. E. 664.

⁴² *Potter v. Douglass*, 44 Conn. 541; *Cooper v. Yazoo, etc., Ry. Co.*, 35 So. Rep. 162, 82 Miss. 634; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038. See also *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. Ed. 299, 25 S. Ct. 108; *McKeen v. Morse*, 49 Fed. 253, 1 C. C. A. 237; *Sparks v. Spaulding Mfg. Co.*, 158 Ia. 491, 139 N. W. 1083; *Porter v. Cook*, 114 Wis. 60, 89 N. W. 823.

⁴³ *Barham v. Kissia*, 100 Ark. 251, 140 S. W. 6; *Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569; *Keck v. Hotel Owners' F. I. Co.*, 89 Ia. 200, 56 N. W. 438; *Le Page v. Lalance Mfg.*

dicating by some act or word not brought home to the debtor at the time that he takes the check that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is an expression of assent unless informed to the contrary.⁴⁴

It may be supposed, however, that as soon as the check is taken notice is promptly given to the debtor that it is taken as satisfaction. It is impossible to find the ordinary elements of a bargain, in such a case. There is not only no mutual assent mentally, but there is no expression of mutual assent. The debtor is promptly made perfectly aware of the creditor's intention, which is to convert the check. But the creditor is not allowed to assert his tortious conversion, though the effect of such a ruling is to fix upon him a bargain which he never made.

§ 1856. Inability to deny that an act was done on the other terms authorized.

It is a general principle that where an act may rightfully be done with certain consequences or effect, the actor cannot assert for his own advantage to avoid that effect, that the act was done wrongfully. One who is offered goods at more than their market value cannot take them and say "I will convert them, but not buy them" and thereby render himself liable only their market value.⁴⁵ One who ships to a third person

Co., 90 N. Y. S. 676; *Legge v. Foster*, 131 N. Y. S. 582; *Waterbury Co. v. Maryland Casualty Co.*, 134 N. Y. S. 564; *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243; *Olson v. Burton* (Tex. Civ. App.), 141 S. W. 549; *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95.

⁴⁴ *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182. In this case the debtor wrote on the check: "Good only . . . if endorsed in full of all demands." The creditor struck this out and cashed the check. The court said: "The erasure on the check was not made

in the presence of the defendants, and could not have been known to them until the check had reached the bank and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money."⁴⁵ See *Lucy v. Mouffet*, 5 H. & L. 229, 232, per Parke, B.

Where a debtor sent cotton to the creditor to sell, providing he honored the debtor's draft for a certain sum and apply the balance of the proceeds on the debt, and the creditor on agreement to make the sale and apply the proceeds on the debt but declined

goods, in cars sent by one who has contracted to buy the goods, cannot assert that he converted the cars before loading them, and never transferred title or possession to the person by whom the cars were sent to him.⁴⁶ So a tenant who holds over after the expiration of his term without a different agreement with his landlord is bound for a new term, though the tenant gives notice that he does not intend to make such an engagement.⁴⁷ For the same reason, a landlord cannot do an act rightful only on the assumption that a breach of condition is excused and simultaneously or afterwards assert a forfeiture because of that breach.⁴⁸ And so where money, a check, or other property is offered in settlement of a liquidated or disputed claim, "the law permits but two alternatives, either

honor the draft and thereupon the debtor instructed him that a sale of the cotton by him without honoring the draft must be treated as a settlement of the debt and the creditor thereafter made the sale without paying the draft, this constituted a complete accord and satisfaction of the debt. *Wilcox v. Rogers*, 13 Ga. App. 410, 79 S. E. 219.

* *Proctor & Gamble Co. v. Peters*, 187 N. Y. App. D. 376, 176 N. Y. S. 169.

* *Wolfe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 673; *Smith v. Bell*, 44 Minn. 524, 47 N. W. 263; *Bradley v. Slater*, 50 Neb. 682, 70 N. W. 258; *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. 636; *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64; *Adams v. Dunn*, 64 Pa. Super. 303; *Hunter v. Karcher*, 8 S. Dak. 554, 67 N. W. 621. See also *Farrell v. Woodward*, 101 N. Y. Misc. 560, 167 N. Y. S. 605. Cf. *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517; *Canal Elevator & Co. v. Brown*, 36 Ohio St. 660.

* In *Croft v. Lumley*, 6 H. L. C. 672, p. 706, Bramwell, B., said: "Now I take it to be clear that the lessor could not do an act affirming the ten-

ancy, and yet say he did not elect not to treat the breach as a forfeiture; for instance, he could not distrain for rent due at Christmas, and at the same time effectually say that he did not elect not to treat an antecedent breach of covenant as a forfeiture; his act would be taken to be rightful, and bind him, rather than his words make his act wrong; so if the lessee had sent the rent in a letter, the lessor could not have kept the money, answering that he kept it, not as rent but as compensation, and then afterwards say he had not received it as rent. So here *Martelli* had no right to take this money except on the terms on which it was offered to him. It is clear it was never offered to him on the terms on which he said he was willing to take it, nor was any assent given to his taking it on those terms. Did he then take it wrongfully? Can he be allowed to set that up? Surely not. The remark in the judgment of the Court of Queen's Bench is well founded, that 'if the party to whom money is offered does not agree to apply it according to the express will of the party offering it, he must refuse it, and stand upon the rights which the law gives him'"

reject or accept in accordance with the condition."⁴⁹ It should be observed that the debtor must make it clear that the check which he sent is offered only on condition that it is taken in full payment. The imposition of an accord and satisfaction against the creditor against his will can be justified only when the taking of the check would be tortious except on the assumption of a taking in full satisfaction.⁵⁰

⁴⁹ *Logan v. Davidson*, 18 N. Y. App. D. 353, 356, 357, 45 N. Y. S. 961, and see cases *supra*, n. 40.

⁵⁰ In *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989, 990, the court said: "But the evidence was such as to justify the finding (impliedly, if not expressly, made) that the tender was not subject to the condition that an acceptance of the check would be a satisfaction in full. This is an essential element of an accord and satisfaction by tender of a check. In the absence of such condition, the retention of the check, at least where the creditor promptly notifies the debtor that he still insists upon payment of the balance claimed, does not establish his assent to the acceptance of the sum tendered as a full settlement. *Hillestad v. Lee*, 91 Minn. 335, 97 N. W. 1055; *Fremont Foundry Co. v. Norton*, 3 Neb. (Unof.), 804, 92 N. W. 1058; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Amer v. Folk*, 28 N. Y. Misc. 508, 59 N. Y. S. 532; *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407; *Van Dyke v. Wilder*, 66 Vt. 579, 29 Atl. 1016." See also *Meyer v. Henry Cowell & Co.*, 21 Cal. App. 602, 132 Pac. 611; *Shull v. McCrum*, 179 Ia. 1232, 162 N. W. 759; *Chapin v. Little Blue School*, 102 Me. 415, 86 Atl. 838; *Rose v. American Paper Co.*, 83 N. J. L. 707, 85 Atl. 354. In the following cases the principle seems to have been pushed to an extreme. *Bisbee v. Pulpit Farm Dairy* (N. H.), 100

Atl. 672, 674, where the debtor on the back of the check "This in payment of all milk received date" and the creditor cancelled these words and then indorsed and cashed the check, the court said: "In considering whether the plaintiff is estopped to deny he accepted the check in settlement, it is impossible to remember that the check was a check within the ordinary meaning of that term, but a written instrument directing the bank on which it was drawn to pay \$36.50, to the order of the plaintiff provided he executed the receipt on its back. It was reasonable therefore for the plaintiff to think that, if he erased the receipt before he deposited the check for collection, the bank would not pay it without notifying the defendants of what he had done, and that it would be guided by them as to paying it. In short, it cannot be said that the plaintiff did not do all the ordinary man would have done to notify the defendants that he would not accept the check in settlement of the account." In *Dimmock v. Banning, etc., Co.*, 256 Pa. 295, 17 Atl. 871, 873, the court thus stated the case: "The check was in the ordinary form. The voucher merely set forth the items showing the balance due from defendants, from which were deducted the amount claimed by them as damages. The receipt at the end was 'in full for the above account.' This is the only clause on which a claim of accord and satisfaction can be based. We find no express statement in the letter of

§ 1857. Accord and satisfaction with a third person—English cases.

The question whether accord and satisfaction entered into by the creditor with a person other than the debtor discharges the debt has been much disputed. Even though the third person pays in money the exact amount of the debt there can in strictness be at most an accord and satisfaction, for, as payment by A is a different thing from payment by B, the obligation has not been performed according to its tenor. In the early case of *Grymes v. Blofield*⁵¹ the defendant pleaded to an action of debt satisfaction given by a third person, but it was held no plea. This is inconsistent with a still earlier case thus stated by Fitzherbert:⁵² "If a stranger doth trespass to me and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" *Grymes v. Blofield* was, however, followed in *Edgcombe v. Rodd*,⁵³ and though its correctness seems to have been doubted in *Jones v. Broadhurst*,⁵⁴ where Cresswell, J., considered the question elaborately, it was rees-

elsewhere to the effect that the check, if accepted, would be considered as a compromise of the claim, or that it was tendered as such, or that acceptance thereof would be considered a waiver of plaintiff's right to the balance of their claim. On the contrary, the letter expressly states the payment was made in settlement of 'the difference between' the amount of the plaintiffs' claim and defendants' loss. In view of this statement, the clause in the receipt, reciting the check to be 'in full for the above account,' merely amounts to a receipt in full for the balance of the account, and leaves no room for the contention of a tender as a compromise in settlement of the entire claim of plaintiffs. The letter and receipt together, therefore, lacked the essential element of notice of a tender in full satisfaction

of plaintiff's claim. This may, in fact, have been the intention of defendants. The burden, however, was on them to expressly inform plaintiffs of such intention, either by express words or by circumstances conclusively establishing such intention. Not having done so, their check was merely a payment of part of the undisputed claim, and does not bar plaintiffs from suing for the balance."

⁵¹ Cro. Elis. 541. This case is elaborately considered in *Jones v. Broadhurst*, 9 C. B. 173, 195 *et seq.*, and the result of an examination of the original rolls is stated.

⁵² Tit. "Barre," pl. 166.

⁵³ 5 East, 294. See also *Thurman v. Wild*, 11 A. & E. 453.

⁵⁴ 9 C. B. 173, 193.

established soon after by several cases thus summarized by Parke in *Simpson v. Eggington*:⁵⁵

"The general rule as to payment or satisfaction by a person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones v. Broadhurst*, B. 173; *Belshaw v. Bush*, 11 C. B. 191, and *James v. I* 22 L. J. C. P. 73; and the result appears to be that it is sufficient to discharge a debtor unless it is made by the person, as agent for and on account of the debtor, and with prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw v. Bush*, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case, *James v. Isaacs*, a satisfaction from a stranger, without authority, prior or subsequent, of the defendant, was held to be bad."⁵⁶ In *Simpson v. Eggington*⁵⁷ it was held that a ratification might be made at the trial of such an action, and it seems likely that however the result may be expressed a creditor with whom settlement had been made by a third person would not thereafter be allowed to maintain an action against the debtor.⁵⁸

§ 1858. American cases.

In the United States the weight of authority sustains the validity of the defence,⁵⁹ though wherever there is any

⁵⁵ 10 Ex. 845.

⁵⁶ See in accord with *James v. Isaacs*, *Kemp v. Balls*, 10 Ex. 607; *Lucas v. Wilkinson*, 1 H. & N. 420.

⁵⁷ 10 Ex. 845. See also *Neely v. Jones*, 16 W. Va. 625, 37 Am. St. Rep. 794.

⁵⁸ See *Hirachand-Punamchand v. Temple*, [1911] 2 K. B. 330.

⁵⁹ *Merrick's Exec. v. Giddings*, 115 U. S. 300, 29 L. Ed. 403, 6 S. Ct. 65;

Harrison v. Hicks, 1 Port. (Ala.) 1; *Underwood v. Lovelace*, 61 Ala. 1; *Martin v. Quinn*, 37 Cal. 55; *White v. Cannon*, 125 Ill. 412, 17 N. E. 233; *Poole v. Kelsey*, 95 Ill. App. 233; *Ritenour v. Mathews*, 42 Ind. 7; *Harford v. Adams*, 104 Ind. 41, 3 N. E. 753; *Thompson v. Conn. Mut. L. Co.*, 139 Ind. 325, 345, 38 N. E. 1; *Harvey v. Tama County*, 53 Ia. 1; *5 N. W. 130*; *Porter v. Chicago*, 6

dence that the payment or satisfaction was made on behalf of the debtor and was ratified by him, these facts are relied upon.⁶⁰ In New York, however, the strictness of the early English law was long maintained,⁶¹ and a similar result has been reached in Kentucky⁶² and Missouri.⁶³

§ 1859. Ratification by the debtor.

The difference in the authorities is of less importance than it might seem on first consideration. The courts which require the satisfaction to be made on behalf of the debtor and ratified by him are disposed to find these facts upon rather slight evidence. The difficulty in principle is that the third person

Ry. Co., 99 Ia. 351, 359, 68 N. W. 724; *Marshall v. Bullard*, 114 Ia. 462, 87 N. W. 427, 54 L. R. A. 862; *Oliver v. Bragg*, 15 La. Ann. 402; *Leavitt v. Morrow*, 6 Ohio St. 71; *Beck v. Snyder*, 167 Pa. 234, 31 Atl. 555; *Royalton v. Cushing*, 53 Vt. 321, 326; *Crumlish's Admr. v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691. This view was forcibly expressed in the case last cited, as follows:

"In the charge of the learned circuit judge, he says that, in his opinion, it was not competent for the party sued to plead payment by another party who was not sued and could not be affected by the judgment. Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What sense or reason is there in any such technical rule as that if it exists? The plaintiff's counsel says that the satisfaction of a debt by a stranger, between whom and the defendant there is no privity, is not available to the debtor as a defence. But again we ask, why should it not be, if the creditor accepts the payment in satisfaction of the debt? If a debt is fully paid, it would seem, according

to plain common sense, that the obligation was extinguished and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?"

⁶⁰ See the careful opinions in *Snyder v. Pharo*, 25 Fed. 398, and *Jackson v. Pennsylvania R. Co.*, 66 N. J. L. 319, 49 Atl. 730, 55 L. R. A. 87.

⁶¹ *Clow v. Borst*, 6 Johns. 37; *Daniels v. Hallenbeck*, 19 Wend. 408; *Bleakley v. White*, 4 Paige, 654; *Muller v. Eno*, 14 N. Y. 597, 605; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Dusenbury v. Callaghan*, 8 Hun, 541, 544. *Cf. Hun v. Van Dyck*, 26 Hun, 567, affirmed, without opinion, 92 N. Y. 660. See also *Wellington v. Kelly*, 84 N. Y. 543; But in *Dansiger v. Hoyt*, 120 N. Y. 190, 194, 24 N. E. 294, the court say: "But if ratification of the latter [i. e. the debtor] may be deemed essential, it appears by the fact of her asserting payment and seeking to avail herself of the benefit of the receipt as a defence." And see *Beebe v. Worth*, 146 N. Y. S. 146.

⁶² *Stark's Admr. v. Thompson's Exrs.*, 3 T. B. Mon. 296, 302.

⁶³ *Armstrong v. School District*, 28 Mo. App. 169. See also *Carter v. Black*, 4 Dev. & Bat. 425, 427.

rarely purports to act on behalf of the debtor. If he did an payment was thus capable of ratification, there can be no culty so far as the debtor himself is concerned in making such ratification. The mere assertion by the debtor that debt has been satisfied though made by plea or at the after action has been brought on the debt is sufficient. In question whether the debt has been paid comes in issue tween the creditor and third persons, then indeed trouble arise over the question of ratification.

§ 1860. Equitable defence.

Even though satisfaction from a third person does not leg discharge the obligation, there may be ground for an equit defence. There must be implied from the creditor's accepta of the satisfaction a promise to forbear perpetually to sue original debtor. Whether the original debtor can enforce promise in any jurisdiction should depend upon the doctri there held in regard to the enforcement by third persons contracts for their benefit or for the discharge of obligati due to them.⁶⁴ If the promise is enforceable by the origi debtor, either a permanent injunction or an equitable plea law is an appropriate remedy.

§ 1861. Rescission of arrangement.

It has been held in England that before ratification by debtor, it is competent for the creditor and the third person rescind their arrangement, and the original debtor will th still continue liable.⁶⁵ In this case, too, if it be granted th satisfaction by a third person is not a legal discharge, the c rectness of the result depends on the doctrine held as to t right of parties to a contract in which a third person is int ested. Whether they can rescind it is elsewhere considere

§ 1862. Accounts stated.

Though the validity of executory accords was not fully r

⁶⁴ See *supra*, §§ 347 *et seq.*; *Armstrong v. School District*, 28 Mo. App. 169.

⁶⁵ *Walter v. James*, L. R. 6 Ex. 124. In this case the creditor when he received payment thought that it was

authorized by the debtor, and fact that he accepted the paym under this mistake had weight w the court.

⁶⁶ See *supra*, §§ 396 *et seq.*

ognized until the nineteenth century, one transaction similar to an accord was given early judicial recognition though not under that name, but under that of an account stated. This was a promise by a debtor to pay a stated sum of money which the parties had agreed upon as the amount due. The promise "must be founded on previous transactions of a monetary character creating the relation of debtor and creditor."⁶⁷ Therefore a promise to pay a sum of money on account of an antecedent transaction, will not create an account stated even though the promise is supported by consideration and is binding, unless there is an antecedent debt.⁶⁸ The distinction, however, may be easily overemphasized at the present time. An unliquidated or disputed demand arising from any transaction, or a series of such demands may be the subject of compromise or accord; and if an executory accord is given and accepted in satisfaction of real or supposed liabilities,⁶⁹ it will possess all the virtues of an account stated, though not properly called by that name, and though under the theory of its origin the validity of an account stated did not depend upon the uncertainty of previous claims since the stated sum was not necessarily or indeed primarily supposed to be fixed by way of compromise, but rather by way of computation. The recognition of such an account as a contract seems to have been simply one illustration of the early doctrine that an antecedent debt was sufficient consideration to support a subsequent promise to pay the debt.⁷⁰ Doubtless the law will more readily imply a promise (*e. g.*, from retention without objection of an account) where there is a debt, than where there is a mere claim for damages.

Not only was the account stated a binding contract but it was said in an early case to operate as a discharge of the original obligation precluding any subsequent action thereon.⁷¹ This, however, was soon denied,⁷² on the ground that one simple

⁶⁷ *Chase v. Chase*, 191 Mass. 556, 562, 78 N. E. 115; *Tucker v. Columbian Nat. L. Ins. Co.*, 232 Mass. 224, 122 N. E. 285, 286.

⁶⁸ *Lubbock v. Tribe*, 3 M. & W. 607. See also *Vanbebber v. Plunkett*,

26 Oreg. 562, 38 Pac. 707, 27 L. R. A. 811.

⁶⁹ See *supra*, § 1846.

⁷⁰ See *supra*, § 143.

⁷¹ *Milward v. Ingram*, 2 Mod. 43.

⁷² *May v. King*, 12 Mod. 537; *Atherley v. Evans, Sayer*, 269.

contract obligation could not extinguish another; an view seems to have prevailed until the middle of the nine century.⁷³ But after it was recognized that an executo cord might itself be accepted in satisfaction of an oblig a return to the earlier view followed.⁷⁴ To establish an ac stated there must be a contract between the parties—t an express or implied promise by the debtor to the cre An admission by a debtor to a third person, not an ag the creditor, may have value as tending to prove the or indebtedness, but it is no evidence of an account stated.⁷⁵ the same reason—that the new promise express or implied basis of the plaintiff's action—the items of original inde ness need not be stated in the creditor's declaration.⁷⁶

§ 1863. Form and evidence of an account stated.

It is not essential that the account shall be stated in particular form. Any evidence indicating an admission the debtor to the creditor of a stated indebtedness cla by the latter will furnish ground for implying a prom

Evidence of assent to an account stated may consi

⁷³ In *Smith v. Page*, 15 M. & W. 683, 686; *Parke, B.*, seems to have thought that the statement in *Milward v. Ingram*, 2 Mod. 43, was unsound.

⁷⁴ In *Laycock v. Pickles*, 4 B. & S. 497, 506, 507, *Blackburn, J.*, criticized the statement from *Comyn's Digest*, that "an account without payment or release is no plea to an indebitatus assumpsit, for a chose in action cannot discharge a matter executed;" saying: "I think that is true of an account stated where there is only one item; but when there are several cross items, it is really an account stated and there is a discharge of the items on either side."

⁷⁵ *Breckon v. Smith*, 1 Ad. & E. 489; *Thurmond v. Sanders*, 21 Ark. 255; *Hoffar v. Dement*, 5 Gill, 132, 46 Am. Dec. 648.

So a vote of a board of directors authorizing payment of certain com-

missions to the plaintiff is not evi of an account stated, the pl having neither made a deman that payment or subsequently sent to the vote. *Parker v. chants' &c. Co.* (Cal. App.), 186 192.

⁷⁶ *Foster v. Allanson*, 2 T. R. *Manchester Fire Assur. Co. v. patrick*, 120 Ill. App. 535, 537 *brecht v. Gies*, 33 Mich. 389; *M v. Nave*, 52 Miss. 494, 498; *M Kloss*, 44 Mo. 300; *Schutz v. Mon* 146 N. Y. 137, 141, 40 N. E. 780; *v. New York Brick &c. Co.*, 95 N App. D. 371, 88 N. Y. S. 582; *Me land v. West*, 70 Pa. 183, 187.

⁷⁷ "It is not necessary that acknowledgment of an account's rectness should be either set forth writing or be made in express w in order to constitute it an acco stated." *Baltimore & O. R. Co Berkeley &c. R. Co.*, 168 Fed. "

express statements or of inferences from conduct. Especially it is held that the retention of a statement of account without objection for more than a reasonable time implies assent to its correctness.⁷⁸ Usually it is the creditor who submits a bill or statement, but it may be the debtor. A common application of the principle occurs when a bank renders a statement of account to its customer. Such a statement if retained without objection more than a reasonable time, becomes a stated account.⁷⁹

As appears from the following section, the account may none the less be corrected not only for fraud but for mistake; and it is the latter qualification of the general principle that has chiefly concerned banking institutions. If the depositor fails to make reasonable examination of his account and vouchers, and

⁷⁸ *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; *Baltimore & O. R. Co. v. Berkeley, etc., R. Co.*, 168 Fed. 770; *Joshua Hendy Iron Works v. Brenneman*, 185 183; *May & Ellis Co. v. Farmers' Union Mercantile Co.*, 120 Ark. 316, 179 S. W. 490; *Riley v. Mattingly*, 42 App. D. C. 290; *Anderson v. Crane*, 183 Ill. App. 21; *Rudolph Wurlitzer Co. v. Dickinson*, 153 Ill. App. 36, aff'd. 247 Ill. 27, 93 N. E. 132; *Graham & Corry v. Work*, 162 Iowa, 383, 141 N. W. 428; *Little, etc., Co. v. Pigg*, 29 Ky. L. Rep. 809, 96 S. W. 455; *Western Newspaper Union v. Sugarstrom, etc., Co.*, 118 Minn. 230, 136 N. W. 752; *Alexander v. Scott*, 150 Mo. App. 213, 129 S. W. 991; *Locke v. Woodman (Mo. App.)*, 216 S. W. 609; *Little v. McClain*, 134 N. Y. App. Div. 197, 118 N. Y. S. 916; *Davis v. Stephenson*, 149 N. C. 113, 62 S. E. 900; *Lamont Mercantile Co. v. Piburn*, 51 Okl. 618, 152 Pac. 112; *Harrison v. Birrell*, 58 Or. 410, 115 Pac. 141; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726; *Ripley v. Sage Land & Imp. Co.*, 138 Wis. 304, 119 N. W. 108, 23 L. R. A. (N. S.) 787. *Cf. New York Telephone Co. v. Bernstein*, 174 N. Y. S. 620; *McGraw v. Traders'*

Nat. Bank, 64 W. Va. 509, 63 S. E. 398; *Dodge v. Brown*, 74 W. Va. 466, 82 S. E. 282.

⁷⁹ *Leather Mfrs'. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *Pospisil v. Hajicek*, 190 Ill. App. 638; *Corbin Banking Co. v. Bryant*, 151 Ky. 194, 151 S. W. 393; *Kenneth Inv. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173; *Farry v. Farmers', etc., Bank (N. J. Eq.)*, 58 Atl. 305; *Pannonia Building, etc., Assoc. v. West Side Trust Co. (N. J. L.)*, 108 Atl. 240; *Clark v. Mechanics' National Bank of City of New York*, 11 Daly, 239; *Shipman v. Bank*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Nadine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109. See also *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 56 S. E. 152, 7 L. R. A. (N. S.) 744, 117 Am. St. Rep. 1014. In *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 398, the court said that as between banker and customer the rule of account stated did not apply, but what the court had in mind was that the customer might object to certain items; that is, might open the account—a conclusion not inconsistent with treating the account as stated.

such examination would have disclosed an error, the bank has in good faith taken action, or failed to take possible action in the meantime, may assert an estoppel precluding the depositor from setting up the mistake.⁸⁰

It should be remembered that it is necessary to establish not an admission as such but an implied promise; and all facts of each case should be admissible in order to determine whether such an implication is warranted.⁸¹

If there is sufficient consideration for the promise it will be binding, though, (as appears from the following section) subject like other contracts, to possible defences. A debt unenforceable because of the Statute of Frauds affords sufficient basis for the promise;⁸² as will a debt barred by the Statute of Limitations. But in the latter case under the statutes of many States the debtor's promise would be required to be in writing.⁸³

⁸⁰ See *supra*, § 1145; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *New York Produce Exchange Bank v. Houston*, 169 Fed. 785, 95 C. C. A. 251; *National Bank of Commerce v. Tacoma Mill Co.*, 132 Fed. 1, 104 C. C. A. 441; *Stallo v. Wagner*, 220 Fed. 360; *National Dredging Co. v. President, etc., of Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593; *Dana v. National Bank*, 132 Mass. 156; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 330; *Pannonia Building, etc., Assoc. v. West Side Trust Co.* (N. J. L.), 108 Atl. 240; *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 64 S. E. 950. See also *Skyring v. Greenwood*, 4 B. & C. 281; *Heane v. Rogers*, 9 B. & C. 577; *Hume v. Bolland*, 1 Cr. & Mees. 130.

In some States, statutes have fixed a time within which objection must be made by the depositor. See *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 75

Atl. 313, *affd.* 81 N. J. L. 588, 80 492.

⁸¹ *Wilbur v. Win* (N. J. Eq.), 103 985.

⁸² *Peacock v. Harris*, 10 East, *Cocking v. Ward*, 1 C. B. 858.

⁸³ See *supra*, § 164. In *Slayback Alexander*, 179 N. Y. App. Div. 167 N. Y. S. 194, 195, the court said:

"The account rendered on the day of August, 1908, after the transaction between the parties, which was received, examined, and retained by defendant without exception, clearly constituted an account stated as to the entire balance, and gave rise to a new cause of action quite independent of the original cause of action on the account; the Statute of Limitations not having then run against any of the items of the account constituting the original transactions. *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 28, 51 N. E. 986; *Daintrey v. Evans*, 14 N. Y. App. Div. 275, 132 N. Y. S. 12; *Knickerbocker v. Gould*, 115 N. Y.

The common law found the same difficulty in allowing an account stated based on prior sealed obligations that it did in permitting such obligations to be discharged by parol rescission,⁸⁴ or accord and satisfaction.⁸⁵ The simple contract promise of the account stated could not merge the prior sealed obligation; and even if it could itself be regarded as a valid contract, the creditor must pursue his higher remedy.⁸⁶ The

533, 22 N. E. 573; *Schuts v. Morette*, 146 N. Y. 137, 40 N. E. 780; *Dela-
barre v. McAlpin*, 101 App. Div. 468,
92 N. Y. S. 129, 25 Cyc. 1138.

"The subsequent monthly statements of the account were merely renditions of the account already rendered with the exception of the addition of the monthly interest. Manifestly the addition of the interest monthly did not constitute the statement then rendered a new account, for in so far as it involved compound interest, which was the only new item in it, it was unauthorized, and therefore the monthly accounts rendered were quite analogous to the monthly rendition of an overdue account by a merchant to a customer, and only different therefrom in the addition of the interest.

"No decision has been cited, and we have found none, in which the question arose as to whether a cause of action on an account stated may be continued indefinitely against the Statute of Limitations by merely rendering the same over again within each six-year period. We are of the opinion that, where an account becomes an account stated by reason of its being forwarded and received and retained after examination, as here, the cause of action upon that account stated thereupon accrues, and the Statute of Limitations commences to run, and that it is not within the power of the creditor to extend the running of the Statute of Limitations merely by rendering the same account over again from time

to time." See also *Jasper Trust Co. v. Lampkin*, 162 Ala. 388, 50 So. 337, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33.

⁸⁴ See *supra*, § 1834.

⁸⁵ See *supra*, § 1849.

⁸⁶ In *Young v. Hill*, 67 N. Y. 162, 174, 175, 23 Am. Rep. 99, the court said: "When a sum of money is secured by a deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it, an action will not lie on this account and promise, but the action must be brought on the security. A simple contract is merged in a bond, covenant or other contract by deed or record, but the greater security is not merged in a lesser. (*Middleditch v. Ellis*, 2 Exch. 623; *Wood v. Edwards*, 19 J. R. 205; *Landis v. Urie*, 10 S. & R. 316; *Gilson v. Stewart*, 7 Watts, 100.) A debt of record or by deed may be turned into a simple contract debt, but only upon some new consideration, and then the action must be upon the special agreement and not upon an *inasmul compulassent*. (*Miller v. Watson*, 4 Wend. 267, S. C. 7 Cow. 39.) . .

"Perhaps, if a debt, although secured by deed, is made up of many items, and in the statement of an account the items are mingled with other and distinct items of indebtedness, and a balance struck, the including of the latter class of items may be a sufficient consideration to support an express promise to pay the general balance. (*Gilson v. Stewart, supra*)."

possibility of an account stated has likewise been denied where the prior indebtedness was on a negotiable instrument;⁸⁷ and under the California statute⁸⁸ on an ordinary written contract.⁸⁹ There is more difficulty here than in the case of parol rescission and accord and satisfaction in escaping the technical rule of the common law; since an account stated frequently does not fulfil the modern requirements of a contract, there being no consideration for the debtor's promise other than an antecedent debt. Where there is present consideration there should be no hesitation in upholding the new parol agreement.

It is not essential that there be cross-demands. Indeed there may be but a single item to the account.⁹⁰ Usually, however, there are several. On the account being stated, "the balance is a debt as a matter of contract implied by law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it."⁹¹

§ 1864. Conclusiveness of an account stated.

An account stated was said, near the end of the eighteenth century, "to have been formerly conclusive," but that "a greater latitude has of late prevailed in order to remedy the errors which may have crept into the account in surcharging the items."⁹² And now an account stated is open to a wide variety of attack. Of course it may be shown that the parties never agreed to an account stated;⁹³ or that if an account was

This last point was so held in *Foster v. Allanson*, 2 Term R. 479; *State v. Jennings*, 10 Ark. 428. See also *Spangler v. Springer*, 22 Pa. 454.

⁸⁷ *Jasper Trust Co. v. Lampkin*, 162 Ala. 388, 50 So. 337, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33. See also *Murphy v. Oregon Engraving Co. (Oreg.)*, 186 Pac. 12.

⁸⁸ Likewise enacted in Oklahoma, see *supra*, § 1828.

⁸⁹ *Bennett v. Potter (Cal.)*, 183 Pac. 156.

⁹⁰ *Tucker v. Barrow*, 7 B. & C. 623; *Lemere v. Elliott*, 6 H. & N. 656; *Buck v. Hurst*, L. R. 1 C. P. 297; *Ware v. Dudley*, 16 Ala. 742; *Gardner*

v. Watson, 170 Cal. 570, 150 Pac. 994; *State v. Hartman Steel Co.*, 51 N. J. L. 446, 20 Atl. 67; *Benjamin v. Levy*, 176 N. Y. S. 454; *Truman v. Owens*, 17 Oreg. 523, 21 Pac. 665.

⁹¹ *Allen-West Co. v. Patillo*, 90 Fed. 631, 632, 33 C. C. A. 197, 198; *Patillo v. Allen-West Co.*, 131 Fed. 680, 688, 65 C. C. A. 508. See also *Bartlett v. Emery*, 1 T. R. 42 n.

⁹² *Trueman v. Hurst*, 1 T. R. 40, 42, by Lord Mansfield.

⁹³ *Clare v. Kelley*, 177 N. Y. S. 212; *Consolidated Machinery &c. Co. v. Harper Machinery Co.*, 180 N. Y. S. 135.

agreed upon it was not intended to include the claim later in question,⁹⁴ or that it was induced by fraud.^{94a} But it may also be shown not only that the transaction was without consideration because the promise of the debtor was supported by no previous debt,⁹⁵ or because the promise of the creditor to accept the stated sum was similarly unsupported since the debtor's promise was merely to pay a portion of an admitted liquidated debt,⁹⁶ but that the consideration was illegal,⁹⁷ or that there was failure of consideration,⁹⁸ or mistake.⁹⁹

So far has this last defence been sometimes carried that the nature of an account stated is frequently lost sight of, and it is sometimes regarded as if it were an admission, making out a *prima facie* case, rather than a contract to pay the stated sum, which must be set aside in order to recur to the original claims which form the basis of the stated account.¹

⁹⁴ Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Hunt v. Stockton Lumber Co., 113 Ala. 387, 400, 21 So. 454; White v. Thompson (Cal. App.), 180 Pac. 953; Poppell v. Culpepper, 56 Fla. 515, 520, 47 So. 351; Graham v. Chubb, 39 Mich. 417; Treacy v. Powers, 112 Minn. 226, 127 N. W. 936; Ryan v. Rand, 26 N. H. 12; Newhall v. Field, 13 N. Mex. 82, 79 Pac. 713, 12 Ann. Cas. 979; Pierce v. Delamater, 3 How. Pr. 162; Segelke & Kohlhaus Mfg. Co. v. Vincent, 135 Wis. 237, 115 N. W. 806. And see cases cited *infra*, n. 83.

^{94a} The Washtenaw, 163 Fed. 372, 375, and see cases cited *infra*, n. 83.

⁹⁵ McAveigh v. Pelham Park R. Co., 120 N. Y. S. 102, 103; Gottfried v. Levy, 177 N. Y. S. 895; Powers v. New England Ins. Co., 68 Vt. 390, 396, 35 Atl. 331. See also Jasper Trust Co. v. Lampkin, 162 Ala. 388, 50 So. 337, 136 Am. St. Rep. 33.

⁹⁶ French v. French, 2 M. & Gr. 644. See also Smith v. Page, 15 M. & W. 683; Kennedy v. Broun, 13 C. B. (N. S.) 677; Perry v. Attwood, 6 E. & B. 691; *Supra*, § 120. But it is not necessary that every item of an account stated should be supported by consideration.

Patillo v. Allen-West Commission Co., 131 Fed. 680, 65 C. C. A. 508.

⁹⁷ Rose v. Savory, 2 Bing. (N. S.) 145; Murphy v. Springs, 200 Fed. 371, 118 C. C. A. 524, 45 L. R. A. (N. S.) 539; Elmore-Schultz Grain Co. v. Stonebraker (Mo. App.), 214 S. W. 216.

⁹⁸ Jacobs v. Fisher, 1 C. B. 178; Wilson v. Wilson, 14 C. B. 616.

⁹⁹ Thomas v. Hawkes, 8 M. & W. 140; Gough v. Finden, 7 Exch. 48. See cases in the following note.

¹ See on the extent to which an account stated may be set aside for mistake, etc.: Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Patillo v. Allen-West Commission Co., 131 Fed. 680, 65 C. C. A. 508; The Washtenaw, 163 Fed. 372; Jackson v. White, 194 Fed. 677, 115 C. C. A. 71; Allen-West Commission Co. v. Hudgins, 74 Ark. 468, 86 S. W. 289; Godfrey v. Hughes, 114 Ark. 312, 169 S. W. 958; St. Louis Cooperage Co. v. Jackson, 121 Ark. 633, 182 S. W. 534; Gardner v. Watson, 170 Cal. 570, 150 Pac. 994; White v. Thompson (Cal. App.), 180 Pac. 953; Gutshall v. Cooper, 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.) 820; Riley v. Mattingly, 42 App. Dist. Col.

§ 1865. Novation.

A contract may be discharged by novation; that is, substitution of a new contract for the old. The name is derived from the Roman law and has been commonly used only recent years in English and American law, but the transactions which it designates are not modern. It is more usually applied in the Common law to a transaction in which the substituted contract has a new party. Merger, substituted contract and satisfaction, are the terms ordinarily used to contracts between the same parties which discharge prior obligations. In the Civil law, however, a substituted contract between the same parties, also is called a novation;² and the same usage is not infrequent in the Common law.³ A distinguishing feature of the transaction which involve particular difficulties are due to the inclusion of three parties, and as substituted contracts between the same parties have been considered elsewhere,⁴ the present discussion is confined to situations where

290; *Poppell v. Culpepper*, 56 Fla. 515, 47 So. 351; *State v. Illinois &c. R.*, 246 Ill. 188, 92 N. E. 814; *Schmoker v. Miller*, 89 Kan. 594, 132 Pac. 158; *McCue v. Hope*, 97 Kan. 85, 154 Pac. 216; *Hallowell Granite Works v. Orleans (La.)*, 80 So. 610; *Fordyce v. Dillaway*, 212 Mass. 404, 99 N. E. 166; *Kimmerle v. Lowitz*, 203 Mich. 482, 169 N. W. 857; *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860; *Wilder-mann v. Donnelly*, 86 Minn. 184, 90 N. W. 366; *Treacy v. Powers*, 112 Minn. 228, 127 N. W. 936; *Behrens v. Kruse*, 132 Minn. 69, 155 N. W. 1065; *Peebles v. Yates*, 88 Miss. 289, 40 So. 996; *Union Electric, etc., Co. v. Surgical Supply Co.*, 122 Mo. App. 631, 99 S. W. 804; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; *Vanderveer v. Statesir*, 39 N. J. L. 593; *Farry v. Farmers, etc., Bank (N. J. Eq.)*, 58 Atl. 305; *Wilbur v. Win (N. J. Eq.)*, 103 Atl. 985; *Stenton v. Jerome*, 54 N. Y. 480; *Williams v. Rutherford Realty Co.*, 159 N. Y. App. D. 171, 144 N. Y. S. 357; *Tennent v. Dewees*, 7

Pa. St. 305; *Tustin v. Philadelphia Co.*, 250 Pa. 425, 95 Atl. 595; *Snell v. Allmon*, 74 S. C. 502, 54 S. E. 1009; *Fourth Nat. Bank v. Stahlman*, Tenn. 367, 178 S. W. 942, L. 1916 A. 568; *McKay v. Overton*, Tex. 82; *Harman v. Maddy*, 5 Va. 66, 49 S. E. 1009; *Chapman v. Liverpool Salt, etc., Co.*, 57 W. Va. 395, 50 S. E. 601; *Hoover-Dimick Lumber Co. v. Neill*, 77 W. Va. 87 S. E. 855; *Jefferson County v. Jones*, 19 Wis. 51; *Segelke & Kohlhaus v. Co. v. Vincent*, 135 Wis. 237, 111 W. 806.

² See *Bouvier's Law Dictionary*, 50 in Louisiana: *Studebaker Mfg. Co. v. Endom*, 51 La. Ann. 1263, 26 90.

³ *Hoffman v. Moreman*, 184 Ill. 220, 63 So. 942; *Morecraft v. Allen*, N. J. L. 729, 75 Atl. 920 L. R. A. 11 B. 1; *Bandman v. Finn*, 185 N. Y. 417, 73 N. E. 175, 12 L. R. A. (N. S.) 11; *Guichard v. Brande*, 57 Wis. 534, 15 W. 764.

⁴ See *supra*, §§ 1826 et seq.

new party is introduced. In its simple form a novation may involve a change in the debtor or a change in the creditor. If A owes B a sum of money and there is substituted for this obligation an obligation of C to B, there is a novation of the debtor. If there is substituted for the original obligation an obligation of A to C, there is a novation of the creditor.⁵ There may also be a novation by the introduction of a new debtor⁶ or creditor as to part of the debt due from one of the original parties to the other.

Novation necessarily involves the discharge of an old debt or part of it and the creation of a new one. There is no novation until this has been accomplished. In a broad sense it may be said that the discharge of the old debt is the consideration for the creation of the new one.⁷ And a bargain must not

⁵ For a discussion of the theory of novation by Ames, see his Lectures on Legal History, 298, 6 Harv. L. Rev. 184.

⁶ *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660.

⁷ *Cuxon v. Chadley*, 3 B. & C. 591; *American Paper Bag Co. v. Van Nortwick*, 52 Fed. 752, 3 C. C. A. 274; *Illinois Car, etc., Co. v. Linstroth Wagon Co.*, 112 Fed. 737, 50 C. C. A. 504; *Carpenter v. Murphree*, 49 Ala. 84; *Hoffman v. Moreman*, 184 Ala. 220, 222, 63 So. 942; *Bank &c. Co. v. Jackson*, 190 Ala. 411, 67 So. 235; *Brewer v. Winston*, 46 Ark. 163; *Elkins v. Henry Vogt Machine Co.*, 125 Ark. 6, 187 S. W. 663; *Ferguson v. McBean* (Cal.), 35 Pac. 559; *Chapin v. Brown*, 101 Cal. 500, 35 Pac. 1051; *Carpy v. Dowdell*, 131 Cal. 495, 63 Pac. 778; *Martin v. Brosnan*, 18 Cal. App. 477, 123 Pac. 550; *Charles v. Amos*, 10 Colo. 272, 15 Pac. 417; *Woodruff v. Hensel*, 5 Colo. App. 103, 37 Pac. 948; *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227; *Allen v. Rundle*, 45 Conn. 528; *Donegan v. Baker &c. Co.*, 73 Fla. 241, 74 So. 202; *Mills v. McMillan* (Fla.), 82 So. 812; *Knisely v. Brown*, 95 Ill. App. 516; *Horn v. McKinney*, 5 Ind. App. 348,

32 N. E. 334; *Bristol Mill, etc., Co. v. Probasco*, 64 Ind. 406; *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830; *Cox v. Baltimore &c. R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453; *Adams Co. v. Helman*, 58 Ind. App. 394, 106 N. E. 733; *Black v. DeCamp*, 78 Iowa, 718, 43 N. W. 625; *Spiro v. Leibenguth*, 51 La. Ann. 152, 24 So. 785; *Sucker State Drill Co. v. Henry, Loewer, etc., Co.*, 114 La. 403, 38 So. 399; *Bank v. Sanders*, 139 La. 622, 71 So. 891; *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. 551; *Griffin v. Cunningham*, 183 Mass. 505, 509, 67 N. E. 660; *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999; *Wierman v. Bay City-Michigan Sugar Co.*, 142 Mich. 422, 106 N. W. 75; *Nelson v. Larson*, 57 Minn. 133, 58 N. W. 687; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Adams v. Power*, 48 Miss. 450, 52 Miss. 828; *Corinth, etc., Turnpike Co. v. Gooch*, 113 Miss. 50, 73 So. 869; *Davis v. Dunn*, 121 Mo. App. 490, 97 S. W. 226; *Scharff Distilling Co. v. Springfield, etc., Transfer Co.*, 180 Mo. App. 497, 166 S. W. 654; *Aldritt v. Panton*, 17 Mont. 187, 42 Pac. 767; *Kinsman v. Stanhope*, 50 Mont. 41, 144 Pac. 1083, L. R. A. 1916 C. 443; *Western White Bronze Co. v. Portrey*,

be confused with novation where it is provided that on the performance of a new agreement an old obligation shall be discharged,⁸ or that a new contract shall be security for a former one.⁹ In a novation the new contract of itself effects the discharge.

§ 1866. Analysis of simple novations.

Even with the assent of all parties a satisfactory analytical explanation of how a complete legal discharge of the old contract and the creation of a new one is effected is not easy. If a novation of the debtor is considered where under the original contract A owes B and it is desired to introduce C instead of A, the substance of the transaction consists of a promise by B to C, or to A, or to both, to surrender his claim against A; and a promise by C to A or B, or both, that he will pay B. If it is supposed that only a promise to B by C can create the desired new right, and only a promise to A by B can discharge A, consideration must be sought for these promises. If it be supposed that B not only promises A to discharge him, but also promises C to discharge A, the latter promise is clearly sufficient to support C's promise to B, even though B's promise to C does not discharge A.¹⁰ But unless A gives B some consideration exterior to the novation, what consideration is there for any promise which B may make to A (as distinguished from C) to discharge him? It may be suggested that inducing C to enter into the bilateral contract with B, furnishes the necessary

50 Neb. 801, 70 N. W. 383; *Warren v. Batchelder*, 15 N. H. 129; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Lowe v. Blum*, 4 Okl. 260, 43 Pac. 1063; *Gaar v. Rogers*, 46 Okl. 67, 148 Pac. 161; *Miles v. Bowers*, 49 Ore. 42; 90 Pac. 905; *Jones v. Commonwealth Casualty Co.*, 255 Pa. 566, 100 Atl. 450; *Cohen v. P. E. Harding Const. Co. (R. I.)*, 103 Atl. 702; *Bowen v. Carolina, etc., R. Co.*, 34 S. Car. 217, 13 S. E. 421; *Klinkoosten v. Mundt*, 36 S. Dak. 595, 156 N. W. 85; *Haynes v. Delius (Tenn.)*, 59 S. W. 158; *State Bank v. Domestic Sewing-Machine Co.*, 99 Va. 411, 39

S. E. 141, 86 Am. St. Rep. 891; *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983, 36 L. R. A. (N. S.) 464; *Sutter v. Moore Investment Co.*, 30 Wash. 333, 70 Pac. 746; *Stuckey v. Middle States Loan &c. Co.*, 61 W. Va. 74, 55 S. E. 996, 8 L. R. A. (N. S.) 814, 123 Am. St. Rep. 977; *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

⁸ See *In re Lemerise*, 73 Vt. 304, 50 Atl. 1062.

⁹ *District Nat. Bank v. Mordecai (Md.)*, 105 Atl. 585.

¹⁰ This was decided as early as *Roe v. Haugh*, 12 Mod. 133, s. c. 1 Salk. 29, 3 Salk. 14.

consideration, and doubtless it would be possible for B to offer A his discharge if A would induce C to enter into a bilateral contract with B, such as that suggested above; and if A induced C as requested, there would be an effective discharge of A. It is evident, however, that the facts in many cases of novation of the debtor will not justify the inference of the supposed offer to A, or of any inducement of C by A; so that generally it is either necessary to suppose that the promise of C to B is sufficient consideration for a promise of B to A,¹¹ or that a promise of B to C to discharge A is operative in favor of A.¹²

If a novation of the creditor is considered, there is no less difficulty. The agreement between the original creditor B, and the debtor A, by which B agrees to surrender his right in consideration of the debtor's promise to pay C, is easily supported, but what is the consideration for the debtor's direct undertaking to C, in the absence of some consideration furnished by C apart from merely assenting to the novation? It is impossible to find any moving from C and it is necessary to conclude that B's agreement with A to discharge him in consideration of A's promise to C to pay him is a valid contract or that A's promise to B that he will pay C must of itself be operative to give C a direct right. However equitable such results may be, and acceptable to most American courts, English lawyers and judges have always asserted that consideration must move from the promisee,¹³ and that a third party beneficiary could have no rights under a contract.¹⁴ It may be said that in a novation of the creditor, the new creditor acquires by virtue of his agreement with the original creditor the equitable right of an assignee, and that the surrender of this equitable right against the debtor furnishes consideration for the direct promise of the latter to pay the assignee. This is all very well if the assignment was for some exterior consideration furnished by C. If not, the assignee has merely a revocable power.¹⁵ If it is said that in the exercise of that power the assignee agrees with the debtor to discharge him from liability to the original creditor in consideration of a promise to pay the assignee, the

¹¹ See *supra*, § 114.

¹² See *supra*, §§ 1857-1860.

¹³ See *supra*, § 114.

¹⁴ See *supra*, § 360.

¹⁵ See *supra*, § 440.

supposed contract consists of a promise to A by C as agent for B (and therefore virtually a promise by B) in consideration of a promise by B to C personally.

§ 1867. Analysis of compound novation.

The novations thus far considered have been of simple kind. It is possible, however, to have in one transaction a novation of debtor and creditor, where there are originally two contracts, both of which are to be cancelled and another or others substituted. This may occur in two kinds of cases. In one kind A owes B, and B owes C, and the three parties then agree that A shall drop out altogether and that A shall owe the amount of the debt to C. In this case there seems no difficulty in explaining the transaction on ordinary principles. B in effect assigns his claim against A to C, in satisfaction of C's claim against himself; C either simultaneously or subsequently then agrees with A that in consideration of the surrender of C's right as assignee of B's claim, A will undertake the direct obligation to C. There is in this kind of novation a consideration for the assignment to C of the claim against A which gives C the full equitable rights of an assignee, and thereby a difficulty which exists in explaining the simpler form of novation is avoided.

The other kind of compound novation arises if the original obligation is a bilateral contract. In such a contract A is under a duty to B and B is under a reciprocal duty to A, and it may be proposed to substitute C for either A or B, so that he shall acquire the rights and also become subject to the duties of the party for whom he is substituted. Here also the analysis presents no difficulty, if all parties assent. If it be supposed that A is to drop out, B promises A to discharge him, and A renders performance to C if A will assign his rights to C. C then procures C to enter into a contract with B. A, then, accepting this offer, assigns his rights to C in consideration of a promise by C to A to assume A's liability to B. Then C makes a direct promise to B to perform what A had previously promised to B, and B in consideration thereof makes a reciprocal direct promise to C to perform what B had originally promised to A. What has been thus traced as successive agreements by

parties may, without affecting the reasoning, take place simultaneously.

§ 1868. Decisions recognizing novations.

The earliest recognition of the validity of a novation was not until 1789. In that year a decision ¹⁶ and a dictum ¹⁷ asserted the validity of a novation in the compound form where a party who is both a debtor and a creditor drops out, but the decisions of the next half century rather threw doubt on this assertion than confirmed it. ¹⁸

Until the belated recognition by the courts ¹⁹ of the possibility of an executory promise of accord operating as an immediate discharge of a debt, if so intended, the difficulties in the way of supporting a novation by logical reasoning were overwhelming; ²⁰ and it is only since that recognition that it can be said with certainty that a novation by parol agreement is effective. Even with that principle of accord established, a simple novation with no further consideration than is furnished by the agreement itself requires, as has been shown in the preceding sections, recognition of one of two other principles—either that under a contract for the benefit of a third person

¹⁶ In *Israel v. Douglas*, 1 H. B. 239, A being indebted to B and B indebted to C, B gave A an order to pay C the sum which A owed B. The order was accepted by A. On his subsequent refusal to comply with it, C brought this action against him. On the common counts it was held by the majority of the court that the action might be maintained for money had and received. Gould, J., asked what difference is there between the case "whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money to which you expressly assent?"

Wilson, J., dissented from the decision on the count for money had and received, but agreed with the decision for the plaintiff on a count based on an account stated.

¹⁷ The statement by Buller, J., which is always referred to in a discussion of novation was made in the same month in which *Israel v. Douglas*, 1 H. Bl. 239, was decided: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover the sum against A." *Tatlock v. Harris*, 3 T. R. 174.

¹⁸ So far as the decision on the count for money had and received was concerned, *Israel v. Douglas*, 1 H. Bl. 239, was practically overruled by *Wharton v. Walker*, 4 B. & C. 163, and the court in that case certainly indicated no confidence that recovery in any form of action would be possible.

¹⁹ See *supra*, § 1846.

²⁰ See *Cuxon v. Chadley*, 3 B. & C. 591.

the third person acquires an immediate right, or that a promise by B to A will support a promise by A to C.

Since the middle of the nineteenth century, however, out any very nice consideration of the reason for sustaining such a transaction, novations are universally upheld. The most frequent illustrations arise where a new corporation assumes the debts of a former one which is thereupon discharged,²¹ or a newly formed corporation assumes obligations undertaken by a promoter,²² or a new partnership assumes debts of an old firm which is freed from liability.²³ Illustrating compound novations where one who was a debtor to one party and creditor of another, dropped out of the transaction, are cited below.²⁴

§ 1869. Requisites for a novation.

It was stated by the Supreme Court of Indiana,²⁵ "In every novation there are four essential requisites: First, a previous valid obligation; second, the agreement of all parties to the new contract; third, the extinguishment of the old contract; and fourth, the validity of the new one." This statement has been copied in the prominent Encyclo-

²¹ In *In re British Co.*, 12 Weekly Rep. 701; *Morgan v. Overman*, 37 Cal. 534; *Burns v. Grand Lodge*, 153 Mass. 173, 26 N. E. 443, the corporation assuming the indebtedness was held liable to the creditor. In *In re Times Co.*, L. R. 5 Ch. 381; *In re Medical Soc.*, L. R. 6 Ch. 362; *Miller's Case*, 3 Ch. Div. 391, the old corporation was held free from liability.

²² See *supra*, § 306.

²³ For example in the following cases the new firm was held liable: *Rolfe v. Flower*, L. R. 1 P. C. 27; *Burritt v. Dickson*, 8 Cal. 113; *Frazer v. Howe*, 106 Ill. 563; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Osborn v. Osborn*, 36 Mich. 48; *Baum v. Fryrear*, 85 Mo. 151; *Durand v. Curtis*, 57 N. Y. 7; *Earon v. Mackey*, 106 Pa. 452. In the following cases the old firm was held discharged:

Thompson v. Percival, 5 B. & C. 925; *Lyth v. Ault*, 7 Exch. 661; *Borough v. Holmes*, 5 Ch. D. 1; *Luddington v. Bell*, 77 N. Y. 1; *Am. Rep.* 601; *Frye v. Phillips*, 190 Wash. 190, 89 Pac. 559.

²⁴ *Fairlie v. Denton*, 8 B. & C. 1; *Cochrane v. Green*, 9 C. B. (N. S.) 448; *Barriger v. Warden*, 12 Cal. 448; *Lester v. Bowman*, 39 Iowa, 301; *Finan v. Babcock*, 58 Mich. 301; *N. W.* 294; *Scharff Distilling Co. v. Springfield, etc., Transfer Co.*, 186 Ill. App. 497, 166 S. W. 654; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 1; *Butterfield v. Hartshorn*, 7 N. H. 26 Am. Dec. 741; *Warren v. Bader*, 16 N. H. 580; *Murphy v. Oregon Engraving Co. (Oreg.)*, 186 Pac. 1; *Cotterill v. Stevens*, 10 Wis. 422; *Clark v. Barrett*, 15 Wis. 596.

²⁵ *Clark v. Billings*, 59 Ind. 508,

dias ²⁶ and in the opinions of a number of decisions,²⁷ it seems likely to be accepted with little examination; but though the actual decision of most if not all of the cases where the statement is made is not open to criticism, the statement itself may readily cause misapprehension, as will appear from the following sections.

§ 1870. Necessity for the assent of all parties to a simple novation.

It is undoubtedly a commonplace in the discussion of novations that the assent of all parties is necessary;²⁸ and certainly no new debtor can be bound without his assent and no old debtor can be discharged without the creditor's consent, but broader generalizations may be misleading. Everything depends on the character of the right or duty or both, of which a novation is sought. Various situations should be separately examined. If A owes B money, and B assigns the right to C, who notifies A of the assignment, C thereupon becomes entitled to enforce the claim against A whether A assents or not. C's right is in its nature equitable as has previously been shown,²⁹ but if A had, at when the time the notice was received, no equity or set-off against B, C will have the substantial rights of ownership, even though still compelled in a few

²⁶ It is given literally in 29 Cyc. 1130, and substantially in 21 Am. & Eng. Encyc. (2d ed.) 663.

²⁷ *J. I. Case Threshing Mach. Co. v. Improvement Dist.*, 210 Fed. 366; *In re Schwab*, 258 Fed. 772; *Bank &c. Co. v. Jackson*, 190 Ala. 411, 412, 67 So. 235; *Young v. Benton*, 21 Cal. App. 382, 384, 131 Pac. 1051; *Burge v. Maund*, 66 Fla. 173, 174, 63 So. 708; *Flow Co. v. Leeper*, 194 Ill. App. 92; *Bristol Milling, etc., Co. v. Probasco*, 64 Ind. 406; *McClellan v. Robe*, 93 Ind. 298; *Pope v. Vajen*, 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688; *Kitchell v. Schneider*, 180 Ind. 589, 593, 103 N. E. 647; *Horn v. McKinney*, 5 Ind. App. 348, 32 N. E. 334; *Hill v. Warner*, 20 Ind. App. 309, 50 N. E. 582; *District Nat. Bank v. Mordecai*, 133 Md.

419, 105 Atl. 536; *Piehl v. Piehl*, 138 Mich. 515, 101 N. W. 628; *Gillett v. Ivory*, 173 Mich. 444, 139 N. W. 53; *Bank v. Douglass*, 178 Mo. App. 664, 680, 161 S. W. 601; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Martin v. Leeper Bros. Lumber Co.*, 48 Okl. 219, 149 Pac. 1140, 1141; *Jarmusch v. Otis Iron, etc., Co.*, 23 Oh. Cir. Ct. 122; *Burford v. Hughes* (Okl.), 182 Pac. 689; *Jones v. Commonwealth Casualty Co.*, 255 Pa. 566, 100 Atl. 450; *Davis v. Wynne* (Tex. Civ. App.), 190 S. W. 510; *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14.

²⁸ See, e. g., *Jordan v. Scott* (Cal.), 177 Pac. 504; *Elkey v. Seymour* (Wis.), 172 N. W. 138, and cases cited in §§ 1865-1875, *passim*.

²⁹ See *supra*, § 447.

jurisdictions to maintain his action in the name of B, has lost all right. In such jurisdictions the assent of C is indeed necessary in order to enable C to sue in his own name, but even the procedural effect of A's agreement in giving the assignee a right to sue in his own name is obtained without the assent in jurisdictions where an assignee is by statute enabled to sue in his own name. There is indeed a difference which should be observed between C's being assignee of B's claim, even if C is allowed to sue in his own name, and acquiring a direct right of his own; for if prior to the notice of the assignment A had some equitable defence or set-off against B he would not be deprived of this without his assent, while if as part of a novation he had agreed absolutely to pay C a specific sum, his agreement would be binding, and a defence good against B would not be available against C.³⁰

Moreover even though notice of the assignment were given to the debtor when he had no defence or set-off against the original creditor, the position of the assignee is not quite the same as it would be had a novation been made creating a new and direct obligation, since the assignee's right is limited by the character of the original right of the assignor. If, therefore, the original claim was under seal, the assignee in a jurisdiction where common-law forms of action are preserved, must sue on covenant or debt; but if a novation had been made the proper action would be assumpsit. This difference in the appropriate form of action may also involve a difference in the period of limitation.³¹ In many States, also, unrecorded assignments of wages are ineffectual against creditors of the assignor. Accordingly even after notice to the assignee of an unrecorded assignment, garnishment by the assignee's creditors would be legal, but if a novation had been made, the claim of the assignor would have been destroyed and the employer could not be garnisheed.³²

In most jurisdictions of the United States a contract bet

³⁰ See *infra*, § 1872; also *Pugh v. Barnes*, 108 Ala. 167, 19 So. 370.

³¹ See *Warren v. Wheeler*, 21 Me. 484; *Compton v. Jones*, 4 Cow. 13.

³² *Denver Co. v. Smeeton*, 2 Col.

App. 126, 29 Pac. 815; *Stinson v. Well*, 71 Me. 510; *Clough v. Gilman*, N. H. 73, 5 Atl. 835. But see *Fenton v. Cooley*, 102 Mass. 233; *Mason v. Daley*, 114 Mass. 408.

A and B, without any assent on the part of C may be even more effective than a contract between B and C without the consent of A. If a bilateral agreement is made between A and B by which A the debtor promises B to pay a third person, C, in consideration of the promise by B, the original creditor, to free A from liability to B, there is a contract for the benefit of a third person, which, under the law prevailing in most of the United States, will allow recovery by C, the third person, and where he is a sole beneficiary, at any rate, C gets an irrevocable right before he knows of the transaction and therefore before he can assent.³³

The transaction will also, at least equitably, if such are the terms of the agreement, discharge the debtor from liability.³⁴

Where there is a novation of the debtor, assent also of all three parties is not universally necessary to produce in effect the liability of a new debtor and the discharge of the original debtor. If A owes B money, it may be supposed that C, for some exterior consideration, contracts with A to assume the obligation. As has been seen in most American jurisdictions the creditor, B, can then sue C without any direct contract having been made between the two;³⁵ this, of itself, however, will not discharge the original debtor,³⁶ but in some jurisdictions the attempt by the creditor to enforce such a right operates as a discharge of the original debtor. This, however, is on the assumption, fictitious though it be, that the creditor

³³ See *supra*, § 396.

³⁴ See *supra*, §§ 1857-1860. But see *Hanson v. Nelson*, 82 Minn. 220, 222, 84 N. W. 742, where it was held that consent of the original debtor to be released must be shown affirmatively.

³⁵ See *supra*, § 368.

³⁶ *United States v. Illinois Surety Co.*, 226 Fed. 653, 661, 141 C. C. A. 409; *Munson v. Magee*, 161 N. Y. 182, 194, 55 N. E. 916. In *Klinkoosten v. Mundt*, 36 S. Dak. 595, 598, 156 N. W. 85, the court said: "All that the Unitype Company ever assented to, as shown by the correspondence, was that the Messenger Publishing Com-

pany might assume the rights and obligations of defendant under the contract and make payment of the notes given by defendant, and when said notes had all been fully paid and satisfied, it would transfer title to the machinery to the Messenger Publishing Company. There was no assent or agreement, either express or implied, that the Messenger Company be substituted in place of defendant as a debtor to the Unitype Company. There was no assent or agreement, either express or implied, to discharge or release defendant." And see *supra*, § 393.

by seeking to recover from C, impliedly agrees to discharge A.²⁷ It may be supposed, however, that instead of a contract between A and C, a contract is made between B and C, by which B agrees with C to discharge A in consideration of C's promise to pay the debt. As has been seen, payment of a debt by a stranger is generally held in the United States to operate as at least an equitable discharge of the debt.²⁸ This being true, it is obvious that B may assent to accept the promise of C as a satisfaction as freely as payment from him in any other form.²⁹

²⁷ See *supra*, § 393.

²⁸ See *supra*, §§ 1857-1860.

²⁹ In *Lawton v. Dargan*, 238 Fed. 303, 151 C. C. A. 319, it was held that where the holders of all the stock of a corporation, who also held notes given by it for large amounts, sold the stock to the manager of the business and surrendered the notes in consideration of the manager's agreement to pay the agreed price out of the proceeds of the business and to pledge the stock as security for such payments, the former stockholders could not, after the bankruptcy of the corporation in a year, prove claims against the estate. In this case the agreement was in fact made with the manager of the business of the corporation, and the price promised was to be derived from the business, but it seems clear that the same result must have been reached had the agreement been made with one who had no previous connection with the corporation, and who promised a price directly from his own funds. This necessarily follows from the decisions, cited *supra*, § 1846, holding that an accord may itself be accepted as satisfaction by a creditor. See also *In re Haynes*, 224 Fed. 269. In *Molera v. Cooper*, 173 Cal. 259, 160 Pac. 231, the court held that a promise by a debtor to his creditor to pay the amount of the obligation to third persons was ineffectual to extinguish the original obligation. The court

said the agreement was an attempt to alter a written agreement by an unexecuted parol agreement and could not operate as a novation because all the parties interested had not assented. Whatever the validity of the first objection may be under the California Code, it has little validity generally at the present day even in regard to sealed instruments. See *infra*, §§ 1834-1836. As to the second objection, if the creditor and debtor intended an immediate substitution of a new promise by the debtor to pay a third person for the original obligation to pay the creditor, there seems no reason why the creditor's agreement immediately to discharge his claim in consideration of the debtor's new promise should not be effectual, since an executory promise may be taken as satisfaction. See *supra*, § 1846. The serious question in the case should have been whether the creditor in fact agreed to accept the debtor's promise to pay the third persons as an immediate satisfaction, or agreed merely that when the third persons were paid the payment should then operate as satisfaction. It should be noticed that such statements as that made in *Klinkoosten v. Mundt*, 36 S. Dak. 595, 598, 156 N. W. 85, in speaking of a novation of the debtor, are not equivalent to saying that all parties must assent: "In order to constitute novation, there must be either an

§ 1871. Necessity of the assent of all parties to a compound novation.

The two simple forms of novation which have thus far been referred to may be combined so that there is both the creation of a new right and a new debt. If A owes B and B owes C, the same amount, it may be effectively agreed between the three parties that B's right against A, and debt to C, shall be cancelled, and that A shall acquire a right against C.⁴⁰ Here too the substance of the transaction can generally be carried out without the assent of all the parties. If B assigned his claim against A to C in satisfaction of the debt which he owed to C, and C notified A of the assignment, then in the absence of some then existing defence or set-off of A against B, dissent or assent by A would be immaterial. He would be discharged from liability to B, and subject to liability to C.⁴¹

Often, though two parties by contract with one another might create a new debt and effect at least an equitable discharge of an old one without inviting the third party to join in the arrangement, they make no attempt to do so, but rather make the whole agreement conditional on the assent of each of

express or implied agreement on the part of the creditor to substitute the new debtor in the place of the original debtor, and also an express or implied agreement to release and discharge the original debtor. *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830; *Carpy v. Dowdell*, 131 Cal. 495, 63 Pac. 778; *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N. W. 465, 13 L. R. A. 388; *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. 610; *Piehl v. Piehl*, 138 Mich. 515, 101 N. W. 628; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Lowe v. Blum*, 4 Okla. 260, 43 Pac. 1063; *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384." It will be observed that the court does not state that the agreement by the creditor to accept must be with the old debtor as well as with the new.

⁴⁰This is the form of the trans-

action suggested by Buller, J., *supra*, § 1868, n. 17.

⁴¹In *Security Warehousing Co. v. The American Exchange Nat. Bank*, 118 N. Y. App. Div. 350, 103 N. Y. S. 399, the plaintiff had a claim against one Greig, and also against the defendant bank, as severally liable for a tort. In satisfaction of this claim, Greig made a partial payment and transferred a note of a third person to the plaintiff. Of the plaintiff's attempt to charge the defendant, the court said (p. 354): "If Greig paid a part and gave the obligation of a third party, accepted in payment by defendant [plaintiff] for the balance, this was as much a payment as though the whole amount had been paid in cash. . . . A novation was thus effected and plaintiff could thereafter look to the substituted debtor only for reimbursement."

the three persons interested. Where this is the case there is nothing more than an offer until all assent.⁴²

Where A and B are bound by a bilateral contract and it is sought to substitute a third person C for either one, the assent of all three is indeed necessary. A man may be given rights without any actual assent or expression of assent on his part, but he cannot be subjected to new contractual duties or be deprived of existing rights without his assent, and in the proposed transaction, C is to be subjected to new contractual duties and A and B are each to be deprived of previously existing rights.

§ 1872. Necessity of valid obligations.

Unless all the decisions considered in an earlier chapter,⁴³ holding that a promise to surrender or forbear a doubtful claim or one erroneously supposed by the claimant to be good are to be overthrown, it is not essential that the original obligation discharged by the subsequent novation shall have been valid in every sense of that word. It is indeed generally necessary that the original contract shall not have been illegal,⁴⁴ and it is always essential that the new agreement shall be supported by sufficient consideration; but it is clearly possible in a novation of the debtor, for a new debtor to promise absolutely to pay money in consideration of the creditor's surrender of his old claim, whether that claim was well founded or not, so long as it was not wholly frivolous and unreasonable. It is indeed a question of fact whether the new obligor's promise in such a case is merely to pay such indebtedness as the original obligor was subject to, or was to pay in any event a fixed amount,⁴⁵ but whichever form the transaction may take it will be a valid contract, though if the undertaking is merely to pay such an amount as the original debtor was liable for, the new promisor by the very terms of his promise need pay nothing, if he can prove that the original debtor was liable for nothing.

⁴² *McCall Co. v. Parson & Co.*, 107 Miss. 865, 878, 66 So. 274.

⁴³ *Supra*, § 135.

⁴⁴ Occasionally an illegal contract is enforceable by one of the parties

thereto. See *supra*, § 1631. In such a case a novation based upon it would be valid.

⁴⁵ See *supra*, § 399.

Similarly, in a novation of the creditor, it is possible for the debtor to promise absolutely to pay a fixed sum to C in consideration of his discharge from an asserted claim by B whether B's claim was valid or not; subject to the same proviso that B's claim shall not have been merely frivolous or unreasonable.

The assertion that the new obligation must be a valid one is perfectly true. It is the new agreement that the parties are seeking to enforce, whether it is used as the basis for an action on the new claim or as the ground for a defence against the old one; and if it is not a valid contract it can be effective in neither way. But the principle may be misapplied. It has been held that where a novation of the debtor took place the fact that the new debtor was an infant, and therefore capable of avoiding his obligation, invalidated the novation.⁴⁶ This seems erroneous. As long as a voidable or unenforceable promise is recognized as capable of supporting a binding counter-promise,⁴⁷ it seems impossible to deny that the adult party to the transaction is bound by the novation. If, indeed, the infant elects to avoid his promise, it seems that the adult may also refuse to be bound by his obligation to the infant, and if the original debtor has not parted with value in return for his supposed discharge, or on the faith of it, he should not be allowed to set up the agreement with any greater effect than the infant himself could do. If an original contract was unenforceable under the Statute of Frauds similar questions may arise.

§ 1873. Conditional novations.

It is said "the legal rule is well settled that if an agreement intended as a novation is conditional, the novation can only take effect by the performance of the condition before the debt is extinct."⁴⁸ There seems no difficulty, however, if the parties so intend in substituting a conditional agreement by way of novation for an obligation which was originally absolute; nor is there any difficulty in substituting an absolute new agreement for one which was originally conditional. The only question involved is what the parties in fact agreed upon.

⁴⁶ *Spycher v. Werner*, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414.

⁴⁷ See *supra*, § 105.

⁴⁸ *Cooke v. McAdoo*, 85 N. J. L. 692, 695, 90 Atl. 302. See also *Edgell v. Tucker*, 40 Mo. 523.

Where the new agreement is conditional, it is possible that the parties agreed that on the happening of a condition there should be a novation, and that until and unless the condition happened, the original obligation should remain in force. It is equally possible, however, for them to agree upon the immediate substitution in satisfaction of the original obligation of a new conditional contract. In such a case, the original debt is none the less extinguished if the failure of the condition in the new agreement prevents liability thereon from ever arising.

§ 1874. Subsequent promise of a surety given in conformity with prior agreement of principal.

It has been frequently held that the promise of a surety is supported by sufficient consideration, though made subsequent to the contract between the principal debtor and the creditor, if that contract was induced by the debtor's promise to furnish a surety.⁴⁹ Some of the decisions are based wholly or partly on the theory that the contract between the principal debtor and the creditor is incomplete until the surety has added his promise. If the facts bear out such a construction there is no legal difficulty. Sometimes, however, it is clear that the creditor has made no condition in his bargain with the debtor, but has relied on the promise of the latter to provide a surety subsequently. Even in such a case the surety should be held. His promise is taken by way of novation in satisfaction of the principal debtor's promise to provide a surety. There is no greater difficulty in such a novation than in any case where a promisee accepts the promise of a new obligor in lieu of the promise of the previous one.

* *Williams v. Perkins*, 21 Ark. 18; *Stroud v. Thomas*, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111; *Heints v. Cahn*, 29 Ill. 308; *Wylie v. Dickenson*, 50 Ill. App. 622; *Grim v. Semple*, 39 Ia. 570; *Sypert v. Harrison*, 88 Ky. 461, 18 S. W. 435; *Deposit Bank v. Peak*, 110 Ky. 579, 62 S. W. 268, 96 Am. St. Rep. 466; *Sawyer v. Fernald*, 59 Me. 500; *Moies v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Bowen v. Thwing*, 56 Minn. 177, 57 N. W. 468; *Kneisley*

Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 S. W. 840; *Faust v. Rodelheim*, 77 N. J. L. 740, 73 Atl. 491, 27 L. R. A. (N. S.) 189; *McNaught v. McClaughry*, 42 N. Y. 22, 1 Am. Rep. 487; *Harrington v. Brown*, 77 N. Y. 72; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669; *Simmang v. Farnsworth* (Tex. Civ. App.), 24 S. W. 541.

§ 1875. Evidence of novation.

Following the principle generally applicable to the formation of contracts, the consent of parties to a novation may be established by circumstances showing such assent as well as by expressed words.⁵⁰ In partnership cases, it is often said that slight evidence will warrant the court in inferring liability on the part of an incoming partner.⁵¹ There is danger in pushing such a principle too far in a desire to hold an incoming partner liable, since unless the incoming partner has agreed with the old firm to assume the old debts and the local law permits a creditor to sue on such an assumption of liability without losing thereby his rights against his original debtor,⁵² the only consideration for an agreement of the incoming partner with the creditor to be liable to him must be the creditor's agreement to discharge the old firm.⁵³ Such an agreement should not be assumed without clear evidence, for often the creditor while perfectly willing to accept payment from the new firm is not ready to accept its obligation in satisfaction of his claim against the old firm.⁵⁴

⁵⁰ *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; *Elkins v. Henry Vogt Machine Co.*, 125 Ark. 6, 187 S. W. 663; *Walker v. Wood*, 170 Ill. 463, 48 N. E. 919; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Peyser v. Myers*, 135 N. Y. 599, 32 N. E. 699; *Lane v. United Oil Cloth Co.*, 103 N. Y. App. Div. 378, 92 N. Y. S. 1061; *Union Central Life Ins. Co. v. Hoyer*, 66 Oh. St. 344, 64 N. E. 435; *Updike v. Doyle*, 7 R. I. 446.

"Justinian says that novation takes place only when the contracting parties expressly disclose that their object in making the new contract is to extinguish the old contract; that otherwise the old contract remains in force and the new contract is added to it, and each gives rise to an obligation still in force. Inst. Lib. III, Tit. XXIX. pl. 3. We allow this intention to be inferred from circumstances. *Hard v. Burton*, 62 Vt. 314, 321, 20 Atl. 269.

⁵¹ *Ex parte Jackson*, 1 Ves. Jr. 131; *Ex parte Peele*, 6 Ves. Jr. 602, 604; *Regester v. Dodge*, 6 Fed. 6; *Wheat v. Hamilton*, 53 Ind. 256; *Cross v. National Bank*, 17 Kans. 336; *Shaw v. McGregory*, 105 Mass. 96.

⁵² In some jurisdictions the creditor is given no right unless there has been a direct promise to him. See *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999, and *supra*, §§ 367, 368. In some of the other jurisdictions where he is given such a right, if he elects to enforce it he discharges the original debtor. See *supra*, § 392.

⁵³ See, *e. g.* (not partnership cases), *Griffin v. Cunningham*, 183 Mass. 505, 508, 509, 67 N. E. 660; *Scharff Distilling Co. v. Springfield &c. Transfer Co.*, 180 Mo. App. 497, 166 S. W. 654.

⁵⁴ See *Weingarden v. Folly Theatre Co.*, 189 Mich. 220, 155 N. W. 501 (assumption by new corporation of contracts of another); *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742 (not a partnership case).

CHAPTER LI

DISCHARGE BY CANCELLATION OR ALTERATION

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§ 1876. Cancellation and surrender is the normal method of discharging a specialty.

At common law the normal method of discharging a contract under seal was by the cancellation of the document. As such a contract was not merely evidence of the intent of the parties, but was itself regarded as the obligation, even more fully than a railroad or government bond is to-day, when the physical identity of the document was destroyed the obligation ceased to exist.¹ Though the destruction of the document was accidental, the legal obligation was discharged, and equitable relief was necessary to save the obligee's rights.²

§ 1877. Surrender insufficient in early law.

In order to give a contract under seal validity, delivery by the obligor was essential. What constitutes delivery is a question which to-day depends largely on intention, but originally the physical act of delivery was undoubtedly the essential thing.³ Surrender might have been regarded as the converse of delivery and for that reason as undoing the effect of delivery. This, however, was not the doctrine of our early law, which held that "even though the specialty was upon payment surrendered to the obligor, the latter was still not safe unless he cancelled or destroyed the specialty, for, if the obligee should afterwards get possession of the instrument, even by a trespass, the obligor, notwithstanding the payment, the surrender, and the trespass, would have no defence to an action at law by the obligee."⁴

¹ 9 Harv. L. Rev. 49, by Professor Ames. This is illustrated by the doctrine in regard to alteration. See *infra*, §§ 1881 *et seq.*

² 9 Harv. L. Rev. 49.

³ See *supra*, § 210.

⁴ 9 Harv. L. Rev. 49, 54, by Professor Ames, citing "Y. B. 5 Hen. IV. 2-6; Y. B. 22 Hen. VI. 522-4; Y. B. 37 Hen. VI. 14-3; Y. B. 5 Ed. IV. 4-10;

Y. B. 1 Hen. VII. 14-2; *Waberley v. Cockerel*, Dy. 51, pl. 12; *Cross v. Powel*, Cro. El. 483; *Atkins v. Farr*, 2 Eq. Ab. 247; *Lacey v. Lacey*, 7 Barr. 251, 253. In the last case Gibson, C. J., said: 'Even if a bond thus delivered [to the obligor] but not canceled come again to the hands of the obligee, though it be valid at law, the obligor will be relieved in equity.'"

Equity, however, early gave relief in such cases and at the present day there can be no doubt that even a voluntary surrender of a bond, if made with intent to extinguish it, would be effectual between the parties.⁵

§ 1878. Bills and notes—insurance policies.

Cancellation and surrender being appropriate means of discharge for sealed contracts are similarly appropriate to discharge other formal obligations as bills and notes. Voluntary destruction of a note operates as a discharge of the maker.⁶ And so its surrender to the maker with intent to extinguish it has that effect as against the party who surrenders it.⁷

If the surrender is after maturity it is immaterial whether surrender is still to be regarded as an equitable defence or has become a legal extinction of the obligation. If, however, surrender is before maturity, and the document is afterwards wrongfully put in circulation, also before maturity, by a party to whom it was made payable or indorsed, the question becomes vital. Under the Negotiable Instruments Law, it would seem that the maker will be liable again to a holder in due course, since a valid redelivery by the maker will be presumed.⁸

⁵ *Hurst v. Beach*, 5 Madd. 351; *Jaqua v. Shewalter*, 10 Ind. App. 234, 243; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Beach v. Endress*, 51 Barb. 570; *Picot v. Sanderson*, 1 Dev. 309; *Wentz v. Dehaven*, 1 S. & R. 312; *Lacey v. Lacey*, 7 Pa. 251; *Albert's Exrs. v. Ziegler's Exrs.*, 29 Pa. 50; *Piercy's Heirs v. Piercy's Exrs.*, 5 W. Va. 199.

⁶ *Gilbert v. Wetherell*, 2 Sim. & St. 254; *Darland v. Taylor*, 52 Ia. 503, 3 N. W. 510, 35 Am. Rep. 285; *McDonald v. Jackson*, 56 Ia. 643, 10 N. W. 223; *Fisher v. Mershon*, 3 Bibb, 527; *Vanauken v. Hornbeck*, 2 Green, 178; *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126. So of a bond. *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Bond v. Bunting*, 78 Pa. 210, 218; *Rees v. Rees*, 11 Rich. Eq. 86.

⁷ *In re 35% Automobile Supply Co.*, 147 Fed. 377; *Sherman v. Sherman*, 3 2nd. 337; *Gibson v. Gibson*, 15 Ill. App. 328; *Denman v. McMahan*, 37 Ind. 241, 246; *Peabody v. Peabody*, 59 Ind. 556; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168; *Stewart v. Hidden*, 13 Minn. 43; *Marston v. Marston*, 64 N. H. 146, 5 Atl. 713; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Larkin v. Hardenbrook*, 90 N. Y. 333, 46 Am. Rep. 176; *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 170, 26 N. E. 351; *Kent v. Reynolds*, 8 Hun, 559; *Bridgers v. Hutchins*, 11 Ired. 68; *Melvin v. Bullard*, 82 N. C. 33; *Dittoe's Admr. v. Cluney's Exrs.*, 22 Ohio St. 436; *Ellsworth v. Fogg*, 35 Vt. 355; *Lee's Exrs. v. Boak*, 11 Gratt. 182.

⁸ N. I. L., Sec. 16. See *supra*, § 1142.

The same method of discharge would be applicable to policies of insurance, and in jurisdictions where written contracts are by statute presumptively founded on good consideration⁹ it may be that all written contracts are thereby given a formal character.

§ 1879. Simple contracts.

The effect of cancellation or surrender upon written contracts which are not formal contracts must depend somewhat upon the particular circumstances of the case. Surrender or cancellation frequently forms part of and is evidence of a parol agreement to discharge the contract.¹⁰ The validity of such an agreement depends upon rules previously considered.¹¹ Even though it is impossible to make out a binding parol contract of discharge, the rules of evidence may save the original promisor from liability upon his contract; for the voluntary cancellation of the writing by the promisee may have deprived him of his only legal evidence.¹² If the writing is still in existence the mere fact that it has been surrendered will not, however, it seems, prevent its use in evidence, or prevent the admission of secondary evidence of its contents if the holder of it refuses to produce it.

§ 1880. Enforcement of cancellation by equity.

A court of equity has jurisdiction to cancel an instrument to which the obligor has a defence but which on its face is valid, and so is capable of a wrongful and vexatious use; and this jurisdiction will be exercised whenever it is necessary to afford complete protection to parties otherwise liable to injury, actual or threatened, from the fact that the writing is outstanding. The jurisdiction has been frequently exercised in cancelling deeds or other evidences of title to real estate, recorded or susceptible of record, which until cancelled constitute a cloud on title,¹³ deeds which are prima facie evidence of the regularity of proceedings connected with tax assessments and sales,¹⁴ or

⁹ See *supra*, § 218.

¹⁰ *Wanamaker v. Powers*, 102 N. Y. App. D. 485, 93 N. Y. S. 19.

¹¹ See *supra*, §§ 1826 *et seq.*

¹² See *infra*, § 1884.

¹³ *General Film Co. v. Sampliner*, 252 Fed. 443, 448, 164 C. C. A. 367, citing *Ingersoll v. Crocker*, 228 Fed. 844, 852, 143 C. C. A. 242.

¹⁴ *General Film Co. v. Sampliner*,

negotiable bills and notes, or a guaranty upon negotiable bonds, fair on their face, which might otherwise pass into the hands of *bona fide* purchasers.¹⁵ In the Federal courts, however, it is well established that where a party, assuming his theory of the controversy to be correct, has a good defence at law to a "purely legal demand," he must be left to that means of defence, unless he is prepared to allege and prove special circumstances showing that he may suffer irreparable injury if he is denied a preventive remedy.¹⁶ This limitation of the right to equitable relief does not everywhere exist.¹⁷

§ 1881. Alternation. *Pigot's Case*.

It was an early doctrine of the common law that alteration avoided a deed. The leading case is *Pigot's Case*,¹⁸ and the doctrine is stated therein by Lord Coke, as follows:

"These points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

"Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed. . . .

252 Fed. 443, 164 C. C. A. 367, citing *Rich v. Braxton*, 158 U. S. 375, 407, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

¹⁵ *General Film Co. v. Sampliner*, 252 Fed. 443, 164 C. C. A. 367, citing *Insurance Co. v. Bailey*, 13 Wall. 616, 622, 20 L. Ed. 501; *Louisville, New Albany &c. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 567, 19 S. Ct. 817, 43 L. Ed. 1081.

¹⁶ *General Film Co. v. Sampliner*, 252 Fed. 443, 164 C. C. A. 367, citing

Insurance Co. v. Bailey, 13 Wall. 616, 623, 20 L. Ed. 501; *Cable v. Insurance Co.*, 191 U. S. 288, 305, 306, 24 S. Ct. 74, 48 L. Ed. 188. In each of these cases the right of an insurance company to maintain bill in equity for cancellation of an insurance policy claimed to have been fraudulently procured was denied.

¹⁷ 2 *Pomeroy, Eq. Jur.*, §§ 912, 913.

¹⁸ 11 *Coke*, 26b.

"If a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto*, avoids the whole deed, . . . for although they are several covenants, yet it is but one deed, If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both."¹⁹

§ 1882. Conveyance though altered vests title, but covenant must be valid when enforcement sought.

A distinction should be observed between a deed of conveyance and a bond or covenant obliging the maker to some future performance. If a conveyance is valid when delivered, the title to the property vests in the grantee, and no subsequent alteration²⁰ or loss²¹ of the deed can affect the title of the grantee, though for want of evidence he may find difficulty in enforcing his title.^{21a} A bond or covenant for future perfor-

¹⁹ Citing 14 Hy. 8, 25, 26; 3 Hy. 7, 5; *Matthewson's Case*, 5 Coke, fol. 23a.

²⁰ *Argoll v. Cheney*, Palmer, 402; *Doe v. Hirst*, 3 Stark. 60; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; *West v. Steward*, 14 M. & W. 47; *United States v. West*, 22 How. 315; *Mallory v. Stodder*, 6 Ala. 801; *Sharpe v. Orme*, 61 Ala. 263; *Ransier v. Vanorsdol*, 50 Ia. 130; *Hollingsworth v. Holbrook*, 80 Ia. 151, 45 N. W. 561, 20 Am. St. Rep. 411; *Slattery v. Slattery*, 120 Ia. 717, 95 N. W. 201; *Phillips v. Big Sandy Co.*, 149 Ky. 555, 149 S. W. 957; *Barrett v. Thorndike*, 1 Me. 73; *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Chessman v. Whittemore*, 23 Pick. 231, 233; *Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Donaldson v. Williams*, 50 Mo. 407; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556; *Chesley v. Frost*, 1 N. H. 145; *Jackson v. Gould*, 7 Wend. 364; *Herrick v. Malin*, 22 Wend. 388; *Waring v. Smyth*, 2 Barb. Ch. 119; *Rifener v. Bowman*,

53 Pa. 313; *Booker v. Stivender*, 13 Rich. L. 85, 90; *Morgan v. Elam*, 4 Yerg. 375; *Stanley v. Epperson*, 45 Tex. 644; *North v. Henneberry*, 44 Wis. 306.

In *Argoll v. Cheney*, Palmer, 402, a little boy had torn the seals from a deed to guide the uses of a recovery, but the effect of the deed was held not destroyed.

The principle was recognized in regard to leases in *Jones v. Hoard*, 59 Ark. 42, 26 S. W. 193, 43 Am. St. Rep. 17; *Boston Block Co. v. Buffington*, 39 Minn. 385; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427. But in *Bryan v. Carter*, 169 Ala. 515, 51 So. 999, the court assumed that alteration of a lease avoided it, citing as in point cases on altered negotiable instruments. See also *Bliss v. McIntyre*, 18 Vt. 466.

²¹ *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259, 263, per Eyre, C. J.: "God forbid that a man should lose his estate by losing his title deeds." *Donaldson v. Williams*, 50 Mo. 407.

^{21a} See *Chesley v. Frost*, 1 N. H.

mance, however, must be valid when the obligee seeks to enforce it, and the rules in *Pigot's case* are applicable.²²

§ 1883. Conveyances of corporeal and incorporeal hereditaments.

This distinction between conveyances and obligations, while clear on principle, was not that which the early English law adopted. As to conveyances of corporeal hereditaments where there was a transfer of possession, it was early held that a subsequent alteration could not divest a title which had passed by the deed,²³ for it was said that the property lay in livery and the deed was but evidence of the transfer. But in the case of incorporeal hereditaments, which lie in grant, it was otherwise; the title was regarded as continuously dependent on the deed, and a subsequent alteration divested a title previously passing by the deed.²⁴

145; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Bliss v. McIntyre*, 18 Vt. 466.

²² Compare with *Argoll v. Cheney*, *supra*, n. 20; *Bayly v. Garford*, March, 125, where the seal of two obligors had been eaten by mice and rats, and this was thought to discharge a third person jointly bound with them, though his seal was uninjured. See also *Michall's Case*, Owen, 8; *Nichols v. Haywood*, Dyer, 59a; *Seaton v. Henson*, 2 Lev. 220; S. C., 2 Show. 28. The numerous modern decisions are cited *passim infra*.

²³ Bro. Ab. "Lease," pl. 16; *Moore v. Waldron*, 1 Rolle, 188; *Argoll v. Cheney*, Palm. 402; *Miller v. Manwaring*, Cro. Car. 397, 399; *Woodward v. Aston*, 1 Vent. 296; *Nelthorpe v. Dorrington*, 2 Lev. 113; *Lady Hudson's Case* cited in 2 Vern. 476, and Ch. Prec. 235; *Doe v. Hirst*, 3 Stark. 60.

²⁴ *Miller v. Manwaring*, Cro. Car. 397, 399; *Moor v. Salter*, 3 Bulstr. 79. In *Miller v. Manwaring*, the report reads: "And Jones and Berkley, Justices, . . . took a difference when

an estate loseth his essence by a deed, viz., where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent-charge, or such like, if the deed be rased after delivery, it determines the estate and makes it void, but when the estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the estate although it destroys the deed." The court, therefore, held rasure in a lease did not avoid the lessee's estate. Croke's opinion was, however, that the rasure destroyed the deed and also the estate of the lessee, as by a surrender.

So in *Gilbert on Evidence* (1st ed., p. 84, 6th ed., p. 75), "There is a difference to be taken between things that lie in livery, and things that lie in grant, for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed must be shown." See also *ibid.*, 1st ed., p. 109, 6th ed., p. 95.

By the present English law, however, a title once vested whether to corporeal or incorporeal property cannot be divested,²⁵ and probably the distinction of the earlier law would not now be followed in the United States.²⁶

§ 1884. Substantive law and evidence—equitable relief.

The substantive law is here complicated with a question of evidence. The original reason that a deed or sealed contract was discharged by alteration applied equally to the loss or accidental destruction of such an instrument. The instrument was itself the obligation, not merely evidence of it, and if the writing ceased to exist in its original form the obligation necessarily ceased. But an obvious consequence of alteration, loss, or destruction was a difficulty of proving that an instrument of a particular character had been made. In case of accidental loss²⁷ or destruction,²⁸ courts of equity early gave relief, and later courts of law made equitable relief unnecessary

In *Woodward v. Aston*, 1 Vent. 296, 297 (1677), "The Court said in this case that a rent or other grant was not lost by the destruction of the deed, as a bond or *chose en action* was. (*Quære*, if the party himself cancel it)."

The Statute of Frauds introduced a new element into the case, since it made impossible the transfer or surrender (except by operation of law), of an estate without a writing. Consequently even voluntary cancellation of a lease granting an estate within the statute could not operate as a surrender. *Magennis v. McCulloch*, Gilb. Eq. 235; *Leech v. Leech*, 2 Ch. Rep. 100; *Roe v. York*, 6 East, 86.

²⁵ The old distinction was criticised by Eyre, C. J., in *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259, 263: "I hold clearly that the cancelling a deed will not divest property, which has once vested by transmutation of possession, and I would go farther and say that the law is the same with respect to things which lie in grant.

In pleading a grant the allegation is that the party at such time '*did grant*,' but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted. The question in that case is, Whether the party *did* grant? To prove this the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received to shew that the thing was once granted."

²⁶ It was stated as law, however, in *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427.

²⁷ *Griffin v. Boynton*, 8 Nelson, 82; *Collet v. Jaques*, 1 Eq. Cas. Ag. 32, pl. 2; *Lightbone v. Weeden*, 1 Eq. Cas. Ab. 24, pl. 7. So in the case of a lost bill of exchange. *Tercese v. Geray*, Finch, 301.

²⁸ *Brown v. Savage*, Finch, 184; *Bennett v. Ingoldsby*, Finch, 262; *Brookbank v. Brookbank*, 1 Eq. Cas. Ab. 168, pl. 7; *Wilcox v. Sturt*, 1 Vern. 78; *Sanson v. Rumsey*, 2 Vern. 561, and note.

by accepting secondary evidence of the deed and enforcing its provisions.²⁹ But alteration was regarded as due, if not to wrong doing, at least to laches of the obligee or grantee, and equity gave him no relief.³⁰

If a court of law also would not receive in evidence the altered deed or secondary proof of its contents, the consequence would be to deprive any grantee or obligee of all legal rights in any case where the burden of proof rested upon him to show such rights and they could be shown only by proof of the deed. Even if the deed vested an estate in the grantee prior to the alteration, no one would be bound to respect the title if the only legal evidence of it were destroyed. The case is analogous to that of the voluntary destruction of a conveyance by the grantee. Though this is not a reconveyance of the estate, the effect is similar if the grantee cannot prove his title nor show that the grantor's title has been divested. The rule of evidence is often broadly enough stated to lead to these results. In *Greenleaf on Evidence* it is said that if a writing has been destroyed by the party wishing to prove its contents no secondary evidence will be received, unless the party can show that the destruction was not for the purpose of suppressing evidence or any fraudulent purpose.³¹ No English cases, however, are cited which support so severe a rule. On the contrary, the English courts have held that not only in the case of alteration by a stranger may the altered deed be given in evidence as proof that a title passed,³² but that this may be done even where the

²⁹ See 1 *Greenleaf, Ev.*, § 563, b; *Leake, Cont.* (4th ed.) 580. In the case of a negotiable instrument relief could not be given so easily. The possibility of the instrument being found and transferred to an innocent purchaser must be guarded against, so that resort to equity which would give relief only on condition of a bond of indemnity being given remained necessary for some time longer. See *supra*, § 1600. But this was not required for non-negotiable instruments. *Wain v. Bailey*, 10 A. & E. 616. Now relief even on negotiable instruments is generally allowed. *Ibid.*

³⁰ *Sel. C. Chanc. temp. King*, 24. In *Arrison v. Harmstead*, 2 Barr, 191, 193, counsel argued that equity would reform an altered deed in favor of a purchaser, but *Gibson, C. J.*, interrupted, "The deed is dead and equity cannot put life into it." This was cited with approval in *Wallace v. Harmstad*, 44 Pa. 492, 494. See also *Marcy v. Dunlap*, 5 *Lans.* 365.

³¹ 1 *Greenleaf, Ev.* (16th ed.), § 563, b, citing numerous decisions.

³² *Doe v. Hirst*, 3 *Stark.* 60; *Hutchins v. Scott*, 2 *M. & W.* 809; *West v. Stewart*, 14 *M. & W.* 47. See also *Woods v. Hilderbrand*, 46

alteration was chargeable to the party offering the deed,³³ and similarly that the cancellation of a conveyance does not prevent proof by one consenting to the cancellation that such a conveyance was made.³⁴ The Supreme Court of Alabama has followed the English decisions.

§ 1885. American rule governing alteration of a deed by a stranger.

In the United States alteration by a stranger does not generally avoid a deed,³⁵ so that such a deed can of course be given in evidence, but it has been held generally, in accordance with the rule of evidence stated above, that if a material alteration is fraudulently made the altered deed cannot thereafter be given in evidence.³⁵

Whether this in effect by depriving the grantee of an enforceable right transfers the title back to the grantor depends on whether the rule is aimed solely against the party guilty of the fraudulent alteration and his heirs or donees, or whether even a *bona fide* purchaser from him would be similarly debarred. It may be urged that if a purchaser is protected the fraudulent person is in effect given the benefit of his title by being allowed to sell it, though he cannot directly enforce it. Accordingly the Pennsylvania Supreme Court has held that a *bona fide* purchaser can no more assert a title than his wrongdoing

Mo. 284; *Jackson v. Gould*, 7 Wend. 364.

³³ *Agricultural Ins. Co. v. Fitzgerald*, 16 Q. B. 432.

³⁴ *Ward v. Lumley*, 5 H. & N. 656. See also S. C., 5 H. & N. 87; *Harris v. Owen*, West Ch. 527; S. C., *sub nom.* *Harrison v. Owen*, 1 Atk. 520.

³⁵ *Alabama Land Co. v. Thompson*, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80; *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. Rep. 78; *Harper v. Reaves*, 132 Ala. 625, 32 So. 721. See also *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556.

³⁶ See *infra*, § 1892.

³⁷ *Chesley v. Frost*, 1 N. H. 145;

Babb v. Clemson, 10 S. & R. 419, 13 Am. Dec. 684; *Withers v. Atkinson*, 1 Watts, 236; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Newell v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 261; *Batchelder v. White*, 80 Va. 103.

So of a written contract. *Hayes v. Wagner*, 89 Ill. App. 390. The numerous decisions holding that a writing with an apparent alteration cannot be received in evidence unless the alteration is explained necessarily involve the same point. Decisions which allow such documents to be received in evidence on proof of the signature, leaving the question of alteration to be decided as an issue in the case, perhaps have a contrary implication. See *infra*, §§ 1916, 1917.

grantor.³⁶ This conclusion is supported by the rule in regard to executory contracts avoided by alteration. Even though the contract is negotiable an innocent purchaser acquires no rights, except to the extent that the Negotiable Instruments Law has changed the Common Law.³⁷

§ 1886. Rights of creditors.

The rights of creditors are also frequently involved. If the owner of property is so deeply indebted that he could not legally make a voluntary conveyance of it, he cannot be allowed to produce the same effect by destroying the evidence of his title by alteration or cancellation of the conveyance. His creditors may levy on the property. If, however, the debtor cancelled a deed for adequate consideration, or if he had other property sufficient to satisfy his debts, the creditors should have no greater rights than their debtor had, except so far as recording acts or other statutes may provide.³⁸

§ 1887. Voluntary destruction of conveyance.

The voluntary destruction or cancellation by the grantee of a conveyance is not ordinarily done for any fraudulent purpose, but it is an intentional destruction of the appropriate evidence of his title, and it would seem that a court might as well decline to allow a grantee who has done this for the very purpose of depriving himself of his rights to prove his title by secondary evidence, as to deny that privilege to one who has been guilty of some fraudulent purpose. Many cases accordingly hold that neither the grantee nor any one claiming under him can assert his title after such cancellation.³⁹ These decisions have not

³⁶ *Arrison v. Harmstad*, 2 Barr, 191, 197; *Wallace v. Harmstad*, 15 Pa. 462, 53 Am. Dec. 603; *Wallace v. Harmstad*, 44 Pa. 492. See also *Marr v. Hobson*, 22 Me. 321. But see *Chesley v. Frost*, 1 N. H. 145.

³⁷ See *infra*, § 1909.

³⁸ See *Steeley's Creditors v. Steeley*, 23 Ky. L. Rep. 996, 64 S. W. 642.

³⁹ *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Patterson v. Yeaton*, 47 Me. 308, 314; *Trull v.*

Skinner, 17 Pick. 213, 215; *Howe v. Wilder*, 11 Gray, 267 (but see *Chessman v. Whittemore*, 23 Pick. 231); *McAllister v. Mitchner*, 68 Miss. 672, 679, 9 So. 829; *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478; *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 410; *Bank v. Eastman*, 44 N. H. 431; *Sawyer v. Peters*, 50 N. H. 143; *Dukes v. Spangler*, 35 Ohio St. 119 (see *Spangler v. Dukes*, 39 Ohio St. 642); *Wiley v. Christ*, 4 Watts, 196,

met uniform approval in the United States,⁴⁰ but there are not many cases to the contrary. Cases are not in point where primary evidence of the destroyed deed was obtainable, or where the party seeking to use secondary evidence was not bound by the default or estoppel binding the original grantee. Thus the doctrine is applicable only to unrecorded deeds,⁴¹ for when a deed has been recorded and subsequently fraudulently altered or destroyed, there is no difficulty of proof if the statute makes a copy from the records primary evidence. If, however, a deed is altered before it is recorded, the record can afford no help.⁴² If a writing is not necessary to the transfer of property, as is the case with chattel property, alteration of a bill of sale or other writing conveying such property will not prevent proof of the transfer.⁴³

§ 1888. Alteration of separable part of a deed.

A deed to which there are several parties will not be avoided as to one party by the alteration of a provision which relates wholly to other parties.⁴⁴ Also a deed may operate both as a

199; *Howard v. Huffman*, 3 Head, 562, 75 Am. Dec. 783; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165 (lease); *Parker v. Kane*, 4 Wis. 1, 22 How. 1, 16 L. Ed. 286 (but see *Rogers v. Rogers*, 53 Wis. 36, 10 N. W. 2, 40 Am. Rep. 756; *Slaughter v. Bernards*, 97 Wis. 184, 190, 72 N. W. 977).

So where the name of the grantee in a deed was changed with the concurrence of the grantee first named, it was held he could not afterwards claim title in himself. *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470.

⁴⁰ *Cunningham v. Williams*, 42 Ark. 170; *Diver v. Friedheim*, 43 Ark. 203; *Cranmer v. Porter*, 41 Cal. 462; *Weygant v. Bartlett*, 102 Cal. 224, 36 Pac. 417; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591. See further 2 Devlin on Deeds, §§ 300 *et seq.*; 2 Jones on Real Property, § 1258.

⁴¹ See cases cited *supra*, 39; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569. See also *Van Riswick v. Goodhue*, 50 Md. 57.

⁴² *Marr v. Hobson*, 22 Me. 321. See also *Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350; *Respass v. Jones*, 102 N. C. 5, 8 S. E. 770. *Cf.* *Chessman v. Whittemore*, 23 Pick. 231. In *Huffman v. Hatcher*, 178 Ky. 8, 198 S. W. 236, two years after a deed had been made and recorded the parties altered it by adding another tract and changing the estate granted from a fee to a life estate, and these changes were made on the record. It was held that in the absence of objection by the parties or their creditors, the alterations were effectual.

⁴³ *Ransier v. Vanorsdol*, 50 Ia. 130; *Babb v. Clemason*, 10 S. & R. 419, 13 Am. Dec. 684.

⁴⁴ *Doe v. Bingham*, 4 B. & Ald. 672; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432, 440; *Robinson v.*

conveyance and as an obligation. Indeed most conveyances contain covenants. In such a case a material wrongful alteration will discharge the obligation, though it may not divest the title conveyed,⁴⁵ except in so far as the grantee's lack of legal evidence to prove his title by record or otherwise may in effect revest the grantor with the property.

§ 1889. Mortgages.

Accordingly, when a mortgage is materially and wrongfully altered by the mortgagee, any executory right which the mortgage deed gives is thereby discharged,⁴⁶ as for instance a right

Phoenix Ins. Co., 25 Ia. 430; Shelton v. Deering, 10 B. Mon. 405; Bird v. Bird, 40 Me. 392; Kendall v. Kendall, 12 Allen, 92; Herrick v. Baldwin, 17 Minn. 209, 10 Am. Rep. 161; Holladay-Klotz Co. v. T. J. Moss Co., 89 Mo. App. 556; Wright v. Kelley, 4 Lans. 57, 63; Arrison v. Harmstead, 2 Barr. 191, 194. But see Pigot's Case, 11 Coke, 26b.

In Woods v. Hilderbrand, 46 Mo. 284, and Burnett v. McCluey, 78 Mo. 676, it was held that an alteration in the description of one tract in a deed, whatever its effect on the conveyance of this tract, would not affect the validity of the deed as to another tract. But see Powell v. Pearlstine, 43 S. C. 403, 21 S. E. 328; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1128, where it was held that the insertion of an additional tract avoided a mortgage as to the tract originally included.

And similarly the addition in a mortgage of other notes than that which it was actually given to secure avoids the mortgage as to all the notes. Johnson v. Moore, 33 Kan. 90, 5 Pac. 406; Russell v. Reed, 36 Minn. 376, 31 N. W. 452.

In Parke Co. v. White River Lumber Co., 110 Cal. 658, 43 Pac. 202, it was held that alteration of a contract secured by a mortgage discharged the mortgage as far as the contract was

concerned, but not so far as a separate note also secured by the same mortgage was concerned.

⁴⁵ Ward v. Lumley, 5 H. & N. 87, 656; Withers v. Atkinson, 1 Watts, 236; Arrison v. Harmstead, 2 Barr. 191, 194; North v. Henneberry, 44 Wis. 306.

⁴⁶ Harris v. Owen, West Ch. 527, s. c. *sub nom.*, Harrison v. Owen, 1 Atk. 520; Cutler v. Rose, 35 Ia. 456; Hollingsworth v. Holbrook, 80 Ia. 151, 45 N. W. 561, 20 Am. St. Rep. 411; Johnson v. Moore, 33 Kan. 90, 5 Pac. 406; Coles v. Yorks, 28 Minn. 464, 10 N. W. 775; Merchants', etc., Bank v. Dent, 102 Miss. 455, 59 So. 805; Pereau v. Frederick, 17 Neb. 117, 22 N. W. 235; Kime v. Jesse, 52 Neb. 606, 72 N. W. 1050; Waring v. Smyth, 2 Barb. Ch. 119; Marcy v. Dunlap, 5 Lans. 365; McIntyre v. Velte, 153 Pa. 350, 25 Atl. 739; Powell v. Pearlstine, 43 S. C. 403, 409, 21 S. E. 328.

In Hollingsworth v. Holbrook, *supra*, the court said: "Where such an instrument [a deed] has fully accomplished the purpose for which it was executed before the alteration was made, we think the interest it transferred would not be affected by it. Woods v. Hilderbrand, 46 Mo. 283, 2 Am. Rep. 513; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; 1 Am. & Eng. Cyc. L. 502; 1 Greenl. Fv., sec. 568; Chessman v. Whittemore, 23 Pick. 231;

to enter on the mortgagor's premises and take mortgaged chattels.⁴⁷ But the mortgaged estate is still in the mortgagee where the common-law theory of the effect of a mortgage prevails.⁴⁸ Where a mortgage is held to give the mortgagee only a lien, however, such alteration discharges the lien.⁴⁹ Alteration of the mortgage in such a way as to invalidate it does not cause the discharge of a note given with the mortgage for the mortgage debt.⁵⁰ When alteration of the note will not only avoid the note, but altogether discharge the debt, is discussed hereafter.⁵¹ Where a chose in action is assigned as security for a note and the note is materially altered, the assignment also is avoided.^{51a}

Kendall v. Kendall, 12 Allen, 92. But the authorities recognise a difference between covenants which are executed and those which are executory. A fraudulent and material alteration of an instrument of conveyance will destroy the right of recovery on its executory covenants. In this case the mortgage conveyed to the mortgagee an interest in the property described in the mortgage at the time of its delivery, and the right to the possession thereof. *Gordon v. Hardin*, 33 Iowa, 550; Code, sec. 1927. But the interest thus acquired was not the unqualified and absolute ownership. *Kern v. Wilson*, 73 Iowa, 490, 35 N. W. 594. Possession of the property was not in fact taken until after the alleged alteration was made. The right to take possession, and to sell the property and pay the mortgage debt, depended upon the covenants of the mortgage. If the alteration in question destroyed those covenants, it necessarily terminated the right of the mortgagee to the remedy which they provided."

^a *Hollingsworth v. Holbrook*, 80 Ia. 151, 45 N. W. 561, 20 Am. St. Rep. 411; *Bacon v. Hooker*, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. Rep. 279. See also *Bedgood-Howell Co. v. Moore*, 123 Ga. 336, 51 S. E. 420.

⁴⁷ *Harris v. Owen*, West Ch. 527; S. C., *sub nom.*, *Harrison v. Owen*, 1 Atk. 520; *Kendall v. Kendall*, 12 Allen, 92 (see also *Bacon v. Hooker*, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. Rep. 279); *Check v. Nall*, 112 N. C. 370, 17 S. E. 80; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842. See also *Williams v. Van Tuyl*, 2 Ohio St. 336. It is no defence to one who purchased chattels subject to a mortgage and who is sued in replevin by the mortgagee, that the mortgage note has been altered. *Van Eps v. Newald*, 139 Wis. 129, 120 N. W. 853. See also *Dieball v. Wilhite*, 94 Kan. 78, 145 Pac. 854.

⁴⁸ *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406; *Russell v. Reed*, 36 Minn. 376, 31 N. W. 452; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *West v. Naten* (Okl.), 152 Pac. 342; *McIntyre v. Velte*, 153 Pa. 350, 25 Atl. 739; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131; *Bradbury v. Nethercutt*, 95 Wash. 670, 164 Pac. 194.

⁴⁹ *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050. See also *Powell v. Pearlstone*, 43 S. C. 403, 21 S. E. 328.

⁵¹ *Infra*, §§ 1910-1912.

^{51a} *Stone v. Sargent*, 220 Mass. 445, 107 N. E. 1014.

§ 1890. Rule was originally applicable to specialties.

The rule denying recovery where a writing has been altered, so far as relates to the fundamental reason of the rule, might have been confined to specialties, which by our law are more than mere evidence of obligations;⁵² but the reason was early obscured, and the rule was largely rested on principles of evidence and policy that were equally applicable to any written contract. It is true that the rule was first extended from deeds to bills of exchange,⁵³ which are in truth mercantile specialties,⁵⁴ being themselves obligations, not merely evidence; and the same may perhaps be said of insurance policies,⁵⁵ which were also subjected to the rule,⁵⁶ but the grounds on which these extensions were actually made were those of lack of legal evidence and requirements of policy.

§ 1891. Rule now applicable to all written contracts.

It is not surprising, therefore, to find in the nineteenth century the rule against alteration applied not only to all written contracts,⁵⁷ but even to writings like receipts⁵⁸ and memoranda

⁵² "The alteration was a cancellation of the deed, having the same effect that tearing off the seals would have had. This rule comes down to us from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or lost its identity for any cause." *Per* Holmes, C. J., in *Bacon v. Hooker*, 177 Mass. 335, 337, 58 N. E. 1078, 83 Am. St. Rep. 279.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions." *Per* Holmes, J., in *Blackstone v. Miller*, 188 U. S. 189, 206, 23 S. Ct. 277, 47 L. Ed. 439.

⁵³ *Master v. Miller*, 4 T. R. 320, 2 N. Bl. 141. The doctrine has been more frequently applied to bills and notes than to any other instruments. See numerous cases collected in 1 Ames Cas. B. & N. 447-449; *Daniel*, Neg. Inst.

⁵⁴ See 2 Ames Cas. B. & N. 872; *Langdell*, Summ. Cont., §§ 49 *et seq.*

⁵⁵ *Ibid.*

⁵⁶ *Campbell v. Christie*, 2 Stark. 64; *Forshaw v. Chabert*, 3 Brod. & B. 158.

⁵⁷ *Powell v. Divett*, 15 East, 29; *Forshaw v. Chabert*, 3 Brod. & B. 158; *United States Glass Co. v. West Va. Bottle Co.*, 81 Fed. 993; *Outcault Advertising Co. v. Young Hardware Co.*, 110 Ark. 123, 161 S. W. 142; *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169; *Johnson v. Brown*, 51 Ga.

⁵⁸ *Johnson v. Cooke*, 85 Conn. 679, 84 Atl. 97, Ann. Cas. 1913 C. 275.

to satisfy the Statute of Frauds,⁵⁹ which are written evidence, but cannot properly be regarded as written contracts.

§ 1892. Alteration by a stranger.

The original reason for the rule against alteration was obviously applicable as well when the alteration was made by a stranger, or when it was made by the obligee without fraudulent intent to correct a real or supposed mistake, as when made by the obligee with fraudulent purpose; but after relief was given by equity and by the allowance of secondary evidence in cases of accidental loss or destruction, it would seem as if similar relief should have been given in case of alteration, where the obligee was innocent of any fraudulent intent, certainly where he had no part whatever in the alteration. But the English law did not take this step. Alteration by a stranger still operates as a discharge of a contract, provided the instrument was at the time in the custody of the obligee, for it is said that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state."⁶⁰ Why he should be bound to more care to prevent alteration by a stranger than to prevent the total loss or destruction of the instrument, is difficult to see. An alteration made under a mistake of fact has been held not fatal,⁶¹ but otherwise if the al-

498; *Kline v. Raymond*, 70 Ind. 271; *Andrews v. Burdick*, 62 Ia. 714, 720, 16 N. W. 275; *Davis v. Campbell*, 93 Ia. 524, 61 N. W. 1053; *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. 490; *Osgood v. Stevenson*, 143 Mass. 399, 9 N. E. 825; *Fletcher v. Minneapolis Ins. Co.*, 80 Minn. 152, 83 N. W. 29; *Burton v. American Ins. Co.*, 88 Mo. App. 392; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Meyer v. Huneke*, 55 N. Y. 412; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338; *Cline v. Goodale*, 23 Oreg. 406, 31 Pac. 936; *Chicago, etc., R. Co. v. Floyd* (Tex. Civ. App.), 161 S. W. 954; *American Pub. Co. v. Fisher*, 40 Utah, 147, 37 Pac. 259; *Consumers' Ice Co. v. Jenn-*

ings, 100 Va. 719, 42 S. E. 879; *Schwalm v. McIntyre*, 17 Wis. 232.

⁵⁹ *Nichols v. Johnson*, 10 Conn. 192; *A. A. Cooper Wagon Co. v. Wooldrige*, 98 Mo. App. 648, 73 S. W. 724; *Schmidt v. Quinzel*, 55 N. J. Eq. 792, 38 Atl. 665. So where several writings are essential to prove the agreement of the parties, fraudulent alteration of one invalidates all. *Meyer v. Huneke*, 55 N. Y. 412.

⁶⁰ *Davidson v. Cooper*, 13 M. & W. 343, 352.

⁶¹ *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Prince v. Oriental Bank*, 3 App. Cas. 325. These were cases where the cancellation under a mistake of fact of the name of a party to an obligation was held not to discharge the party.

teration was intentionally made and the mistake was only as to the legal effect of the contract.⁶² In the United States the more equitable rule has prevailed that alteration by strangers, or spoliation as it is often called, will not discharge an obligation.⁶³ The rule is the same for alteration by the obligee's agent or attorney if the obligee himself did not authorize it,⁶⁴ or by a trustee.⁶⁵

⁶² *Bank of Hindostan v. Smith*, 36 L. J. (N. S.) C. P. 241. The distinction between this case and those in the preceding note seems trivial. The court may well have been influenced by the fact that there were in this case equitable grounds for holding the defendant not liable, aside from any question of alteration.

⁶³ *United States v. Hatch*, 1 Paine, 336; *Davis v. Carlisle*, 6 Ala. 707; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919; *Nichols v. Johnson*, 10 Conn. 192; *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770; *Probasco v. Shaw*, 144 Ga. 416, 87 S. E. 466; *Condict v. Flower*, 106 Ill. 105; *Paterson v. Higgins*, 58 Ill. App. 268; *State v. Berg*, 50 Ind. 496; *Eckert v. Louis*, 84 Ind. 99; *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412; *Blakey v. Johnson*, 13 Bush, 197, 36 Am. Rep. 254; *Ramsey v. Utica Deposit Bank*, 156 Ky. 263, 160 S. W. 943; *Chessman v. Whittemore*, 23 Pick. 231; *Drum v. Drum*, 133 Mass. 566; *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764; *Croft v. White*, 36 Miss. 455; *Medlin v. Platte Co.*, 8 Mo. 235, 40 Am. Dec. 135; *Moore v. Ivers*, 83 Mo. 29; *Gurley Bros. v. Bunch*, 130 Mo. App. 665, 108 S. W. 1109; *Fisherick v. Hutton*, 44 Neb. 122, 127, 62 N. W. 488; *Perkins Windmill Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *Schlageck v. Widhalm*, 59 Neb. 541, 81 N. W. 448; *Goodfellow*

v. Inslee, 1 Beas. 355; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Martin v. Tradersmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338; *Evans v. Williamson*, 79 N. C. 86; *Commonwealth Nat. Bank v. Baughman*, 27 Okl. 175, 111 Pac. 332; *Whitlock v. Manciet*, 10 Ore. 166; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; *Robertson v. Hay*, 91 Pa. 242; *Bowman v. Berkeley*, 259 Pa. 327, 103 Atl. 49; *Pope v. Chaffee*, 14 Rich. Eq. 69; *Harrison v. Turbeville*, 2 Humph. 242; *Boyd v. McConnell*, 10 Humph. 68; *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108; *Rushing v. Citizens' Nat. Bank (Tex. Civ. App.)*, 160 S. W. 337; *Gould v. Gould (Wash.)*, 169 Pac. 324; *Edwards v. Thompson (Wash.)*, 169 Pac. 327; *Murray v. Peterson*, 6 Wash. 418; *Union Nat. Bank v. Roberts*, 45 Wis. 373. See also cases cited in the following note. So in Ireland, *Swiney v. Barry*, 1 Jones, 109. *Contra*, *Den v. Wright*, 2 Halst. 175, 177.

⁶⁴ *Clyde S. S. Co. v. Whaley*, 231 Fed. 76, 79, 145 C. C. A. 264; *Forbes v. Taylor*, 139 Ala. 286, 25 So. 855; *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. Rep. 78; *Langenberger v. Krøger*, 48 Cal. 147, 17 Am. Rep. 418; *Brooks v. Allen*, 62 Ind. 401; *Mathias v. Leathers*, 99 Ia. 18, 21 68 N. W. 449; *C. Shenkberg Co. v.*

⁶⁵ *Flinn v. Brown*, 6 S. Car. 209. But see *contra*, as to an administrator,

McMurtrey v. Sparks, 71 Mo. App. 126.

The equitable character of the relief given to the holder⁶⁷ where alteration is made by a stranger is shown by the fact that "the alteration of the agent does not destroy the instrument, even when the other contracting party makes the obligation to the agent in his own name supposing him to be the principal. In that case, in the absence of fraudulent concealment on his part, the principal, being the real party in interest, has the right to enforce the contract in its original form upon proof that the nominal payee or obligee was his agent."⁶⁷

So far as negotiable instruments are concerned, however, a reversion to the English doctrine in regard to alteration by a

Porter, 137 Iowa, 245, 114 N. W. 890; Vanderford v. Farmers' &c. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; Tulane Univ. v. O'Connor, 192 Mass. 428, 78 N. E. 494; Nickerson v. Swett, 135 Mass. 514; Broadway Nat. Bank v. Heffernan, 220 Mass. 247, 107 N. E. 921; White Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; Christian County Bank v. Goode, 44 Mo. App. 129; Hays v. Odom, 79 Mo. App. 425; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Rees v. Overbaugh, 6 Cow. 746; Casoni v. Jerome, 58 N. Y. 315; Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338; Gleason v. Hamilton, 64 Hun, 96, 19 N. Y. S. 103, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; Waldorf v. Simpson, 15 N. Y. App. Div. 297, 44 N. Y. S. 921; Fullerton v. Sturges, 4 Ohio St. 529; Acme Harvester Co. v. Butterfield, 12 S. Dak. 91, 80 N. W. 170; Port Huron Co. v. Sherman, 14 S. Dak. 461, 85 N. W. 1008; Deering Harvester Co. v. White, 110 Tenn. 132, 72 S. W. 962; Bigelow v. Stilphen, 35 Vt. 521; Edwards v. Thompson (Wash.), 169 Pac. 327; Yeager v. Musgrave, 28 W. Va. 90; Jesup v. City Bank, 14 Wis. 331. But see *contra*, White Sewing Machine Co. v. Saxon, 121 Ala. 399, 25 So. 784; Hollingsworth v. Holbrook, 80 Ia. 151, 45 N. W. 561, 20 Am. St. Rep. 411. (Cf. Mathias v.

Leathers, 99 Ia. 18, 68 N. W. 449); Gettysburg Nat. Bank v. Chisholm, 169 Pa. 564, 32 Atl. 730, 47 Am. St. Rep. 929. See also Pew v. Laughlin, 3 Fed. 39; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1131. In Barton Savings Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 Atl. 639, 641, 51 L. R. A. (N. S.) 346, the rule was stated in a qualified form: "Where a note is procured by an agent, delivery to whom is delivery to the payee, but whose subsequent authority is limited to the custody and transmission of the writing . . . alterations made by these persons are treated as the acts of a stranger. In this class are Bigelow v. Stilphen, 35 Vt. 521; Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915." If the principal seeks to take the benefit of the agent's alteration, the effect is the same as if the principal had himself made the alteration. Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. 1063; Sherwood v. Merritt, 83 Wis. 233, 53 N. W. 512.

⁶⁷ Tulane University v. O'Connor, 192 Mass. 428, 78 N. E. 494.

⁶⁸ Clyde S. S. Co. v. Whaley, 231 Fed. 76, 79, 145 C. C. A. 264, citing Spreng v. Juni, 109 Minn. 85, 122 N. W. 1015; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

stranger has been brought about by the general enactment of the Uniform Negotiable Instruments Law. The draftsman of that law copied the section on the subject from the English Bills of Exchange Act.⁶⁸ But the effect of the statute in changing the previous law is not always noticed.⁶⁹

§ 1893. Alteration by the obligor, or obligee.

An unauthorized alteration by the obligor is, of course, not allowed to affect the rights of the obligee against him.⁷⁰ The propriety of relieving an obligee who has altered a written contract by allowing its enforcement according to its original terms and admitting secondary evidence of the contract depends on his freedom from fraudulent or wrongful intent in making the alteration. Therefore, if the alteration was made to express more clearly the intent of the parties or to correct a real or supposed mistake, the contract has, in the United States, generally been held not avoided.⁷¹ Similarly, a cancellation by

⁶⁸ Neg. Inst. Act, § 124 (*supra*, § 1193), following Bills of Exch. Acts, § 64. See notes to the section in Brannan's Negotiable Instrument Law; *Stanford v. Stanford*, 87 N. J. Eq., 475, 101 Atl. 388; *Hoffman v. Planters' Bank*, 99 Va. 480, 39 S. E. 134. But see *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49.

⁶⁹ *Bowman v. Berkey*, 259 Pa. 327, 103 Atl. 49.

⁷⁰ *Cutts v. United States*, 1 Gall. 69; *United States v. Spalding*, 2 Mason, 478; *Lane v. Pacific, etc., Ry. Co.*, 8 Idaho, 230, 67 Pac. Rep. 656; *Osborne v. Andrees*, 37 Kan. 301, 15 Pac. 153; *Hughes v. Littlefield*, 18 Me. 400; *Natches v. Minor*, 17 Miss. 544; *Diamond v. Inter-Ocean Newspaper Co.*, 29 Okl. 323, 116 Pac. 773; *Fritz v. Commissioners*, 17 Pa. 130; *Dickenson v. Ramsey*, 115 Va. 521, 79 S. E. 1025.

⁷¹ *Brutt v. Picard, Ryan & M.* 37; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. 542; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Webb v. Mullins*, 78 Ala. 111; *Benton*

v. Clemmons, 157 Ala. 658, 47 So. 582; *Exchange Nat. Bank v. Little*, 111 Ark. 263, 164 S. W. 731; *Turner v. Billagram*, 2 Cal. 520; *Sill v. Reese*, 47 Cal. 294; *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. Rep. 767; *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227; *Miller v. Slade*, 116 Ga. 772, 43 S. E. 69; *Shirley v. Swafford*, 119 Ga. 43, 45 S. E. 722; *Morgan v. Nashville Grain Co.*, 12 Ga. App. 574, 77 S. E. 913; *Day v. Fort Scott Co.*, 53 Ill. App. 165; *Osborn v. Hall*, 160 Ind. 153, 66 N. E. 457; *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494; *Bayse v. McKinney*, 43 Ind. App. 422, 87 N. E. 693; *Andrews v. Burdick*, 62 Ia. 714, 16 N. W. 275; *Barlow v. Buckingham*, 68 Ia. 169, 26 N. W. 58; *Duker v. Franz*, 7 Bush, 273, 3 Am. Rep. 314; *Thornton v. Appleton*, 29 Me. 298; *Croswell v. Labree*, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *Ames v. Colburn*, 11 Gray, 390, 71 Am. Dec. 723; *Produce Exchange Trust Co. v. Bieber-*

mistake has been held not fatal.⁷² As to negotiable instruments, however, it seems clear that innocence of fraudulent intent will not prevent the application of the provision of the Negotiable Instruments Law invalidating materially altered instruments,⁷³ but the debt and a mortgage given to secure it will not be impaired.⁷⁴

§ 1894. Authorized alteration—sealed instruments.

As to alterations authorized by the obligor, the common law

bach, 176 Mass. 577, 58 N. E. 162; James v. Tilton, 183 Mass. 275, 67 N. E. 326; Spiering v. Spiering, 138 Minn. 119, 164 N. W. 583; McRaven v. Crisler, 53 Miss. 542; Foote v. Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631; Blenkiron Bros. v. Rogers, 87 Neb. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127, Ann. Cas. 1912 A. 1043; Cole v. Hills, 44 N. H. 227; Levy v. Arons, 81 N. Y. Misc. 165, 142 N. Y. S. 312; Styles v. Scotland, 22 N. Dak. 469, 134 N. W. 708; Donnybrook State Bank v. Corbett (N. Dak.), 163 N. W. 275; Seymour v. Mickey, 15 Ohio St. 515; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Cline v. Goodale, 23 Oreg. 406, 31 Pac. 956; Wallace v. Tice, 32 Oreg. 283, 51 Pac. 733 (cf. Savage v. Savage, 36 Oreg. 268, 59 Pac. 461); Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608; Gunter v. Addy, 58 S. C. 178, 36 S. E. 553; McClure v. Little, 15 Utah, 379, 49 Pac. 298, 62 Am. St. Rep. 938; Wolferman v. Bell, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126; Young v. Wright, 4 Wis. 144, 65 Am. Dec. 303; Gordon v. Robertson, 48 Wis. 493, 4 N. W. 579. But there are not a few contrary decisions, Warpole v. Ellison, 4 Houst. 322; Kelly v. Trumble, 74 Ill. 428; Soaps v. Eichberg, 42 Ill. App. 375, 381; Hamilton v. Wood, 70 Ind. 306; Letcher v. Bates, 6 J. J. Marsh. 524, 22 Am. Dec. 92; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 103, 37 S. W.

490; Evans v. Foreman, 60 Mo. 449; Barnes-Smith Mercantile Co. v. Tate, 156 Mo. App. 236, 137 S. W. 619; Bowers v. Jewell, 2 N. H. 543; Lewis v. Schenck, 3 C. E. Green, 459; Wegner v. State, 28 Tex. App. 419, 13 S. W. 608; Barton Sav. Bank & Trust Co., 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346. See also Green v. Sneed, 96, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119; White Sewing Machine Co. v. Saxon, 121 Ala. 399, 25 So. 784; Capital Bank v. Armstrong, 62 Mo. 59; Heath v. Blake, 28 S. Car. 406, 5 S. E. 842; Shiffer v. Mosier, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155, 17 Ann. Cas. 756; Otto v. Half, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56; Gray v. Williams, 91 Vt. 111, 99 Atl. 735.

⁷² Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 188; Brett v. Marston, 45 Me. 401; Russell v. Longmoor, 29 Neb. 209, 45 N. W. 624. See also Chamberlin v. White, 79 Ill. 549.

⁷³ Sec. 124, *supra*, § 1193. See Peevey v. Buchanan, 131 Tenn. 24, 173 S. W. 447.

⁷⁴ Edington v. McLeod, 87 Kan. 426, 124 Pac. 163, 41 L. R. A. (N. S.) 230; Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 421. If the alteration was fraudulent, however, the debt is discharged, and the mortgage consequently is invalidated. Sherman v. Connecticut Mut. L. Ins. Co., 222 Mass. 159, 110 N. E. 159. See further, *infra*, § 1911.

made a distinction between an alteration affecting a sealed contract and one affecting other writings. As the common law required that the authority of an agent to execute a sealed instrument should be itself under seal,⁷³ parol authorization by the obligor to make changes in the instrument after its delivery could not make such an instrument in its altered form the deed of the obligor.⁷⁴ Nor could the deed be valid according to its original terms, under the early law, for the deed in that form was destroyed by the mere fact that it possessed no longer physical identity with the original obligation.⁷⁵ It is plain, however, that the situation is one where justice demands

⁷³ *Supra*, § 275.

⁷⁴ *Hibblewhite v. McMorine*, 6 M. & W. 200; *United States v. Nelson*, 2 Brock. 64; *Cross v. State Bank*, 5 Ark. 525; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Thomason v. Wilson*, 127 Ga. 141, 56 S. E. 302; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Simms v. Hervey*, 19 Ia. 273; *Ayres v. Probasco*, 14 Kan. 175; *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764; *Lindsley v. Lamb*, 34 Mich. 509; *Williams v. Crutcher*, 6 Miss. 71, 35 Am. Dec. 422; *Blacknall v. Parish*, 6 Jones Eq. 70, 78 Am. Dec. 239; *Graham v. Holt*, 3 Ired. 300; *Barden v. Southerland*, 70 N. C. 528; *Martin v. Buffalo*, 121 N. C. 34, 36, 27 S. E. 995; *Gilbert v. Anthony*, 1 Yerg. 69, 24 Am. Dec. 439; *Mosby v. State*, 4 Sneed, 324; *Vermont Accident Ins. Co. v. Fletcher*, 87 Vt. 394, 89 Atl. 480; *Walla Walla Co. v. Ping*; 1 Wash. T. 339. *Cf. Lanum v. Harrington*, 267 Ill. 57, 107 N. E. 828.

If the alteration is made before delivery by an agent of the grantor authorized to deliver, the grantor is held bound by the alteration, if not broadly on the ground that parol authority is good, then on the principles of estoppel. *Allen v. Withrow*, 110 U. S. 119, 28 L. Ed. 90, 3 S. Ct. 517; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *State v. Tripp*, 113 Ia. 698, 704, 84 N. W. 546; *Dolbeer v. Living-*

ston, 100 Cal. 617, 35 Pac. 328; *White v. Mason*, 102 Kans. 461, 170 Pac. 814; *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Thummel v. Holden*, 149 Mo. 677, 684, 51 S. W. 404; *Cribben v. Deal*, 21 Oreg. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486. *Cf. Vaca Valley R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145. If a new delivery of the deed is made after the alteration, the deed is, of course, binding in its altered form. *De Malarin v. United States*, 1 Wall. 282, 17 L. Ed. 594; *Prettyman v. Goodrich*, 23 Ill. 330; *Baker v. Baker*, 239 Ill. 82, 87 N. E. 868; *Styles v. Scotland*, 22 N. Dak. 469, 134 N. W. 708; *Vermont Accident Ins. Co. v. Fletcher*, 87 Vt. 394, 89 Atl. 480. But it has been held otherwise if the new delivery was made without knowledge of the alterations. *Nesbitt v. Turner*, 155 Pa. 429, 26 Atl. 750. If acknowledgment is necessary to the validity of the deed an acknowledgment before the alteration will not suffice. *Waskey v. Chambers*, 224 U. S. 564, 32 S. Ct. 597, 56 L. Ed. 885.

⁷⁵ In *McNab v. Young*, 81 Ill. 11, it was held that the objection that an authorized insertion was made after execution could not be taken by one not claiming in the right of the grantor.

that the obligee should be relieved from the consequences of such a destruction of the obligation, and in modern times wherever the instrument is unenforceable at law in its altered form, secondary evidence would be allowed to prove the original terms of the obligation, and if valid in that form it would be enforced,⁷⁶ or if the Statute of Frauds did not prevent, equity should reform the deed to conform to the agreement of parties or should treat it as if reformed.⁷⁷

§ 1895. Contracts within the Statute of Frauds.

Similar reasoning is applicable to alterations in an unsealed writing, made by the obligee under authority from the obligor, if the law requires a contract of the kind which has been altered to be in writing signed by the promisor.⁷⁸ The obligee cannot be agent for the obligor to authenticate the writing, and the signature of the obligor attached to the original writing does not authenticate the changes.

§ 1896. Unsealed contracts—ratification.

If the writing is unsealed, and the Statute of Frauds inapplicable, an authorized alteration is binding upon both parties, and the altered form of the contract, not the original form, will be enforced.⁷⁹ In jurisdictions where the peculiar doctrines applicable to sealed contracts are no longer in force, this is true also of such contracts,⁸⁰ and even in States which

⁷⁶ *Gunter v. Addy*, 58 S. C. 178, 36 S. E. 553.

⁷⁷ *Burnside v. Wayman*, 49 Mo. 356; *McQuie v. Peay*, 58 Mo. 56; *Bryant v. Bank*, 107 Tenn. 560, 64 S. W. 895. See also *Mohlis v. Trauffer*, 91 Ia. 751, 60 N. W. 521; *Huffman v. Hatcher*, 178 Ky. 8, 198 S. W. 236.

⁷⁸ *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549 (overruled by *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867; *Smith v. Farmers' Mut. Ins. Assoc.*, 111 Ga. 737, 36 S. E. 957). But see *Bluck v. Gomperts*, 7 Ex. 862;

Winslow v. Jones, 88 Ala. 496, 7 So 262.

⁷⁹ *Divide Canal &c. Co. v. Tenney*, 57 Colo. 14, 139 Pac. 1110, Ann. Cas. 1917 D. 346; *Gardiner v. Harback*, 21 Ill. 129; *Grimsted v. Briggs*, 4 Ia. 559; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Taddiken v. Cantrell*, 69 N. Y. 597, 25 Am. Rep. 253; *Schmelz v. Rix*, 95 Va. 509, 28 S. E. 890. See also cases in the following notes.

⁸⁰ *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328; *Gardiner v. Harback*, 21 Ill. 129; *Swarts v. Ballou*, 47 Ia.

generally preserve the common-law rules governing sealed instruments, practical reasons have often led courts to uphold authorized or ratified alterations in such instruments.⁸¹ Ratification, subsequent to the alteration, has as full effect as authority originally granted,⁸² and ratification may be shown by any conduct from which assent can fairly be implied.⁸³

188, 29 Am. Rep. 470; *State v. Tripp*, 113 Ia. 698, 704, 84 N. W. 546.

⁸¹ *Speake v. United States*, 9 Cranch, 28, 3 L. Ed. 645; *Drury v. Foster*, 2 Wall. 24, 33, 17 L. Ed. 780; *Woodbury v. Allegheny, etc., Co.*, 72 Fed. 371; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 231; *Inhabitants v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *State v. Young*, 23 Minn. 551; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Otis v. Browning*, 59 Mo. App. 326; *Cribben v. Deal*, 21 Oreg. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681; *Bank v. Hammond*, 1 Rich. L. 281; *Lamar v. Simpson*, 1 Rich. Eq. 71, 42 Am. Dec. 345; *Schintz v. McMahon*, 33 Wis. 299.

⁸² *Speake v. United States*, 9 Cranch, 28, 3 L. Ed. 645; *Divide Canal, etc., Co. v. Tenney*, 57 Colo. 14, 139 Pac. 1110, Ann. Cas. 1917 D. 346; *Goodspeed v. Cutler*, 75 Ill. 534; *Scott v. Bibb*, 48 Ill. App. 657; *Emerson v. Opp*, 9 Ind. App. 581; *Pelton v. Prescott*, 13 Iowa, 567; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340; *Holyfield v. Harrington*, 84 Kan. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131; *Fletcher v. Minneapolis Ins. Co.*, 80 Minn. 152, 83 N. W. 29; *Workman v. Campbell*, 57 Mo. 53; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Conable v. Smith*, 61 Hun, 185, 22 S. E. 757; *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9; *Styles v. Scotland*, 22 N. Dak. 469, 134 N. W. 708; *Barrett v. Effenburg*, 29 Okl. 679, 119 Pac. 135; *Matlock v. Wheeler*, 29 Oreg. 64, 40 Pac. 5, 43 Pac. 867; *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757;

Ratcliff v. Planters' Bank, 2 Sneed 425; *Chesum v. McBride*, 21 Wash. 558, 58 Pac. 1067. But it has been held otherwise as to a surety. *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Warren v. Fant*, 79 Ky. 1 (*contra*, *Bell v. Mahin*, 69 Ia. 408, 29 N. W. 331. See also *Knoebel v. Kircher*, 33 Ill. 308). Where the original alteration amounted to a forgery, it was held that ratification was not possible. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754; *contra*, *Marks v. Schram*, 109 Wis. 452, 84 N. W. 830. See also *Ofenstein v. Bryan*, 20 App. D. C. 1; *Pannonia Building & Loan Assoc. v. West Side Trust Co. (N. J. L.)*, 108 Atl. 240; and *supra*, § 1145.

⁸³ *Barnsdall v. Boley*, 119 Fed. 191; *Montgomery v. Crosthwait*, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832; *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290; *Payne v. Long*, 121 Ala. 385, 25 So. 780, 131 Ala. 438, 31 So. 77; *Jackson v. Johnson*, 67 Ga. 167; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Oswego v. Kellogg*, 99 Ill. 590; *Linington v. Strong*, 107 Ill. 295; *Canon v. Grigsby*, 116 Ill. 15, 5 N. E. 362; *Bell v. Mahin*, 69 Ia. 408, 29 N. W. 331; *Dover v. Robinson*, 64 Me. 183; *Ward v. Allen*, 2 Met. 53, 35 Am. Dec. 387; *Prouty v. Wilson*, 123 Mass. 297; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Janney v. Goehringer*, 52 Minn. 428, 54 N. W. 481; *Board v. Gray*, 61 Minn. 242, 63 N. W. 635; *Evans v. Foreman*, 60 Mo. 449; *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 8 Am. St. Rep. 247; *Perkins Windmill Co. v. Tillman*, 55 Neb. 652,

Silence may be enough. It has been well said, "The rule is just and supported by the authorities that, where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered."⁸⁴

§ 1897. Ratification of alteration of sealed instrument.

Indeed ratification may be more effectual in the case of a sealed instrument than prior authority could have been, though ratification of an agent's execution of a sealed contract, like an original authority to an agent to execute such an instrument, must be under seal.⁸⁵ A sealed instrument takes its validity from delivery, and the maker may adopt a signature or seal previously made and make them his own by delivering them as his. A redelivery, therefore, of a sealed instrument by the obligor after it has been altered will make it binding in its altered form. A prior consent to an alteration can hardly amount to a redelivery after the alteration, but if the maker himself assists or takes part in the alteration it would generally be easy to find a new delivery, and courts which, like those of England, hold that there is always a delivery when the maker of a deed indicates his assent to be bound by it as a completed instrument have no difficulty in finding delivery when the maker after an alteration has been made ratifies it.⁸⁶ But if

75 N. W. 1098; *Wright v. Buck*, 62 N. H. 656; *Freile v. Rudiger*, 89 N. J. Eq. 91, 104 Atl. 142; *Conable v. Keeney*, 61 Hun, 624, 16 N. Y. S. 719; *Styles v. Scotland*, 22 N. Dak. 469, 134 N. W. 708; *Barrett v. Effenburg*, 29 Okl. 679, 119 Pac. 135; *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757; *Matson v. Jarvis*, 63 Tex. Civ. App. 376, 133 S. W. 941. Cf. *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Benedict v. Miner*, 58 Ill. 19; *Fraker v. Cullum*, 21 Kan. 555; *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262; *German Bank v. Dunn*, 62 Mo. 79; *Kennedy v. Lancaster Bank*, 18 Pa. 347; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

⁸⁴ *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919, 921, citing *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Ward v. Williams*, 26 Ill. 447, and cases cited in the note, 79 Am. Dec. 385.

⁸⁵ *Supra*, § 275.

⁸⁶ *Hudson v. Revett*, 5 Bing. 368; *Winslow v. Jones*, 88 Ala. 496, 7 So. 262; *Stiles v. Probst*, 69 Ill. 382; *Abbott v. Abbott*, 189 Ill. 488, 497, 59 N. E. 958, 82 Am. St. Rep. 470; *Lanum v. Harrington*, 267 Ill. 57, 107 N. E. 826; *Bassett v. Bassett*, 55 Me. 127; *Vidvard v. Cushman*, 35 Hun, 18; *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9.

acknowledgment⁸⁷ or witnesses⁸⁸ are necessary to the validity of the deed, the assent of the parties, even though amounting to a redelivery, would be insufficient to make the alterations part of the deed.

§ 1898. Several obligors.

If there are several obligors bound by an obligation, a material alteration of the obligation made with the assent of one or more parties will be binding upon those who assent,⁸⁹ but will totally avoid the obligation of any who do not assent.⁹⁰

The court will not restore such an obligation to its original form, so as to make sureties liable again on the obligation which they assumed.⁹¹ If there are entirely distinct obligations

⁸⁷ *Waskey v. Chambers*, 224 U. S. 564, 32 S. Ct. 597, 56 L. Ed. 885; *Booker v. Stivender*, 13 Rich. L. 85.

⁸⁸ *Drury v. Foster*, 2 Wall. 24, 17 L. Ed. 780; *Bryant v. Bank*, 107 Tenn. 560, 567, 64 S. W. 895. See also *Keene Mach. Co. v. Barratt*, 100 Fed. 590, 40 C. C. A. 571. But the deed may be good as between the parties. *Walkley v. Clarke*, 107 Ia. 451, 78 N. W. 70.

⁸⁹ *Hochmark v. Richler*, 16 Col. 263, 26 Pac. 818; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340; *Rhoades v. Leach*, 93 Ia. 337, 61 N. W. 988, 57 Am. St. Rep. 281; *Brownell v. Winnie*, 29 N. Y. 400, 409, 86 Am. Dec. 314; *Diamond v. Inter-Ocean Co.*, 29 Okl. 323, 116 Pac. 773; *Gould v. Gould* (Wash.), 169 Pac. 324. This is subject to the qualifications previously made with reference to contracts under seal or within the Statute of Frauds.

⁹⁰ *Gardner v. Walsh*, 5 E. & B. 83; *Martin v. Thomas*, 24 How. 315, 16 L. Ed. 689; *Mundy v. Stevens*, 61 Fed. 77, 9 C. C. A. 366; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *State v. Smith*, 9 Houst. 143; *Gardiner v. Harback*, 21 Ill. 129; *State v. Van Pelt*, 1 Ind. 304; *Zimmerman v. Judah*,

13 Ind. 286, 22 Ind. 388; *Horn v. Newton Bank*, 32 Kan. 518, 4 Pac. 1022; *Tyler v. First Nat. Bank*, 150 Ky. 515, 150 S. W. 665; *Warring v. Williams*, 8 Pick. 322; *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Board v. Gray*, 61 Minn. 242, 63 N. W. 635; *Love v. Shoape*, 1 Miss. 508; *Morrison v. Garth*, 78 Mo. 434; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *McMillan v. Hafferlin*, 18 Mont. 385, 45 Pac. 548; *Davis v. Bauer*, 41 Ohio St. 257; *Wills v. Wilson*, 3 Ore. 308; *Rittenhouse v. Levering*, 6 Watts & S. 190; *Shiffer v. Mosier*, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155, 17 Ann. Cas. 756; *Broughton v. Fuller*, 9 Vt. 373; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392, 31 Am. Rep. 768.

See also *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541; *United States v. Freel*, 186 U. S. 309, 46 L. Ed. 1177, 22 S. Ct. 875; *People v. Kneeland*, 31 Cal. 288; *Cotten v. Williams*, 1 Fla. 42; *Thompson v. Williams*, 1 Fla. 56; *Ames, Cas. Suretyship*, 246, n.

⁹¹ *Ruby v. Talbott*, 5 N. Mex. 251, 21 Pac. 72; *Fulmer v. Seitz*, 68 Pa. 237, 8 Am. Rep. 172. Cf. *Davis v. Shafer*, 50 Fed. 764; *Nickerson v. Swett*, 135 Mass. 514.

created by the same instrument, an alteration of one obligation only does not invalidate the others. But the fact that an obligation is several at law is not conclusive. The true test is whether the alteration of one affects the rights of the parties under the others.⁹²

§ 1899. Signature made in ignorance of alteration.

If an obligor signs an obligation after it has been signed by others, in ignorance of the fact that the obligation has been altered or by his signature is altered and that thereby the other obligors are discharged, the obligor signing last is also discharged if the obligee is cognizant of the facts before accepting the obligation. The signature of the last obligor does not bind him, because given under a mistake, induced by what is equivalent to misrepresentation.⁹³ If, however, the obligee was not notified of the alteration either constructively by the appearance of the document or actually, his legal right to enforce the obligation cannot be defeated by the unknown equity of the deceived obligor.⁹⁴

§ 1900. Restoration.

If a contract has been avoided by alteration, the subsequent

⁹² *Collins v. Prosser*, 1 B. & C. 682, which held that tearing off the seal of one obligor on a several bond thereby discharging him did not destroy the liability of the other obligors, is clearly erroneous. The court admit that the right of contribution in equity was affected, and this is surely material.

In *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314, the name of an obligor was added as maker to a note, and the court, in holding the alteration immaterial, relied on the fact that the obligation created was several rather than joint and several. This alone would not support the decision, but as the added signer was in fact a surety the conclusion is sound, since the original maker's liability in law and equity remained unchanged.

⁹³ *Ellesmere Co. v. Cooper*, [1896] 1

Q. B. 75; *People v. Kneeland*, 31 Cal. 288; *State v. Craig*, 58 Ia. 238, 12 N. W. 301; *Howe v. Peabody*, 2 Gray, 556; *State v. McGonigle*, 101 Mo. 353, 13 S. W. 758, 8 L. R. A. 735, 20 Am. St. Rep. 609. Cf. *Evans v. Partin*, 22 Ky. L. Rep. 20, 56 S. W. 648.

⁹⁴ *Crandall v. Auburn Bank*, 61 Ind. 349; *Rhoades v. Leach*, 93 Ia. 337, 61 N. W. 988, 57 Am. St. Rep. 281; *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187, 14 N. W. 578. And see cases cited *supra*, § 1248, to the effect that in general fraud or misrepresentation inducing the surety to enter into an obligation is no defence against a creditor innocent and ignorant of the facts. This principle was lost sight of by the court in the contrary decision of *Ellesmere Co. v. Cooper*, [1896] 1 Q. B. 75.

restoration of the writing to its original form without the assent of the obligor will not restore the legal obligation.⁹⁴ But if the alteration, because made by mistake or without wrongful intent, was not such as to avoid the obligation, and the document has been restored to its original form, it will be received in evidence and enforced.⁹⁵

§ 1901. Effect of immaterial alterations.

It was laid down in *Pigot's case*⁹⁶ that even an immaterial alteration if made by the obligee avoids a deed. But in 1819⁹⁷ the English Court refused to apply the rule to a policy of insurance, and fifty years later⁹⁸ this resolution in *Pigot's case* was dissented from. It has been followed in some cases in the United States,⁹⁹ but most of them were decided a number of years ago, and no such severe rule is generally in force. As has been shown, even material alterations by the obligee, when innocently made, do not bar the obligee's rights, unless a statute like the Negotiable Instrument Law requires that result.¹ This must be true *a fortiori* of immaterial alterations. And the

⁹⁴ Wood v. Steele, 6 Wall. 80, 18 L. Ed. 725; Warpole v. Ellison, 4 Houst. 322; Hayes v. Wagner, 89 Ill. App. 390, 401; Snell v. Davis, 149 Ill. App. 391; Robinson v. Reed, 46 Ia. 219; Shepard v. Whetstone, 51 Ia. 457, 1 N. W. 753; Cotton v. Edwards, 2 Dana, 106; Locknane v. Emmerson, 11 Bush, 69; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; McMurtrey v. Sparks, 71 Mo. App. 126; Shiffer v. Mosier, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155, 17 Ann. Cas. 756; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567. Newell v. Mayberry, 3 Leigh, 250, 23 Ann. Dec. 261.

⁹⁵ Rogers v. Shaw, 59 Cal. 260; Kountz v. Kennedy, 63 Pa. 187, 3 Am. Rep. 541. See remarks on the case last cited in Citizens' Bank v. Williams, 174 Pa. 66, 34 Atl. 303, 35 L. R. A. 464; and in Shiffer v. Mosier, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155, 17 Ann. Cas. 756.

⁹⁶ 11 Coke, 26b. See *supra*, § 1881.

⁹⁷ In Sanderson v. Symonds, 1 Brod. & Bing. 426.

⁹⁸ In Aldous v. Cornwell, L. R. 3 Q. B. 573.

⁹⁹ Herdman v. Bratten, 2 Har. (Del.) 396; Johnson v. Bank, 2 B. Mon. 310, 311; Wickes v. Caulk, 5 Har. & J. 36; Haskell v. Champion, 30 Mo. 136; First Bank v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Hord v. Taubman, 79 Mo. 101; Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300; Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874; McCormick Harvesting Mach. Co. v. Blair, 146 Mo. App. 374, 124 S. W. 49; Vanauken v. Hornback, 2 Green (N. J.), 178, 25 Am. Dec. 509; Wright v. Wright, 2 Halst. 175, 11 Am. Dec. 546; Jones v. Crowley, 57 N. J. L. 222, 30 Atl. 871; Jackson v. Malin, 15 Johns. 293; Nunnery v. Cotton, 1 Hawks, 222; Morris v. Vanderen, 1 Dall. 64; Crockett v. Thomason, 5 Sneed, 342, 344.

¹ *Supra*, § 1893.

prevailing doctrine is that no immaterial alteration will affect rights and liabilities under a writing, irrespective of the person by whom the alteration was made or his purpose in making it.²

§ 1902. What alterations are material.

The following alterations have been held material: erasing the name of the obligee or grantee and substituting the name of another;³ changing the name of the obligor in a deed, who

² *First Bank v. Weidenbeck*, 97 Fed. 896, 897, 38 C. C. A. 131; *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; *Nichols v. Johnson*, 10 Conn. 192; *Reed v. Kemp*, 16 Ill. 445; *Ryan v. First Bank*, 148 Ill. 349, 35 N. E. 1120; *Lisle v. Rogers*, 18 B. Mon. 528; *Tranter v. Hibbard*, 108 Ky. 265, 56 S. W. 169; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; *Moye v. Herndon*, 30 Miss. 110; *Burnham v. Ayer*, 35 N. H. 351; *Robertson v. Hay*, 91 Pa. 242; *Note Holders v. Funding Board*, 16 Lea, 46, 57 Am. Rep. 211.

³ *Sneed v. Sabinal Co.*, 71 Fed. 493, 18 C. C. A. 213, 73 Fed. 925, 20 C. C. A. 230; *Clyde Steamship Co. v. Whaley*, 231 Fed. 76, 145 C. C. A. 264; *Wilson v. Barnard*, 10 Ga. App. 98, 72 S. E. 943; *Horst v. Wagner*, 43 Ia. 373, 22 Am. Rep. 255; *Bell v. Mahin*, 69 Ia. 408, 29 N. W. 331; *Horn v. Newton Bank*, 32 Kan. 518, 4 Pac. 1022; *Ayer & Lord Tie Co. v. Baker*, 138 Ky. 494, 128 S. W. 346 (grantee of deed); *Dolbier v. Norton*, 17 Me. 307; *Andrews v. Sibley*, 220 Mass. 10, 107 N. E. 395; *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363; *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *German Bank v. Dunn*, 62 Mo. 79; *Robinson v. Berryman*, 22 Mo. App. 509; *Erickson v. First Bank*, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753; *Cumberland Bank v. Hall*, 1 Halst. 215; *Gillette v. Smith*, 18 Hun, 10; *Davis v. Bauer*, 41 Ohio St. 257; *International Bank v.*

Mullen, 30 Okl. 547, 120 Pac. 257, Ann. Cas. 1913 C. 180; *Citizens' State Bank v. Grant* (Okl.), 152 Pac. 1082 (adding the word "President" to the payee's name); *Holbart v. Lauritson*, 34 S. Dak. 267, 148 N. W. 19, L. R. A. 1915 A. 166; *Hoffman v. Planters' Bank*, 99 Va. 480, 39 S. E. 134. See also *Park v. Glover*, 23 Tex. 469; *Broughton v. Fuller*, 9 Vt. 373. *Contra*, *Latschaw v. Hildebeitel*, 2 Penny. 257. Where the name of the promisee had recently been changed from "Blenkiron Grain Co." to "Blenkiron Bros., Inc." and by the use of an old form a contract purported to run to the Blenkiron Grain Co., an alteration to the later name was held immaterial. *Blenkiron Bros. v. Rogers*, 87 Neb. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127, Ann. Cas. 1912 A. 1043.

Changing the name of a special indorsee in a note is therefore material (*Grimes v. Piersol*, 25 Ind. 246), or adding the name of another person on a railroad mileage-book as one entitled to ride. *Holden v. Rutland R. Co.*, 78 Vt. 317, 50 Atl. 1096. But changing the name of the insured in a policy from the name of the agent of mortgagors to the name of a trustee for them, the loss being made payable, both before and after the alteration, to the mortgagee, was held immaterial since it effected no material change in the ultimate rights under the policy, *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338.

The addition of the word "junior"

in fact signed as agent, but did not so indicate on the deed, to the name of the principal;⁴ or changing the signature of an obligor so as to make the obligation purport to be that of a corporation⁵ or firm⁶ instead of an individual, or that of an individual instead of a corporation,⁷ or that of a surety instead of a principal.⁸ Erasing the name of a joint or prior obligor,⁹ and changing the amount, time of payment, place of payment, or rate of interest are obviously material, as are the addition of words of negotiability,¹⁰ of a clause requiring payment

to the name of the grantee in a deed was held immaterial, as the only effect was to designate more clearly the grantee actually intended. *Coit v. Starkweather*, 8 Conn. 289. So the addition of "with the will annexed," after the word "administrator." *Casani v. Jerome*, 58 N. Y. 315.

But otherwise of an addition of a designation, which makes the payee in effect different. *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123 (cashier); *First Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397 (president); *Mechanics' American Nat. Bank v. Helmbacher*, 199 Mo. App. 173, 201 S. W. 383 (trustee); *York v. James*, 43 N. J. L. 332 (collector).

⁴ *North v. Henneberry*, 44 Wis. 306. But erasure of an initial of the grantor's name in a deed is immaterial, where no change in the person is thereby intended or indicated. *Banks v. Lee*, 73 Ga. 25. See also *Chadwick v. Eastman*, 53 Me. 12.

⁵ *Tyler v. First Nat. Bank*, 150 Ky. 515, 150 S. W. 665; *Sheridan v. Carpenter*, 61 Me. 83.

⁶ *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832 (though the alteration was made by one having no power to bind the firm); *Haskell v. Champion*, 30 Mo. 136.

⁷ *Texas Printing Co. v. Smith*, 14 S. W. Rep. 1074 (Tex. App.).

⁸ *Laub v. Paine*, 46 Ia. 550, 26 Am. Rep. 163.

⁹ *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *Gillett v. Sewat*, 6 Ill. 475; *Snell v. Davis*, 149 Ill. App. 391; *Citizens' Sav. Bank v. Halstead*, 42 Ind. App. 79, 84 N. E. 1098; *State v. Blair*, 32 Ind. 313; *State v. Craig*, 58 Ia. 238, 12 N. W. 301; *Bracken County v. Daum*, 80 Ky. 388; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *Blanton v. Commonwealth*, 91 Va. 1, 20 S. E. 884.

But not if the obligor whose name was erased was an infant and had repudiated his contract. *Young v. Currier*, 63 N. H. 419.

Of course a release of a joint prior party by any other means than physical changes in the document is not an alteration, and any effect upon the liability of subsequent parties will be governed by rules of joint obligations and of suretyship which have been elsewhere considered. *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14.

¹⁰ Many authorities as to such changes in negotiable paper are collected in 1 Ames, Cas. Bills and Notes, 447, 448; 2 Century Digest, 241 *seq.* See also Sec. 125 of the Uniform Neg. Inst. Law, *supra*, § 1193.

In *Tranter v. Hibbard*, 108 Ky. 265, 56 S. W. 169, a note was altered by writing the word "fixed" after the date of payment, which is equivalent to "without grace." By the law of Kentucky such negotiable paper only as is discounted at a bank is entitled to grace. The note in question never

in gold,¹¹ or providing that on default in one of several notes all shall become due,¹² or that interest shall be compounded,¹³ or that the payee of a note shall have a conditional vendor's rights in property for which the note was given.^{13a} So a waiver of demand and notice written over a blank indorsement;¹⁴ or the insertion of words of guaranty over such an indorsement,¹⁵ unless the indorser's intention was in fact to be liable as a guarantor;¹⁶ or the addition or change of property described in a deed or mortgage;¹⁷ the insertion in a mortgage of an insurance clause¹⁸ or a statement that it was given to secure

was so discounted, and the court therefore held the alteration immaterial though admitting the note might have been discounted. The case seems wrong. The alteration purported to give the payee an added right to discount the note without entitling the maker to grace. The fact that the payee did not exercise this right cannot make any difference.

Similarly changing the penal sum in a bond. *Howe v. Peabody*, 2 Gray, 556; *Board v. Gray*, 61 Minn. 242, 63 N. W. 635. But the words, "Nov. 1, 1889. The rate of interest now 5 per cent. per annum," written above a note, were no part of the note, and did not invalidate it. *Lewis v. Blume*, 226 Mass. 505, 116 N. E. 271.

¹¹ *Hanson v. Crawley*, 41 Ga. 303; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598; *Foxworthy v. Colby*, 64 Nev. 216, 89 N. W. 800, 62 L. R. A. 393; *Church v. Howard*, 17 Hun, 5; *Darwin v. Rippey*, 63 N. C. 318; *Wills v. Wilson*, 3 Oreg. 308; *Bogarth v. Breedlove*, 39 Tex. 561.

¹² *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108.

¹³ *Schroyer v. Thompson (Pa.)*, 105 Atl. 274.

^{13a} *Gray v. Williams*, 91 Vt. 111, 99 Atl. 735. So inserting words in a note that it was given for the price of certain land, since the local effect

of these words would be to give a vendor's lien, is material. *Bank of Lauderdale v. Cole*, 111 Miss. 39, 71 So. 260.

¹⁴ *Andrews v. Simms*, 33 Ark. 771; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793; *Farmer v. Rand*, 16 Me. 453; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059; *Harnett v. Holdrege*, 97 N. W. Rep. 443, 5 Neb. (Unof.) 114, S. C. 73 Neb. 570, 103 N. W. 277, 119 Am. St. Rep. 905.

But otherwise, if the indorser is also the maker, and hence in no event entitled to demand or notice. *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. Ed. 360, 12 Sup. Ct. 657.

¹⁵ *Robinson v. Reed*, 46 Ia. 219; *Belden v. Hann*, 61 Ia. 42, 15 N. W. 591; *Clawson v. Gustin*, 2 South. 821; *Orrick v. Colston*, 7 Gratt. 189.

¹⁶ *Iowa Valley Bank v. Sigstad*, 96 Ia. 491, 65 N. W. 407; *Levi v. Mendell*, 1 Duv. 77.

¹⁷ *Merchants' & Farmers' Bank v. Dent*, 102 Miss. 455, 59 So. 805; *Barnhart v. Little*, (Mo. 1916), 185 S. W. 174; *Powell v. Pearlstine*, 43 S. C. 403, 21 S. E. 328; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131. See also *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350, 13 Sup. Ct. 426. Cf. *Burnett v. McCluey*, 78 Mo. 676.

¹⁸ *Frazier v. Crook (Mo.)*, 204 S. W. 392.

other debts besides that for which it was in fact given; ^{18a} reducing the amount of mortgage indebtedness assumed by a grantee; ^{18b} the insertion in a bond for title of a provision that the vendee shall have immediate possession; ¹⁹ the insertion or alteration of the date, clearly if that results in altering the legal effect of the instrument, as by changing the day of maturity, ²⁰ and under the Uniform Negotiable Instruments Law, apparently, even though no such effect is produced; ^{20a} a change of the place of payment; ^{20b} the addition ²¹ or cancellation ²² of a seal after the signature of an obligor, unless a seal would in no way alter the legal effect of the document. ²³ Detaching a note from a contract of conditional sale of which it formed a part, ^{23a} or severing, in any case, part of a contract from another part which may qualify it, unless the severance is expressly or impliedly authorized. ^{23b}

^{18a} *Carlisle v. People's Bank*, 122 Ala. 446, 26 So. 115; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406.

^{18b} *Hurt v. Stout* (Kan.), 181 Pac. 623.

¹⁹ *Kelly v. Trumble*, 74 Ill. 428.

²⁰ *Hirschman v. Budd*, L. R. 8 Ex. 171; *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Wyman v. Yoemans*, 84 Ill. 403; *Hamilton v. Wood*, 70 Ind. 306; *McCormick Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 730; *Lisle v. Rogers*, 18 B. Mon. 528; *Britton v. Derker*, 46 Mo. 591, 2 Am. Rep. 553; *McMurtrey v. Sparks*, 71 Mo. App. 126; *Bowers v. Jewell*, 2 N. H. 543; *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; *Miller v. Gilleland*, 19 Pa. 119; *Taylor v. Taylor*, 12 Lea, 714; *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346. Alteration of the date of an old bill of lading so as to make it appear still current is material and discharges the railroad. *Merchants' Nat. Bank v. Baltimore &c. Steamboat Co.*, 102 Md. 573, 63 Atl. 108.

^{20a} N. I. L. Sec. 125 (1), *supra*, § 1193. In *Bodine v. Berg*, 82 N. J. L. 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913 D. 721, and *Barton Sav.*

Bank v. Stephenson, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346, in which the statute, though referred to, was not controlling, a demand note was held avoided by an alteration of the date. The period of limitation seems all that would be affected by the change.

^{20b} *Mitchell v. Reed's Exec.*, 32 Ky. L. Rep. 683, 106 S. W. 833.

²¹ *State v. Smith*, 9 Houst. 143; *Morrison v. Welty*, 18 Md. 169; *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. 565; *Fred Heim Co. v. Hasen*, 55 Mo. App. 277; *Biery v. Haines*, 5 Whart. 563; *Bowman v. Berkey*, 259 Pa. 327, 103 Atl. 49; *Vaughan v. Fowler*, 14 S. C. 355, 37 Am. Rep. 731.

²² *Porter v. Doby*, 2 Rich. Eq. 49; *Organ v. Allison*, 9 Baxt. 459; *Piercy v. Piercy*, 5 W. Va. 199.

²³ *Truett v. Wainwright*, 9 Ill. 411.

^{23a} *Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046; *Stevens v. Venema* (Mich.), 168 N. W. 531.

^{23b} *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263, 133 Am. St. Rep. 623. So erasure of the words "see special agreement" following the signature to a note is material. *Central Nat. Bank v.*

§ 1903. Alterations advantageous to the obligor.

An alteration is none the less material because the change in the contract is advantageous to the obligor.²⁴ Thus where a later day of payment is substituted the obligation is avoided.²⁵ So where a smaller amount is substituted in an obligation,²⁶ or, where the specified rate of interest is altered to a lower rate,²⁷ or where the name of a joint obligor or co-surety²⁸ or of a prior

Efird, 91 S. Car. 135, 74 S. E. 136. Otherwise if the severance is authorized. *Harrison v. Hunter* (Tex. Civ. App.), 168 S. W. 1036; *Iowa City State Bank v. Milford* (Tex. Civ. App.), 200 S. W. 883.

²⁴ *Weinstein v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972; *Robertson v. Commercial Security Co.*, 152 Ky. 336, 153 S. W. 450; *Pratt v. Rounds*, 160 Ky. 358, 169 S. W. 848; *Conqueror Trust Co. v. Simmon* (Okl.), 162 Pac. 1098; *Iowa City State Bank v. Milford* (Tex. Civ. App.), 200 S. W. 883. Cf. *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31; *Stevens v. Barnes* (N. Dak.), 175 N. W. 709; *Commonwealth Nat. Bank v. Baughman*, 27 Okl. 175, 111 Pac. 332, and see sec. 125, *Neg. Inst. Law*, *supra*, § 1193, also cases in the following notes.

²⁵ *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Wyman v. Yoemans*, 84 Ill. 403; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *McCormick Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577; *First Bank v. Payne*, 19 Ky. L. Rep. 839, 42 S. W. 736. *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639. But see *contra*, *Union Bank v. Cook*, 2 Cranch C. C. 218.

²⁶ *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; *Johnston v. May*, 76 Ind. 293. See also *Doane v. Eldridge*, 16 Gray, 254.

²⁷ *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *New York L. Ins. Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559, 21 L. R. A.

(N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677; *Board v. Greenleaf*, 80 Minn. 242, 83 N. W. 157; *Whitmer v. Frye*, 10 Mo. 348; *Commonwealth Nat. Bank v. Baughman*, 27 Okl. 175, 111 Pac. 332. But see *contra*, *Burkholder v. Lapp's Ex.*, 31 Pa. 322.

²⁸ *Gardner v. Walsh*, 5 E. & B. 83; *Schmidt v. Bank of Commerce*, 234 U. S. 64, 34 Sup. Ct. 730, 58 L. Ed. 1214; *Baker v. Lehman*, 186 Ala. 493, 65 So. 321; *Taylor v. Johnson*, 17 Ga. 521; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 Ind. 139; *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; *Hall's Adm. v. McHenry*, 19 Ia. 521, 87 Am. Dec. 451; *Hamilton v. Hooper*, 46 Ia. 515, 26 Am. Rep. 161; *Berryman v. Manker*, 56 Ia. 150, 9 N. W. 103; *Sullivan v. Rudisill*, 63 Ia. 158, 18 N. W. 856; *Shipp v. Suggett*, 9 B. Mon. 5; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652; *Palmer v. Blanchard*, 113 Me. 380, 94 Atl. 220, Ann. Cas. 1917 A. 809; *Lunt v. Silver*, 5 Mo. App. 186; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Harper v. Stroud*, 41 Tex. 367. But see *contra*, *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 590, 58 N. E. 162; *Gano v. Heath*, 36 Mich. 441; *Union Banking Co. v. Martin's Estate*, 113 Mich. 521, 71 N. W. 867; *Standard Cable Co. v. Stone*, 35 N. Y. App. Div. 62, 65, 54 N. Y. S. 383.

The alteration is none the less material if the added signature is forged. *Farmers' Bank v. Myers*, 50 Mo. App. 157; *Harper v. Stroud*, 41 Tex. 367.

obligor²⁹ is added. The addition of a collateral guaranty does not, however, discharge the principal debtor³⁰ for the addition neither increases nor diminishes his immediate liability or his ultimate equitable liability. The same is true of the erasure of the name of a collateral guarantor.³¹

§ 1904. Materiality of the addition of a surety's name.

If, however, a surety's name is added in such a way that he incurs or purports to incur at law a joint obligation with others previously bound by the instrument, the alteration seems technically a material one, though his equitable liability is one of suretyship, for the alteration if effective would create a new and different obligation at law on the part of the previous obligors. They could be sued jointly with the surety. The answer adopted in one decision³² to this reasoning is that the surety having signed after delivery of the note was not in fact a joint maker, and that as the original maker could effectively object to the joinder of the new signer the former's obligation remained unaltered. But this is unsound. An alteration to which he has not consented never binds an obligor. He is discharged not because an alteration is in legal effect wrought upon his obligation, but because it purports to be; and in the case in question the obligation of the defendant was on the face of the instrument changed to a joint obligation. Nevertheless, on account of the hardship of the case the addition has in

If the addition is without the knowledge of the obligee, it is an alteration by a stranger and hence in the United States would generally have no effect. *Anderson v. Bellenger*, 87 Ala. 334, 6 So. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46; *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; *Standard Cable Co. v. Stone*, 35 N. Y. App. Div. 62, 54 N. Y. S. 383.

²⁹ *Haskell v. Champion*, 30 Mo. 136; *Oklahoma Sash & Door Co. v. American Bonding Co. (Ok.)*, 153 Pac. 1151, 170 Pac. 511; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

³⁰ *Ex parte Yates*, 2 De G. & J. 191; *First Bank v. Weidenbeck*, 97 Fed.

896, 38 C. C. A. 131; *Baker v. Lehman*, 186 Ala. 493, 65 So. 321; *Burnham v. Gosnell*, 47 Mo. App. 637; *Wallace v. Jewell*, 21 Ohio St. 163, 172, 8 Am. Rep. 48; *Hutches v. J. I. Case Co.*, 35 S. W. 60 (Tex. Civ. App.). See *a fortiori* cases cited *infra*, n. 34. *Cf. Oneale v. Long*, 4 Cranch, 60, 2 L. Ed. 550.

³¹ *First Bank v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131; *Broughton v. West*, 8 Ga. 248; *People v. Call*, 1 Denio, 120, 43 Am. Dec. 655; *Huntington v. Finch*, 3 Ohio St. 445.

³² *McCaughy v. Smith*, 27 N. Y. 39. See also *Ex parte Yates*, 2 De G. & J. 191; *Bowser v. Rendell*, 31 Ind. 128.

such a case frequently been held immaterial.³³ But there are many cases enforcing the strict rule.³⁴

§ 1905. Criticism of decisions.

In two cases³⁵ where the name added created or purported to create a several liability on the part of the new signer the previous signer was held not discharged because no joint liability was created. The terms of the legal obligation of the previous signer are certainly not affected by such an addition, but if the consequence of carrying out the obligation assumed by the new signer is that equitably the latter must pay equally with the previous signer, the contract is certainly altered by the added signature. Such is the situation where the new signer is a co-surety. If, however, the only previous signer is the principal debtor, the alteration is immaterial for he remains liable immediately at law and ultimately in equity for the whole and the altered writing does not indicate the contrary.

§ 1906. What alterations are immaterial.

The following changes have been held immaterial: the al-

³³ *Ex parte Yates*, 2 De G. & J. 191; *Mersman v. Werges*, 112 U. S. 139, 28 L. Ed. 641, 5 S. Ct. 65; *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314 (overruled); *Bowser v. Rendell*, 31 Ind. 128; *Taylor v. Acom*, 1 Ind. Ty. 436, 45 S. W. 130; *Stone v. White*, 8 Gray, 589; *Miller v. Finley*, 26 Mich. 249; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Royse v. State Bank*, 50 Neb. 16, 69 N. W. 301, 12 Am. Rep. 306; *McCaughy v. Smith*, 27 N. Y. 39; *Hecker v. Mahler*, 64 Ohio St. 398, 60 N. E. 555. See also *Ryan v. First Bank*, 148 Ill. 349, 35 N. E. 1120; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842.

³⁴ *Gardner v. Walsh*, 5 E. & B. 83; *First Bank v. Weidenbeck*, 81 Fed. 271 (reversed, 97 Fed. 896, 38 C. C. A. 131); *Brown v. Johnson*, 127 Ala. 292, 28 So. 579, 51 L. R. A. 403, 85 Am. St. Rep. 134 (overruling *Montgomery R.*

Co. v. Hurst, 9 Ala. 513, and, it seems, *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314); *Soaps v. Eichberg*, 42 Ill. App. 375; *Bowers v. Briggs*, 20 Ind. 139; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Dickerman v. Miner*, 43 Ia. 508; *Hamilton v. Hooper*, 46 Ia. 515, 26 Am. Rep. 161; *Sullivan v. Rudisill*, 63 Ia. 158, 18 N. W. 856; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340; *Rhoades v. Leach*, 93 Ia. 337, 61 N. W. 988, 57 Am. St. Rep. 281; *Shipp v. Suggett*, 9 B. Mon. 5; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652; *Lunt v. Silver*, 5 Mo. App. 186; *Farmers' Bank v. Myers*, 50 Mo. App. 157; *Allen v. Dorman*, 57 Mo. App. 288; *Wright v. Kelley*, 4 Lana. 57; *Harper v. Stroud*, 41 Tex. 367; *Ford v. Cameron Bank*, 34 S. W. Rep. 684 (Tex. Civ. App.).

³⁵ *Collins v. Prosser*, 1 B. & C. 682; *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314.

teration of the name of the grantee ³⁶ or grantor ³⁷ or party ³⁸ by correcting a mistake in spelling or initials, no change in the person designated is intended or apparent; the insertion of a more specific description of mortgaged property in a chattel mortgage; ³⁹ the addition of a bond to pay a judgment of a provision for payment of legal interest since that was the effect of the bond originally; ⁴⁰ and, in the absence of weight of authority, the insertion or alteration of a date that does not alter the legal effect of the instrument by changing the day of maturity or otherwise; ⁴¹ but under the Negotiable Instruments Law a change of the date in such instrument is now material. ⁴² Other immaterial alterations are, the insertion of the name of the obligor in the body of a bond, after the execution of the bond, ⁴³ since the obligor is liable though his name had not been inserted; the alteration of the courses named in a deed where the alteration was required by the context and was in accordance with the facts; the insertion of a recital of unessential circumstances; the addition ⁴⁵ or cancellation ⁴⁶ of words of description, or the addition of a place of residence ⁴⁷ after the signature of an

³⁶ *State v. Dean*, 40 Mo. 464; *Cole v. Hills*, 44 N. H. 227; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389. See also *Blenkiron Bros. v. Rogers*, 87 Neb. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127, Ann. Cas. 1912 A. 1043.

³⁷ *Banks v. Lee*, 73 Ga. 25.

³⁸ *Re Howgate & Osborn's Contract*, [1902] 1 Ch. 451.

³⁹ *Starr v. Blatner*, 76 Ia. 356, 41 N. W. 41; *Chicago Trust Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4. See also *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Gunter v. Addy*, 58 S. C. 178, 36 S. E. 553. But see *contra*, *McKinney v. Cabell*, 24 Ind. App. 676, 57 N. E. 598, which went on the ground that the more specific description would charge third persons with notice. See further *supra*, 31 Ind. App. 548, 68 N. E. 601.

⁴⁰ *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733.

⁴¹ *Parry v. Nicholson*, 13 M. & W.

778; *Gill v. Hopkins*, 19 Ill. App. Lee v. Lee, 83 Ia. 565, 50 N. Prather v. Zulauf, 38 Ind. 155; v. Hazlewood, 1 Duv. 104; *St. Miller*, 3 Gill, 335; *Hepler v. M. mel Bank*, 97 Pa. 420, 39 Am. Rep. *Whiting v. Daniel*, 1 Hen. & M. *Bashaw's Adm. v. Wallace's Ad* S. E. Rep. 290, 101 Va. 733.

⁴² Sec. 125 (1), *supra*, § following the English Bills of Act, § 64 (2).

⁴³ *Smith v. Crooker*, 5 Mass. 51.

⁴⁴ *Burnham v. Ayer*, 35 N. 351.

⁴⁵ *Rudesill v. County Court*, 8 446.

⁴⁶ *Manufacturers' Bank v. F. 11 R. I. 92*, 23 Am. Rep. 418 (a).

⁴⁷ *Burlingame v. Brewster*, 71 515, 22 Am. Rep. 177; *Marx v. I. Assoc.*, 17 Tex. Civ. App. 408, W. 596.

⁴⁸ *Struthers v. Kendall*, 41 Pa.

gor; the erasure of the name of a surety, so far as the principal debtor is concerned.⁴⁸ Though the Negotiable Instruments Act provides that "any alteration which changes . . . the number or the relation of the parties" is material,⁴⁸ an indorsement of a negotiable instrument subsequent to its delivery will not invalidate the obligations of prior parties.⁴⁶ The addition of a memorandum, which does not purport to form part of the document itself is not an alteration;⁴⁹ and under this last rule the addition or alteration of the figures indicating the amount of a bill or note is immaterial, if the body of the writing clearly states the amount,⁵⁰ for the figures are rather a memorandum

80 Am. Dec. 610. *Cf.* Commercial Bank v. Patterson, 2 Cranch, C. C. 346.

⁴⁸ *Lynch v. Hicks*, 80 Ga. 200, 4 S. E. 255; *Loque v. Smith*, Wright (Ohio), 10; *Tutt v. Thornton*, 57 Tex. 35.

⁴⁸ Sec. 125 (4), *supra*, § 1193.

⁴⁶ *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82.

⁴⁹ *Hakes v. Russ*, 175 Fed. 751, 99 C. C. A. 327; *Manning v. Maroney*, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Carr v. Welch*, 46 Ill. 88; *Fischer v. Haxtun*, 210 Ill. App. 506; *Huff v. Cole*, 45 Ind. 300; *Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859; *Light v. Killinger*, 16 Ind. App. 102, 44 N. E. 760; *King v. Edward Thompson Co.*, 56 Ind. App. 274, 104 N. E. 106; *Schafer v. Jackson*, 155 Ia. 108, 135 N. W. 622; *Reed v. Culp*, 63 Kan. 595, 66 Pac. 616; *Nugent v. Delhomme*, 2 Mart. (O. S.) 307; *Littlefield v. Coombs*, 71 Me. 110; *Cole's Lessee v. Pennington*, 33 Md. 476; *Cambridge Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *Boutelle v. Carpenter*, 182 Mass. 417, 65 N. E. 799; *Lewis v. Blume*, 226 Mass. 505, 116 N. E. 271; *American Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349; *Moore v. Macon Bank*, 22 Mo. App. 684; *Johnson v. Parker*, 86 Mo. App. 660; *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Edward*

Thompson Co. v. Baldwin, 62 Neb. 530, 87 N. W. 307; *Kinard v. Glenn*, 29 S. Car. 590, 8 S. E. 203; *Yost v. Watertown Steam Engine Co.*, 24 S. W. 657 (Tex. Civ. App.); *Foster v. Iowa City State Bank* (Tex. Civ. App.), 201 S. W. 733; *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346; *Tremper v. Hemphill*, 8 Leigh, 623, 31 Am. Dec. 673. See also *Sawyers v. Campbell*, 107 Ia. 397, 78 N. W. 56; *Steeley's Credr's v. Steeley*, 23 Ky. L. Rep. 996, 64 S. W. 642, and cases of collateral guaranties, *supra*, n. 30. *Cf.* *Warrington v. Early*, 2 E. & B. 763; *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Gray v. Williams*, 91 Vt. 111, 99 Atl. 735.

⁵⁰ *Bryant v. Georgia Fertiliser Co.*, 13 Ga. App. 448, 79 S. E. 236; *Horton v. Horton's Est.*, 71 Ia. 448, 32 N. W. 452; *Woolfolk v. Bank of America*, 10 Bush, 504; *Fisk v. McNeal*, 23 Neb. 726, 37 N. W. 616, 8 Am. St. Rep. 162; *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652.

In *Schryver v. Hawkes*, 22 Ohio St. 308, a *bona fide* purchaser was allowed to recover on a note where the figures had been raised, though the amount was left blank in the body of the note and the figures had been written by the defendant in order to limit the amount for which the blank space for the amount could be filled in.

than an integral part of the obligation. But if a memorandum collateral in form is in fact a part of the contract, the erasure of the memorandum is a material alteration.⁵¹

§ 1907. Further illustrations—test of materiality.

Alteration by adding or changing a statement of the consideration does not ordinarily change the apparent legal effect of an obligation, and if that is the correct test, as is generally held, in the American decisions,⁵² such an alteration is immaterial.⁵³ But a statement of consideration may be so important as evidence of the terms of a transaction, and if altered or erased fraudulently should make the writing inadmissible as evidence upon that question at least.⁵⁴ If the writing v

⁵¹ *Cochran v. Nebeker*, 48 Ind. 459; *Scofield v. Ford*, 56 Ia. 370, 9 N. W. 309; *Johnson v. Heagan*, 23 Me. 329; *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Bay v. Shrader*, 50 Miss. 326; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; *Gerrish v. Glines*, 56 N. H. 9; *Price v. Tallman*, *Coxe* (N. J.), 447; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382. See also *Law v. Crawford*, 67 Mo. App. 150. *Cf.* *Theopold v. Deike*, 76 Minn. 121, 78 N. W. 977, 77 Am. St. Rep. 607; *Lau v. Blomberg*, 3 Neb. (Unof.) 124, 91 N. W. Rep. 206; *Hubbard v. Williamson*, 5 Ired. 397. But if a condition qualifying the liability of the maker of a note is written with a pencil and the condition is afterwards erased, the maker has been held liable, because of his negligence, to a *bona fide* purchaser without notice on the note in its altered form. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257. This principle has been carried so far in some cases as to hold the maker liable when a condition written below the note has been cut off. *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Zimmerman v.*

Rote, 75 Pa. 188. These decisions are on their facts opposed to several cases cited above. *Cf.* *Brown v. Brown*, 79 Pa. 370, 21 Am. Rep. 75.

⁵² *Benton v. Clemmons*, 1 La. 658, 47 So. 582; *Fry v. P. Sewer Pipe Co.*, 179 Ind. 309, 10 E. 10; *Wicker v. Jones*, 159 N. E. 74, 801, 40 L. R. A. (N. S.) 1083. See generally the American cases on materiality and immateriality in *Caldwell v. Parker*, Ir. Rep. 519. This decision was dissented from in *Suffell v. Bank of England*, 1 D. 555.

⁵³ *Riggs v. St. Clair*, 1 Cranch 606; *Murray v. Klinzing*, 64 Conn. 29, 44 Atl. 244; *Gardiner v. Harbison*, 129 Ill. 129; *Magers v. Dunlap*, 39 Ill. 618; *Cheek v. Nall*, 112 N. C. 31, 80 S. E. 80. But see *Knill v. Williams*, 431 East, 431; *Wright v. Inshaw*, 1 D. (N. S.) 802; *Suffell v. Bank of England*, 9 Q. B. D. 555, 571; *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 129; *Low v. Argrove*, 30 Ga. 129; *Richardson v. Fellner*, 9 Okl. 51, 10 Pac. 270.

⁵⁴ See *supra*, § 1884. In *Suffell v. Bank of England*, 9 Q. B. D. 555, the Court of Appeal held an alteration of the number of a bank note ma

sole legal evidence by which the debt could be proved, the alteration would then be fatal to any recovery by the plaintiff; otherwise not.⁵⁵ The same may be said in regard to an alteration of the number of a bond or bank note;⁵⁶ or of adding⁵⁷ or erasing⁵⁸ the name of an attesting witness, where the legal effect of the instrument is not affected by

though admitting the change did not alter the legal effect of the contract. In *Craighead v. McLoney*, 99 Pa. 211, it was said, "Any alteration which changes the evidence or mode of proof is material," and in *Brady v. Berwind-White Co.*, 94 Fed. Rep. 28, 106 Fed. Rep. 824, 45 C. C. A. 662, an addition was held material which did not change the meaning of the writing, because it would render inadmissible parol evidence of facts contradicting the inserted words. This is in accordance with earlier Pennsylvania cases holding the addition of an attesting witness material. *Foust v. Renno*, 8 Pa. 378; *Henning v. Werkheiser*, 8 Pa. 518. See also *White Sewing Machine Co. v. Saxon*, 121 Ala. 399, 25 So. 784; *International Bank v. Parker*, 88 Mo. App. 117. If this principle were logically applied it would overthrow many of the cases of immaterial alteration collected here. With the English and Pennsylvania decisions may be compared *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636. In that case it was argued that the unauthorized addition of a United States revenue stamp was a material alteration. The lack of a stamp, though it would not have made the note inadmissible in evidence in the Massachusetts courts, would have made it inadmissible in the Federal courts. The addition therefore purported to enlarge the rights of the holder by affording evidence legal in the Federal courts. The plaintiff nevertheless recovered.

⁵⁵ See *supra*, § 1884; *infra*, § 1916.

⁵⁶ Such a change was held material in *Suffell v. Bank of England*, 9 Q. B.

D. 555; but immaterial in *Wylie v. Missouri Pac. Ry. Co.*, 41 Fed. Rep. 623; *State v. Cobb*, 64 Ala. 127, 157; *Comm. v. Emigrant Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Elizabeth v. Foroe*, 29 N. J. Eq. 587; *Birdsall v. Russell*, 29 N. Y. 220; *Note Holders v. Funding Board*, 16 Lea, 46, 57 Am. Rep. 211; *Fisk's Claim*, 11 Op. Atty. Gen. 258. Sometimes the number of a bond may affect the contract, as where bonds are paid as their numbers are drawn. See *Suffell v. Bank of England*, 9 Q. B. D. 555, 563.

⁵⁷ Held immaterial in *Hall v. Weaver*, 34 Fed. 104; *International Harvester Co. v. Davis*, 13 Ga. App. 1, 78 S. W. 770; *Ford v. Ford*, 17 Pick. 418; *State v. Gherkin*, 7 Ired. L. 206; *Beary v. Haines*, 4 Whart. 17; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600. But see *contra*, *White Sewing Machine Co. v. Saxon*, 121 Ala. 399, 25 So. 784; *Adams v. Frye*, 3 Met. 107; *Carson v. Woods (Mo.)*, 177 S. W. 623; *Girdner v. Gibbons*, 91 Mo. App. 412; *Foust v. Renno*, 8 Pa. 378; *Henning v. Werkheiser*, 8 Pa. 518; *Shiffer v. Mosier*, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155, 17 Ann. Cas. 756. It is material if the legal effect of the instrument would be changed thereby, as by extending the Statute of Limitations. *Milberry v. Storer*, 75 Me. 69, 46 Am. Rep. 361; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169. See also *Richardson v. Mather*, 178 Ill. 449, 53 N. E. 321.

⁵⁸ *Wickes v. Caulk*, 5 H. & J. 36. Cf. *Nunnery v. Cotton*, 1 Hawks, 222.

§ 1908 DISCHARGE BY CANCELLATION OR ALTERATION

attestation, but only the mode of proof. Retracing portions of a contract written in pencil is not mate

§ 1908. Materiality is a question of law.

Whether an alteration is material is a question of law decided by the court.⁵⁹

§ 1909. Assignment of altered contract generally gives validity—contract with blanks.

If a contract has been made void by alteration, no subsequent assignment, even if the contract is a negotiable note, can give it validity. The assignee or indorsee, an innocent purchaser for value, has no greater rights than the previous holder.⁶⁰ This rule has, however, been qualified by statute so far as negotiable instruments are concerned.⁶¹

⁵⁹ *Tutwiler v. Burns*, 160 Ala. 386, 49 So. 455.

⁶⁰ *Steele v. Spencer*, 1 Pet. 552, 7 L. Ed. 259; *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Ofenstein v. Bryan*, 20 App. D. C. 1; *Milliken v. Marlin*, 66 Ill. 13; *Snell v. Davis*, 149 Ill. App. 391; *Cochran v. Nebeker*, 48 Ind. 459; *Hessig-Ellis Drug Co. v. Todd-Baker Drug Co.*, 161 Ia. 535, 143 N. W. 569; *Holyfield v. Harrington*, 84 Kan. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131; *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375; *Belfast Nat. Bank v. Harriman*, 68 Me. 522; *Fisher-dick v. Hutton*, 44 Neb. 122, 62 N. W. 488; *Burnham v. Ayer*, 35 N. H. 351; *Stephens v. Graham*, 7 S. & R. 505, 10 Am. Dec. 485; *Kinard v. Glenn*, 29 S. C. 590, 8 S. E. 203.

⁶¹ *Master v. Miller*, 4 T. R. 320; *Vance v. Lowther*, 1 Ex. D. 176; *Suffell v. Bank of England*, 9 Q. B. D. 555; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Burwell v. Orr*, 84 Ill. 465; *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; *McCoy v. Lockwood*, 61 Ind. 319; *Eckert v. Louis*, 84 Ind. 99, 104; *Horn*

v. Newton Bank, 32 Kan. 511, 1022; *Farmer v. Rand*, 14 L. R. A. 1059; *Belknap v. National Bank*, 100 Mass. 376; *Cape Ann v. Burns*, 129 Mass. 596; *Huntersons*, 22 Mich. 96; *Coles v. Y. Minn.* 464, 10 N. W. 775 (modified); *Trigg v. Taylor*, 27 Mo. 245, Dec. 263; *Hurlbut v. Hall*, 39 N. W. 538; *Erickson v. First Nat. Bank*, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753; *H. Dennett*, 11 N. H. 180; *Get Bank v. Chisholm*, 169 Pa. 564, 730, 47 Am. St. Rep. 929; *Shaw v. Mosier*, 225 Pa. 552, 74 Atl. 251; *L. R. A. (N. S.)* 1155, 17 Ann. C. 1; See also *Burwell v. Orr*, 84 Ill. 465; *Pereau v. Frederic*, 17 Neb. 1, 1 N. W. 235; *Walla Walla Co. v. 1 Wash. Ty.* 339; *Bradbury v. Putt*, 95 Wash. 670, 164 Pa. (mortgage).

⁶¹ The English Bills of Exchange Act, § 65 (1) contains the following proviso: "Provided that where the bill has been materially altered the alteration is not apparent on the face of the bill and the bill is in the hands of a holder in due course."

How far the rule is also subject to an exception if the alteration consisted in filling in a blank left by the obligor is a disputed question. If the instrument was incomplete and a blank in it was later filled in accordance with express or implied authority, the case is covered by what has been said of alterations made by consent.⁶²

Issuing a negotiable instrument with blanks gives any *bona fide* holder authority to fill them with appropriate words.⁶³ This is so enacted in the Uniform Negotiable Instruments Law.⁶⁴

The same principle has been applied to other contracts.⁶⁵

course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." And the substance of this proviso has been adopted in Sec. 124 of the Negotiable Instruments Law in the United States, see *supra*, § 1193, also *Schwartz v. Wilmer*, 90 Md. 136, 143, 44 Atl. 1059.

⁶² See *Kramer v. Schnitzer*, 268 Ill. 603, 109 N. E. 695; *State v. Dean*, 40 Mo. 464; *Montgomery v. Dresher*, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. (N. S.) 423; *Kinney v. Schnitt*, 12 Hun, 521; *Stahl v. Berger*, 10 S. & R. 170, 13 Am. Dec. 666; *Walla Walla Co. v. Ping*, 1 Wash. Ty. 339; *John Kindler Co. v. First Nat. Bank*, 61 Ind. App. 79, 109, N. E. 66; *Johnston v. Hoover*, 139 Ia. 143, 117 N. W. 277. See further, *supra*, § 1894.

⁶³ *Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763; *Huntington v. Bank*, 3 Ala. 186; *Visher v. Webster*, 8 Cal. 109; *Blochman Commercial & Sav. Bank v. Ketcham* (Cal. App.), 171 Pac. 1084; *Norwich Bank v. Hyde*, 13 Conn. 279; *Riddle v. Stevens*, 32 Conn. 378, 390, 87 Am. Dec. 181; *Young v. Ward*, 21 Ill. 223; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Lowden v. Schoharie County Nat. Bank*, 38 Kan. 533, 16 Pac. 748; *Bank v. Curry*, 2 Dana, 142;

Cason v. Grant County Bank, 97 Ky. 487, 31 S. W. 40, 53 Am. St. Rep. 418; *Diamond Distilling Co. v. Cott*, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643; *Ives v. Farmers' Bank*, 2 Allen, 236; *Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603; *First Nat. Bank v. Webster*, 1 121 Mich. 149, 79 N. W. 1088; *Russell v. Langstaffe*, Doug. 514; *Scotland Bank v. O'Connell*, 23 Mo. App. 165; *Mitchell v. Culver*, 7 Cow. 336; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Waggoner v. Millington*, 8 Hun, 142; *Porter v. Hardy*, 10 N. Dak. 551, 88 N. W. 458; *Merchants' Nat. Bank v. Brastrup* (N. Dak.), 168 N. W. 42; *Fullerton v. Sturges*, 4 Ohio St. 529; *Cox v. Alexander*, 30 Ore. 438, 46 Pac. 794; *Wessell v. Glenn*, 108 Pa. 104; *Douglas v. Scott*, 8 Leigh, 43. But see *contra*, *Inglish v. Breneman*, 9 Ark. 122, 47 Am. Dec. 735; *Holmer v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Morehead v. Parkersburg Bank*, 5 W. Va. 74, 13 Am. Rep. 636 (overruled in *First Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506). See also *Young v. Baker*, 29 Ind. App. 130, 64 N. E. 54; *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

⁶⁴ Sec. 14. See *supra*, § 1141.

⁶⁵ *Roe v. Town Ins. Co.*, 78 Mo. App. 452; *Kinney v. Schmitt*, 12 Hun, 521. Cf. *Solon v. Williamsburgh Bank*, 114 N. Y. 122, 21 N. E. 168.

If a negotiable instrument was incomplete and the holder or another authorized to fill the blank in a certain way filled it in a different way, a holder in due course of the complete instrument can recover as if the instrument had been filled in accordance with authority.⁶⁶ But this principle was inapplicable to a bill of lading.^{66a} If, however, a holder takes the issue in blank he must at his peril ascertain the extent of the authority to fill in the blanks.⁶⁷

Where the instrument was complete when issued but contained spaces which could be filled in without exciting suspicion, there is no agency. If the obligor is liable, it must be because he was so negligent in leaving spaces which invited alteration that he cannot be allowed to assert the defense of alteration against an innocent holder. In the leading case of *Young v. Grote*,⁶⁸ the maker was held liable when he had carelessly left an unfilled space after the amount on a check. The case seems sound in principle and has been followed in the United States;⁶⁹ though there are contrary

⁶⁶ Uniform Neg. Inst. Law, Sec. 14. See *supra*, § 1141; *Hatch v. Searles*, 2 Sm. & G. 147; *Garrard v. Lewis*, 10 Q. B. D. 30; *Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763; *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Elliott v. Levings*, 54 Ill. 213; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *De Pauw v. Bank*, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 557; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567. (Cf. *Pope v. Branch County Bank*, 23 Ind. App. 210, 54 N. E. 835.) *Woolfolk v. Bank of America*, 10 Bush, 504; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; *Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603; *Simmons v. Atkinson*, 69 Miss. 862, 12 So. 263, 865; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Ross v. Doland*, 29 Ohio St. 473; *Cox v. Alexander*, 30 Oreg. 438, 46 Pac. 794; *Wessell v. Glenn*, 108 Pa. 104; *Orrick v. Col-*

ston, 7 Gratt. 189. But see *Fitch v. Stevens*, 32 Conn. 378, 87 Am. Rep. 181; *Holmes v. Trumper*, 22 Conn. 427, 7 Am. Rep. 661; *Solon v. Wallingburgh Bank*, 114 N. Y. 122, 21 N. E. 168; *Porter v. Hardy*, 10 N. D. 188, 88 N. W. 458.

^{66a} *Lehman v. Central R. Co.*, 101 Fed. 595.

⁶⁷ See *supra*, § 1141.

⁶⁸ 4 Bing. 253.

⁶⁹ *Young v. Lehman*, 63 Ala. 580, 10 Am. Rep. 120; *Winter v. Pool*, 104 Ala. 580, 10 Am. Rep. 120; *Merritt v. Boyde*, 104 Ala. 543; *Yocum v. Smith*, 63 Ill. 31, 10 Am. Rep. 120; *Merritt v. Boyde*, 104 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 120; *Lowden v. Schoharie County Bank*, 38 Kan. 533, 16 Pac. 104; *Blakey v. Johnson*, 13 Bush, 104, 10 Am. Rep. 254; *Cason v. Grant*, 10 Ky. 487, 31 S. W. 40, 10 Am. St. Rep. 418; *Hackett v. First Bank*, 114 Ky. 193, 70 S. W. 664. (See *Commercial Bank v. Arder*, 10 Ky. 520, 197 S. W. 951, L. R. A. 101, 10 B. 321.) *Isnard v. Torres*, 10 La.

sions.⁷⁰ *Young v. Grote*, though regarded for a number of years as overruled in England,⁷¹ has now been approved by the House of Lords, so far as to hold that the customer of a bank must take reasonable precautions against alterations;⁷² and it is to be hoped that this decision may influence courts in the United States which were previously disposed to a contrary view. Of course, it is only when spaces are left in such a way that the obligor must be regarded as careless in view of existing mercantile usage that the doctrine of *Young v. Grote* is applicable.⁷³ To the argument commonly made that the fraud or crime of the person raising the check is the proximate cause of the injury, it has been well said: "Fraud and crime are facts in this world which can be foreseen and guarded against just like other facts. They are occasional and violent, but so are washouts and the escape of high-tension currents. Under some circumstances intentional unlawful acts are events which

103; *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520; *First Bank v. Webster*, 121 Mich. 149, 79 N. W. 1068; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Scotland County Bank v. O'Connel*, 23 Mo. App. 165; *Timbel v. Garfield Nat. Bank*, 121 N. Y. App. D. 870, 106 N. Y. S. 497. [But see *National Exchange Bank v. Lester*, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402.] *Humphrey v. Herrick*, 72 Neb. 878, 101 N. W. 1016, 102 N. W. 1010; *Garrard v. Hadden*, 67 Pa. 82, 5 Am. Rep. 412; *Zimmerman v. Rote*, 75 Pa. 188; *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699; *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 610, 70 Atl. 876; *Johnston Harvester Co. v. Mo-Lean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

⁷⁰ *Exchange Nat. Bank v. Bank of Little Rock*, 58 Fed. 140, 7 C. C. A. 111; *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *De Pauw v. Bank of Salem*, 126 Ind. 553, 25 N. E. 705, 10 L. R. A. 46; *Knox-*

ville Bank v. Clarke, 51 Ia. 264, 1 N. W. 491, 33 Am. Rep. 129; *First Bank v. Zeims*, 93 Ia. 140, 61 N. W. 483; *Commercial Bank v. Arden*, 177 Ky. 520, 197 S. W. 951, L. R. A. 1918 B. 320; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378; *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497; *Simmons v. Atkinson*, 69 Miss. 862, 12 S. E. 263, 23 L. R. A. 599; *Goodman v. Eastman*, 4 N. H. 455; *Worrall v. Gheen*, 39 Pa. 388; *Searles v. Seipp*, 6 S. Dak. 472, 61 N. W. 804.

⁷¹ *Scholfield v. Londesborough*, [1895] 1 Q. B. 536, [1896] A. C. 514; *Colonial Bank v. Marshall*, [1906] A. C. 559; *Macmillan v. London Joint Stock Bank*, [1917] 1 K. B. 363, 2 K. B. 439 (reversed in [1918] A. C. 776).

⁷² *London Joint Stock Bank v. Macmillan*, [1918] A. C. 776.

⁷³ See cases cited, *supra*, n. 69, also *Harvey v. Smith*, 55 Ill. 224; *Derr v. Keaough*, 96 Ia. 397, 65 N. W. 339; *Bank of Billings v. Wade*, 73 Mo. App. 558; *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699.

the average reasonable man would take care to avoid of the injury threatened to others clearly within range of criminal character of these acts then becomes immaterial purposes of the law of negligence. There is a duty not to injure in this way any more than by non-human methods. There is nothing in the Uniform Negotiable Instrument Act which should control the question.⁷⁵

Most of the decisions relate to makers of notes or drawers of checks, and it is obvious that there is at least a difference in the degree of negligence of one who indorses a carelessly drawn instrument and that of one who makes it; but in *Louis v. Indorser*⁷⁶ and a certifying bank⁷⁷ have been held liable for putting their names on carelessly drawn instruments.

On the other hand, some courts which would derive a more general duty owing by those who make negotiable instruments would recognize that a depositor must exercise reasonable care in his dealings with his bank and that, therefore, a bank which pays a depositor's raised or altered check can charge the payment to him if his negligence facilitated the fraud.⁷⁸ The rule of *Young v. Grote* is applicable to instruments other than negotiable paper.⁷⁹

⁷⁴ 31 Harv. L. Rev. 783.

⁷⁵ The general provision of Sec. 124 that unauthorized alteration avoids a negotiable instrument cannot be held to include an alteration for which the maker is the responsible cause, though he has not authorized it. See 31 Harv. L. Rev. 779. In *Commercial Bank v. Arden*, 177 Ky. 520, 197 S. W. 951, L. R. A. 1918 B. 320, however, the Kentucky Court of Appeals held that the statute precluded a bank from charging its customer with the amount of a raised check, even though negligence of the drawer in leaving spaces facilitated the fraud. In *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 610, 70 Atl. 876, the court quoted

with approval language from a previous decision to the effect that carelessly drawing a check would render the drawer liable. The Negotiable Instrument Law, though in force, was not referred to in this connection.

⁷⁶ *Isnard v. Torres*, 10 La. Ann. 520. A surety was similarly held liable in *Hackett v. First Nat. Bank*, 189, 70 S. W. 664. A contrary decision as to an indorser is *Burrows v. State*, 70 Md. 451, 17 Atl. 378, 14 Am. Rep. 371, 3 L. R. A. 576.

⁷⁷ *Helwege v. Hibernia Nat. Bank*, La. Ann. 520.

⁷⁸ See *London Joint Stock Bank v. Macmillan*, [1918] A. C. 776; *Company of America v. Conklin*

⁷⁹ *Lehman v. Central Co.*, 12 Fed. 595; *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *Smith v. Holzhauser*, 67 N. J. L. 202, 50 Atl. 683;

Searles v. Seipp, 6 S. Dak. 472, 7 W. 804. See also *Solon v. Wilburgh Bank*, 114 N. Y. 122, 136, 1 E. 168.

§ 1910. Formerly debt died with the writing—reason for the rule.

While the doctrine of alteration was applied only to obligations under seal, there was no question that if the validity of the document was destroyed by alteration, the debt represented by the document was equally destroyed, and in no form of action could the holder get relief. But with the extension of the doctrine of alteration to writings which are only evidence, and perhaps not the sole evidence, of the obligation, the technical reason for regarding the obligation as totally destroyed does not hold good; for the existence of a simple contract obligation is not in theory dependent on the evidence by which it is proved. If, therefore, in such a case the obligee is held to lose all rights, even though it would be possible to prove the obligation by legal evidence, it is because the policy requiring that the purity of written evidence shall be maintained demands the imposition of a severe penalty on those who tamper with such evidence.

Whether the rule against alteration is wider in its effect than a rule of evidence, forbidding the use of writings materially and wrongfully altered, is well illustrated by the case of a contract executed in duplicate, one part of which is thereafter fraudulently and materially altered. If the requirement of the law is merely that the altered writing shall not be given in evidence, the fraudulent party may still prove his right by the unaltered part, for each part is an original.⁸⁰ But if the fact that he has fraudulently altered a writing which embodies the contract is, as matter of substantive law, a defence there can be no recovery.^{80a}

N. Y. Misc. 1, 119 N. Y. S. 367; *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826. Illustrations of the depositor's duty where the negligence in question was not careless drawing of a check may be found in *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811; *Dana v. National Bank*, 132 Mass. 156; *Weisberger v. Barberton*, 84 Ohio St. 21, 95 N. E. 379.

⁸⁰ 1 Greenl. Ev. (16th ed.), § 563.

^{80a} The former view is supported by two decisions in regard to duplicate leases. *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jones v. Hoard*, 59 Ark. 42, 26 S. W. 193, 43 Am. St. Rep. 17. Since a lease is primarily a conveyance, these cases may perhaps be distinguished from the case supposed. But *Jones v. Hoard* was followed in the case of an executory contract in *Barkley v. Atlantic Coast Realty Co.*, 170 N. C. 481, 87 S. E. 219. Certainly

§ 1911. Recovery on original debt allowed in the States where alteration not fraudulent.

In most of the cases upon the point the altered was a bill of exchange or promissory note, and it has been held in England that as between the original and the alteration does not extinguish the liability on account of the instrument was given.⁸¹ In the United States the distinction has been taken between an alteration made fraudulently and an alteration not made fraudulently. In the latter case it has been seen, the alteration in many jurisdictions will not bar recovery on the instrument itself;⁸² but where such recovery is barred, relief is granted by allowing recovery on the original debt or consideration for which the instrument was given.

the conclusion, as applied to executory contracts, cannot be regarded as free from doubt. An affirmative plea alleging alteration of the contract would, it seems, set up a good defence and would be supported by proof of the facts. *Chitty, Pleading* (16th Am. ed.), 299; *infra*, § 1915; and the alteration of one copy was held fatal to recovery in *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49. On the other hand, *Rev. L. Okl.* (1910), § 991 provides: "Where a contract is executed in duplicate an alteration or destruction of one copy while the other exists, is not within the provisions of the last section" (which provides that intentional material alteration extinguishes executory obligations in favor of one guilty thereof). See *Magnolia Petroleum Co. v. Saylor* (Okl.), 180 Pac. 861.

⁸¹ *Atkinson v. Hawdon*, 2 A. & E. 628; *Sloman v. Cox*, 1 C. M. & R. 471. See also *Hall v. Fuller*, 5 B. & C. 750.

But there could be no recovery against a party secondarily liable on the instrument, for the consideration received by him, since the alteration has deprived him of any right to recover over against prior parties to the instrument. *Alderson v. Langdale*, 3 B. & Ad. 660.

⁸² See *supra*, § 1893.

⁸³ *Green v. Sneed*, 101 Ala. 277, 46 Am. St. Rep. 118; *v. Fowler*, 1 Root, 94; *W. Layton*, 3 Harr. (Del.) 404; *Ripper*, 34 Ill. 100, 85 Am. D. Elliott v. Blair, 47 Ill. 342; *W. Wallace*, 8 Ill. App. 69; *First Ryan*, 31 Ill. App. 271, 38 Ill. 268, *affd.* 148 Ill. 349, 35 N. E. *Hayes v. Wagner*, 89 Ill. App. *Hampton v. Mayes*, 3 Ind. Ty. S. W. 483; *Krause v. Meyer*, 32 566; *Morrison v. Huggins*, 53 Io 4 N. W. 854; *Eckert v. Pickel*, 56 545, 13 N. W. 708; *Maguire v. meier*, 109 Ia. 301, 304, 80 N. W. *Edington v. McLeod*, 87 Kans. 42 Pac. 163, 41 L. R. A. (N. S. *Ramsey v. Utica Deposit Banl*, Ky. 263, 160 S. W. 943; *Her Harvey*, 15 Me. 357; *Morris Welty*, 18 Md. 169; *Owen v. Hl Md.* 97, 16 Atl. 376; *Jeffrey v. F. feld*, 179 Mass. 506, 61 N. E. *McCormick Harvesting Mach. C Blair*, 146 Mo. App. 374, 124 S. W. *State Bank v. Shaffer*, 9 Neb. 1, W. 980; *Lewis v. Schenck*, 18 N. J. 459, 90 Am. Dec. 631; *Hunt v. Gra. N. J. L.* 227, 10 Am. Rep. 232; *Me v. Boury*, 4 Ohio St. 60; *Sava Savage*, 36 Ore. 268, 59 Pac.

Where the instrument was given in conditional payment of an antecedent debt, there is no difficulty in reaching this result. The instrument has not been paid at maturity, and the old debt therefore still exists. But the same result would probably be reached in the United States, though no debt had ever existed before the transaction of which the delivery of the instrument was a part, though a recovery of the consideration or its value must in such a case be supported on principles of quasi-contract.⁸⁴ If a material alteration is made fraudulently, however, no recovery can be had in any form of action either on the instrument or the original debt or consideration.⁸⁵

§ 1912. Application of doctrine to mortgages.

The application of these principles seems clear in the case of alteration of a mortgage note or bond. If the effect of the alteration is to discharge not simply the note or bond, but the debt itself, the mortgage, being an incident of the debt, must

Keene v. Weeks, 19 R. I. 309, 33 Atl. 446; *Wyckoff v. Johnson*, 2 S. Dak. 91, 48 N. W. 837; *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108; *Otto v. Half*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766. See also *Craig v. Lowe*, 36 Ga. 117. *Contra*, are *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722.

As the note, though void because of alteration, may be injurious to the defendant if it remains outstanding, the plaintiff is required to surrender it in order to recover the consideration. *Morrison v. Welty*, 18 Md. 169; *Smith v. Mace*, 44 N. H. 553, 560; *Booth v. Powers*, 56 N. Y. 22, 31. *Cf. Eckert v. Pickel*, 59 Ia. 545, 13 N. W. 708.

⁸⁴ In *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108, the right of an innocent holder of an altered note to recover on the original consideration was stated as existing only where the note was taken

in conditional payment. *Cf. Jeffrey v. Rosenfeld*, 179 Mass. 506, 509, 61 N. E. 421.

⁸⁵ *Elliott v. Blair*, 47 Ill. 342; *Ballard v. Franklin Ins. Co.*, 81 Ind. 239; *Woodworth v. Anderson*, 63 Ia. 503, 19 N. W. 296; *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839; *Sherman v. Connecticut Mut. L. Ins. Co.*, 222 Mass. 159, 110 N. E. 159; *Warder, etc., Co. v. Willyard*, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; *Bank of Lauderdale v. Cole*, 111 Miss. 39, 71 So. 260; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468; *Martendale v. Follett*, 1 N. H. 95; *Smith v. Mace*, 44 N. H. 553; *Clute v. Small*, 17 Wend. 238; *Kennedy v. Crandell*, 3 Lans. 1; *Meyer v. Huneke*, 55 N. Y. 412; *Booth v. Powers*, 56 N. Y. 22; *Columbia Distilling Co. v. Rech*, 151 N. Y. App. Div. 128, 135 N. Y. S. 206; *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108. Otherwise in South Carolina. See the following note.

also fall.⁸⁶ If, however, the alteration was not due to fraud of the holder, the debt is not discharged, whether the altered obligation is or not; and if the debt is not discharged the mortgage will survive.⁸⁷ If a mortgage is given to secure several separate obligations, such an alteration of one of them as avoids the debt represented thereby, avoids also the lien of the mortgage as to that obligation, but not as to the other obligations.⁸⁸

Though an obligor whose obligation has been materially and fraudulently altered may thus keep the consideration which he has received without giving any equivalent for it, he would not be allowed to enforce an executory obligation, given in exchange for the altered obligation, while repudiating his own obligation on account of the alteration. He must either perform his obligation as if it had not been altered, or rescind both obligations.⁸⁹

§ 1913. Alteration of writing before delivery precludes recovery.

To speak of alteration as a method of discharging contracts necessarily assumes a contract at one time binding, and subsequently altered. In some cases, however, a writing is altered before it has become a binding contract by delivery or assent. This most commonly happens where a surety or joint obligor signs an obligation and entrusts it to the principal debtor or co-obligor, who alters it before delivering it to the creditor, but

⁸⁶ *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Elliott v. Blair*, 47 Ill. 342; *Tate v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84; *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468.

In South Carolina, even a fraudulent alteration by the holder of the note or bond will not discharge the mortgage. *Plyler v. Elliott*, 19 S. C. 257; *Smith v. Smith*, 27 S. C. 166, 3 S. E. 78; 13 Am. St. Rep. 633; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842. See also *Bailey v. Gilman Bank*, 99 Mo. App. 571, 578, 74 S. W. 874.

⁸⁷ *Elliott v. Blair*, 47 Ill. 342; *Clough v. Seay*, 49 Ia. 111; *Edington v. McLeod*, 87 Kan. 426, 124 Pac. 163, 41 L. R. A. (N. S.) 230, Ann. Cas. 1913 E. 315; *Simpson v. Sheley*, 9 Kan. App. 512, 60 Pac. 1098; *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49; *Hoffman v. Molloy*, 91 Mo. App. 367; *Bailey v. Gilman Bank*, 99 Mo. App. 571, 74 S. W. 874; *Gillette v. Smith*, 18 Hun, 10; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80.

⁸⁸ *Parke Co. v. White River Lumber Co.*, 110 Cal. 658, 43 Pac. 202; *Hoffman v. Molloy*, 91 Mo. App. 367.

⁸⁹ *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652.

the same question may arise in any case where a writing is entrusted to an agent to deliver and is altered before delivery. It seems clear on principle that, however innocent the obligee may be or however innocently the alteration may have been made, so long as it is material, a non-assenting obligor cannot be held.⁹⁰ He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered or assented to by the creditor. A court may on equitable principles enforce an obligation, once valid, though technically destroyed or discharged, but only under exceptional circumstances can it construct and enforce an obligation which never existed, on the ground that the defendant was once willing to enter into such an obligation and would have done so if the writing had not been altered.⁹¹

§ 1914. Qualification of the rule.

This principle is, however, subject to a qualification. If the writing was entrusted to one with actual or apparent authority

⁹⁰ *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352; *People v. Kneeland*, 31 Cal. 288; *Palton v. San Jacinto Co.*, 113 Cal. 21, 45 Pac. 12; *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *State v. Craig*, 58 Ia. 238, 12 N. W. 301; *Builders' Lime & Cement Co. v. Weimer*, 170 Ia. 444, 151 N. W. 100; *Warren v. Fant*, 79 Ky. 1; *Waterman v. Vose*, 43 Me. 504; *Howe v. Peabody*, 2 Gray, 556; *Citizens' Bank v. Richmond*, 121 Mass. 110; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Robinson v. Berryman*, 22 Mo. App. 509; *Mockler v. St. Vincent's Inst.*, 87 Mo. App. 473; *McGavock v. Morton*, 57 Neb. 385, 77 N. W. 785; *Goodman v. Eastman*, 4 N. H. 455; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372;

Crawford v. West Side Bank, 100 N. Y. 50, 57, 2 N. E. 881, 53 Am. Rep. 152; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664; *Newman v. King*, 54 Ohio St. 273, 43 N. E. 683, 35 L. R. A. 471, 56 Am. St. Rep. 705; *Washington Finance Corp. v. Glass*, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043. See also *Bracken County v. Daum*, 80 Ky. 388; *Sharpe v. Bellis*, 61 Pa. 60, 100 Am. Dec. 618; *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346.

⁹¹ See *supra*, § 1548. This, however, was done in *Latashaw v. Hildebeitel*, 2 Penny. 257; and under the Negotiable Instruments Law it has been held liability may be enforced by a holder in due course. *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Packard v. Windholz*, 88 N. Y. App. D. 365, 84 N. Y. S. 888.

to make the alteration in question, the obligor will be bound by the instrument in its altered form, and the courts have gone very far in inferring such authority. Thus where a note is entrusted by a signer to one who is to borrow money upon it, and the latter without authority procures additional signatures to the note,⁹² or an attesting witness⁹³ the original signer is liable. So where a note, signed in blank for accommodation and entrusted to the accommodated party, is filled out by him and later before delivery altered;⁹⁴ and where a note entrusted to the accommodated party in a complete form was wrongly drawn and was altered before delivery so that it should conform to the intention of the parties,⁹⁵ and even where names of obligors previously on the note have been erased and others substituted, the same result has been reached.⁹⁶

§ 1915. Pleading.

The pleading appropriate to enable a defendant to take advantage of alteration depends on whether the plaintiff bases his action on the obligation in its original or in its altered form. In the latter case the defendant should deny the making of the

⁹² *Hochmark v. Richler*, 16 Col. 263, 26 Pac. 818; *Governor v. Lagow*, 43 Ill. 134; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567; *Fry v. P. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10; *Hall's Admr. v. McHenry*, 19 Ia. 521; *Graham v. Rush*, 73 Ia. 451, 35 N. W. 518; *Devoy & Kuhn Coal &c. Co. v. Huttig*, 174 Ia. 357, 156 N. W. 412; *Edwards v. Mattingly*, 107 Ky. 332, 53 S. W. 1032; *Brey v. Hagan*, 110 Ky. 566, 62 S. W. 1, 96 Am. St. Rep. 464; *Evans v. Partin*, 22 Ky. L. Rep. 20, 21, 56 S. W. 648, 1130; *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; *Babcock v. Murray*, 58 Minn. 385, 59 N. W. 1038; *Kiefer v. Tolbert*, 128 Minn. 519, 151 N. W. 529; *Standard Cable Co. v. Stone*, 35 N. Y. App. Div. 62, 54 N. Y. S. 383. But see *contra*, *Lunt v. Silver*, 5 Mo. App. 186, and *cf. Elleamere Co. v. Cooper* [1896] 1 Q. B. 75.

⁹³ *Hall v. Weaver*, 34 Fed. 104.

⁹⁴ *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Douglass v. Scott*, 8 Leigh, 43. But if the blanks are filled in and the note negotiated, the accommodated party cannot on subsequently recovering the note change its terms. *Ofenstein v. Bryan*, 20 App. D. C. 1.

⁹⁵ *Boyd v. Brotherson*, 10 Wend. 93.

⁹⁶ *Jones v. Shelbyville Ins. Co.*, 1 Met. (Ky.) 58; *Hall v. Smith*, 14 Bush, 604, 612; *King Co. v. Ferry*, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880. It is submitted that this result is wrong. Even though the alteration is not apparent, there can be no ground of estoppel unless the original signer was guilty of negligence. These decisions seem opposed to *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *State v. Blair*, 32 Ind. 313. See also *State v. Craig*, 58 Ia. 238, 12 N. W. 301.

contract alleged, by plea of *non est factum* or *non assumpsit* or modern equivalents.⁹⁷ In the former case the defendant may plead affirmatively that the obligation has been altered,⁹⁸ but in the United States he would also generally succeed by denying the making of the obligation, for the burden would then be on the plaintiff to prove this and on the defendant's objection to the original writing because fraudulently altered and to secondary evidence because the non-production of the original was not satisfactorily accounted for, the plaintiff would be unable to sustain this burden.⁹⁹ The affirmative plea is, therefore, strictly necessary only in cases in which the rule of substantive law applicable is more stringent than the rule of evidence, as in jurisdictions where an innocent material alteration is held fatal.

§ 1916. Evidence.

There are many decisions in regard to the admissibility of altered writings in evidence, and presumptions have been laid down as rules of law in a way to confuse the subject. Many courts hold that when a writing offered in evidence shows on its face an alteration, there is a presumption that the alteration was improperly made after the execution of the writing, and that, therefore, a burden is cast upon the party offering the writing to explain the alteration before the writing can be received in evidence.¹ Other courts hold that in the absence

⁹⁷ *Cock v. Coxwell*, 2 C. M. & R. 291; *Yancy v. Gordon*, 172 Ala. 439, 55 So. 239, Ann. Cas. 1913 E. 251; *Mo-Caskey Register Co. v. Bennett*, 6 Ala. App. 185, 60 So. 541; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *J. I. Case Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470; *Daniel v. Daniel*, Dud. (Ga.) 239; *Conner v. Sharpe*, 27 Ind. 41; *Lincoln v. Lincoln*, 12 Gray, 45; *Cape Ann Bank v. Burns*, 129 Mass. 596; *Whitmer v. Frye*, 10 Mo. 348; *Nat. Bank v. Nickell*, 34 Mo. App. 295; *Schwartz v. Oppold*, 74 N. Y. 307; *Farmers' Trust Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358; *Zeigler v. Sprengle*, 7 Watts & S. 175; *Churchill v. Capen*, 84 Vt. 104, 78 Atl. 734.

⁹⁸ *Field v. Woods*, 7 A. & E. 114;

Davidson v. Cooper, 11 M. & W. 778; *Croockewit v. Fletcher*, 1 H. & N. 893.

⁹⁹ *First Nat. Bank v. Mack*, 35 Ore. 122, 127, 57 Pac. 326; *Kansas Mut. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388.

¹ *Brady v. Berwind-White Co.*, 106 Fed. 824, 45 C. C. A. 662; *Arnold v. Wood*, 127 Ark. 234, 191 S. W. 960; *Warren v. Layton*, 3 Harring. (Del.) 404; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Montag v. Linn*, 23 Ill. 551; *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Dewey v. Merritt*, 106 Ill. App. 156; *Rambousek v. Supreme Council*, 119 Ia. 263, 93 N. W. 277 (but see Iowa case in the following note); *McMicken v. Beauchamp*, 2 La. 290; *Dreyfuss v. Process Oil &*

of suspicious circumstances there is exactly the opposite presumption, namely, that the alteration was made innocently and legally.² Nor is it always clear whether in speaking of

Fuel Co., 142 La. 564, 77 So. 283; *Arnold v. Brechtel*, 174 Mich. 147, 140 N. W. 610; *Ellison v. Mobile, etc., R. Co.*, 36 Miss. 572; *Withers v. Hart*, 96 Miss. 453, 51 So. 714 (cf. *Jackson v. Day*, 80 Miss. 800, 31 So. 536); *Patterson v. Fagan*, 38 Mo. 70 (but see Missouri cases in the following note); *Burton v. American Ins. Co.*, 96 Mo. App. 204, 70 S. W. 172 (if proved to have been made after delivery); *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187 (but see Nebraska cases in the following note); *Hills v. Barnes*, 11 N. H. 395; *Burnham v. Ayer*, 35 N. H. 351; *Ames v. Manhattan Ins. Co.*, 31 N. Y. App. Div. 180, 185, 52 N. Y. S. 759, affd. 167 N. Y. 584, 60 N. E. 1106; *Eisner v. Crommette*, 151 N. Y. S. 3; *Merchants' Nat. Bank v. Brastrup* (N. Dak.), 168 N. W. 42 (only if the alteration purports to increase the liability of the adverse party); *Simpkins v. Windsor*, 21 Oreg. 382, 28 Pac. 72; *First Bank v. Mack*, 35 Oreg. 122, 57 Pac. 326; *Clark v. Eckstein*, 22 Pa. 507, 62 Am. Dec. 307; *Jordan v. Stewart*, 23 Pa. 244; *Burgwin v. Bishop*, 91 Pa. 336; *Conrog v. Wilson*, 231 Pa. 281, 80 Atl. 174 (otherwise if the change does not appear to be beneficial to the party offering the instrument. *Bowman v. Berkey*, 259 Pa. 327, 103 Atl. 49); *Park v. Glover*, 23 Tex. 469; *Collins v. Ball*, 82 Tex. 259, 268, 17 S. W. 614, 27 Am. St. Rep. 877; *Bullock v. Sprowls*, 54 S. W. 657 (Tex. Civ. App.); *Elgin v. Hall*, 82 Va. 680; *Bradley v. Dells Lumber Co.* 105 Wis. 245, 81 N. W. 394. See also *Stevens v. Odlin*, 109 Me. 417, 84 Atl. 899.

² *Doe v. Catomore*, 16 Q. B. 745; *Little v. Herndon*, 10 Wall. 26, 19 L. Ed. 878; *Rankin v. Tygard*, 198

Fed. 795, 119 C. C. A. 591; *Ward v. Cheney*, 117 Ala. 238, 22 So. 996; *E. E. Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458; *Corcoran v. Doll*, 32 Cal. 82; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Cross v. Abey*, 55 Fla. 311, 45 So. 820; *Calhoun v. McKay*, 64 Fla. 226, 60 So. 182; *Printup v. Mitchell*, 17 Ga. 558; *Bedgood v. McLain*, 89 Ga. 793, 15 S. E. 670; *Gilmer v. Harrison*, 146 Ga. 721, 92 S. E. 67; *Westmoreland v. Westmoreland*, 92 Ga. 233, 17 S. E. 1033; *Dangel v. Levy*, 1 Idaho, 722; *Exchange State Bank v. Taber*, 26 Idaho, 723, 145 Pac. 1090; *Stoner v. Ellis*, 6 Ind. 152; *Thorp v. Jamison*, 154 Ia. 77, 134 N. W. 583, 39 L. R. A. (N. S.) 100; *Pike County v. Sowards*, 147 Ky. 37, 143 S. W. 745; *Sirrine v. Briggs*, 31 Mich. 443; *Brand v. Johnrowe*, 60 Mich. 210, 26 N. W. 883; *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754; *Matthews v. Coalter*, 9 Mo. 696; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Adams v. Yates*, 143 Mo. 475, 481, 45 S. W. 304; *Trimble v. Elkin*, 88 Mo. App. 229, 234; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556; *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715; *German-American Bank v. Manning*, 133 Mo. App. 294, 298, 113 S. W. 251; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 81 Neb. 517, 116 N. W. 157, 18 L. R. A. (N. S.) 680, 129 Am. St. Rep. 703; *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Hodge v. Scott*, 1 Neb. (Unof.) 619, 95 N. W. 837; *Teske v. Baumgart*, 99 Neb. 479, 156 N. W. 1044; *North River Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 263; *Wicker v. Jones*, 159 N.

presumptions of one sort or another the courts mean that in the absence of any evidence showing innocence or fraud these presumptions apply, or further that there is a burden upon the party who has not the advantage of a presumption of making out his contention by a preponderance of evidence, irrespective of the pleadings.

§ 1917. Tendency of best modern decisions.

The tendency of many of the best modern decisions is largely to disregard these rules of presumption and to treat each case upon its own facts so far as the duty of adducing further evidence is concerned, and to throw the burden of ultimate proof upon whichever party has the burden of establishing the issue raised by the pleadings.*

C. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69, Ann. Cas. 1914 B. 1083; *Cass County v. American Bank*, 9 N. Dak. 263, 83 N. W. 12; *Franklin v. Baker*, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547; *Richardson v. Fellner*, 9 Okl. 513, 60 Pac. 270; *Bowman v. Berkey*, 259 Pa. 327, 103 Atl. 49; *Foley Co. v. Solomon*, 9 S. Dak. 511, 70 N. W. 639; *Northwestern Mortgage Trust Co. v. Levtsow*, 23 S. Dak. 494, 124 N. W. 436; *Farnsworth v. Sharp*, 4 Sneed, 55 (cf. *Organ v. Allison*, 9 Baxt. 459); *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346; *Wolferman v. Bell*, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126; *Yakima Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733; *Engstrom v. Peterson (Wash.)*, 182 Pac. 623; *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140. See also *Barclift v. Treece*, 77 Ala. 528; *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43; *Galloway v. Bartholomew*, 44 Oreg. 75, 74 Pac. 467. In *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770, this presumption was held not applicable to the erasure of a signature as

that must necessarily have been done after execution. See also *Burton v. American Ins. Co.*, 88 Mo. App. 392.

* *Rosenberg v. Jett*, 72 Fed. 90; *Harper v. Reaves*, 132 Ala. 625, 32 So. 721; *Klein v. German Bank*, 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183; *Hayden v. Goodnow*, 39 Conn. 164; *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Hutchison v. Kelly*, 276 Ill. 438, 114 N. E. 1012; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Hagan v. Insurance Co.*, 81 Ia. 321, 46 N. W. 1114, 25 Am. St. Rep. 493; *McGee v. Allison*, 94 Ia. 527, 63 N. W. 322; *University v. Hayes*, 114 Ia. 690, 87 N. W. 664; *Ely v. Ely*, 6 Gray, 439; *Comstock v. Smith*, 26 Mich. 306; *Stough v. Ogden*, 49 Neb. 291, 68 N. W. 516; *Cole v. Hills*, 44 N. H. 227; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Hoey v. Jarman*, 39 N. J. L. 523; *Riley v. Riley*, 9 N. Dak. 580, 84 N. W. 347; *Robinson v. Myers*, 67 Pa. 9; *Nesbit v. Turner*, 155 Pa. 429, 26 Atl. 750; *Cosgrove v. Fanebust*, 10 S. Dak. 213, 72 N. W. 469; *Conner v. Fleshman*, 4 W. Va. 693.

CHAPTER LII

DISCHARGE BY MERGER OR ARBITRATION AND AWARD

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§ 1918. Merger by judgment or bond.

Where an obligation arising under a contract is reduced to judgment,¹ or where an obligation arising under a simple contract is put in the form of a specialty² the original obligation is merged in the judgment or specialty.

¹ See cases cited *infra*, n. 8.

² "If a man contract to pay money for a thing which he hath bought, if he take a bond for the money, the contract is discharged, and he shall not have an action of debt upon the contract." Fitz. Nat. Brev. 120, n.

"If a man be indebted to me by contract, and afterward makes me a bond for the same debt, the contract is hereby determined, for in debt on the contract it is a good plea that he has a bond for the same debt. But if a stranger makes an obligation to me for the same debt, the contract still remains, because it is by another person,

and both are now debtors." Istit. Contract, pl. 29.

"A simple contract and a contract under seal between the same parties cannot both subsist for the same subject-matter or obligation. The simple contract under seal being of a higher dignity and solemnity in the contemplation of law will merge the simple contract." *Magruder v. Belt*, 4 D. C. 303; *Kinney v. McNabb*, 4 D. C. 340, 344.

So *Oldfield's Case*, Noy, 140; *v. Curtis*, Ch. Cas. 226; *Twopenny v. Young*, 3 B. & C. 208; *U. S. v. Ives*, 1 Mason, 482; *Howell v. Wilson*, 10 B. & C. 101.

by operation of law extinguished and merged in the new obligation.

§ 1919. Judgment on other causes than bonds.

That a judgment and satisfaction of the judgment merged and extinguished any personal cause of action other than a formal obligation was undoubtedly recognized from very early times.

That a judgment without satisfaction had the same effect upon a simple contract debt leaving the creditor to his remedy exclusively on the judgment seemed clear in the minds of the judges at least by 1469,³ though whether the principle extended to personal actions generally seems to have been somewhat doubted.⁴

§ 1920. Judgment on a bond.

The case of a bond gave more trouble. As the bond itself was regarded as constituting the obligation, so long as that bond existed the obligation necessarily existed. Accordingly when judgment was given in an action on a bond the bond was "damned."⁵ But if the defendant did not procure the bond to

Ark. 360; *Chambers v. McDowell*, 4 Ga. 185, 189; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Rhoads v. Jones*, 92 Ind. 328; *Kennion v. Kelsey*, 10 Ia. 443; *Davidson v. Kelly*, 1 Md. 492, 500; *Banorges v. Hovey*, 5 Mass. 11; *Atty.-General v. Whitney*, 137 Mass. 450; *Van Brunt v. Mismar*, 8 Minn. 232; *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243; *Renard v. Sampson*, 12 N. Y. 561; *Burt v. Quackenbush*, 72 N. Y. App. D. 547, 551, 75 N. Y. S. 1031; *McNaughten v. Partridge*, 11 Ohio St. 223, 232, 38 Am. Dec. 731; *Share v. Anderson*, 7 S. & R. 43, 10 Am. Dec. 421; *Chalmers v. Turnipseed*, 21 S. C. 126; *Witz v. Fite*, 91 Va. 446, 453, 22 S. E. 171.

A deed if so intended may merge only a part of the provisions of a simple contract. *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722.

³ 9 Edw. IV, 50, pl. 10. "For by the recovery the nature of the duty was changed."

⁴ *Ibid.*, abridged in Bro. Ab. Judgment, pl. 47. In an action of account the defendant pleaded a previous judgment of account for the same matter from which an appeal was then pending, and it was doubted, if execution was not taken out whether the plaintiff could have a new action. "Littleton and Choke, justices, it is a good plea that he has previously recovered. Contrary, Danby and Moyle, justices, for if execution was not taken out he can have a new action and if the plaintiff sued out execution on both, the defendant shall have *causis querela*."

⁵ *I. e.*, canceled. See, e. g., 9 Edw. IV, 50, 51, pl. 10.

be damned he was liable to be sued again thereon.⁶ In *Higgins's case*,⁷ however, Coke held not only that "there is not any question but judgment and execution upon a bond is a good bar in a new action thereon," but that even though no execution had issued, so long as the judgment remained in force there could be no new action on the bond. The general application of this principle to all kinds of contracts has not since been doubted.⁸

§ 1920a. Distinction between merger and *res judicata*.

The extinction of contract rights by judgment is based not simply on the principles applicable to merger generally, namely, that a larger and more important obligation or estate, which fully expresses or includes a lower form of obligation or estate, as it renders the latter unnecessary, extinguishes it, but on the broader principle, necessary to prevent vexation of litigants and courts with repeated trials of the same dispute, that matters which have once passed into judgment are, as between parties to the litigation or their successors, conclusively settled by the decision of the court. The doctrines of *res judicata* include more than can be properly brought under the heading of merger, since they debar parties from calling in

⁶ See the early law stated in *Higgins's Case*, 6 Co. 44b, 45b.

⁷ 6 Co. 44b, 46a.

⁸ *Connecticut Ins. Co. v. Jones*, 8 Fed. 303; *Ries v. Rowland*, 11 Fed. 657; *Schuler v. Israel*, 27 Fed. 851, 120 U. S. 506, 30 L. Ed. 707, 7 Sup. Ct. 648; *Runnamaker v. Cordray*, 54 Ill. 303; *Peoria Savings Co. v. Elder*, 165 Ill. 55, 45 N. E. 1083; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *North v. Mudge*, 13 Ia. 496, 81 Am. Dec. 441; *Harford v. Street*, 46 Ia. 594; *Scott v. Sanders' Heirs*, 6 J. J. Marsh. 506; *Campbell v. Mayhugh*, 15 B. Mon. 142; *West Feliciana R. Co. v. Thornton*, 12 La. Ann. 736; *Sweet v. Brackley*, 53 Me. 346; *Alie v. Nadeau*, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346; *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Schaferman v.*

O'Brien, 28 Md. 565, 92 Am. Dec. 708; *Gould v. Svendsgaard* (Minn), 170 N. W. 595; *Standifer v. Bush*, 16 Miss. 383; *Cooksey v. Kansas City, etc., R. Co.*, 74 Mo. 477; *Garabedian v. Avedisian* (R. I.), 105 Atl. 516; *Tourville v. Wabash R. Co.*, 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650; *Grant v. Burgwyn*, 88 N. C. 95; *Ellis v. Staples*, 9 Humph. 238; *Saunders v. Griggs' Admr.*, 81 Va. 506. Cf. *Boyn-ton v. Ball*, 121 U. S. 457, 30 L. Ed. 985, 7 Sup. Ct. 981; *Bacon v. Reich*, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311. See as to a decree in equity, *Laur v. People*, 17 Ill. App. 448; *Meyer v. Meyer*, 40 Ill. App. 94; *Foster v. The Richard Busteed*, 100 Mass. 409; *Mutual Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756.

question in any litigation any matter actually decided in the earlier litigation,⁹ but all the essential consequences of the merger of the plaintiff's right in a judgment are also necessary consequences of an application of the principles of *res judicata*.

§ 1921. Requisites for merger.

In order to effect a merger of a lower obligation into a higher, the obligations must be between the same parties¹⁰ and upon the same debt.¹¹ Moreover, a foreign judgment, while it will bind the parties by its determination, will not have the technical effect of merging the original cause of action.¹² A domestic action may be brought and the foreign judgment will then be conclusive evidence as to the rights of the parties, if the foreign court had full jurisdiction of the parties and the

⁹ Thus a judgment in an action on part of a continuing contract not only merges that right of action but may have the effect of conclusively fixing a construction of the contract for all future disputes.

¹⁰ *White v. Cuyler*, 6 T. R. 176; *Holmes v. Bell*, 3 Man. & G. 213; *Bell v. Banks*, 3 Man. & G. 258; *Ansell v. Baker*, 15 Q. B. 20; *Boaler v. Mayor*, 19 C. B. (N. S.) 76; *Mowatt v. Londesborough*, 4 E. & B. 1; *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059; *Chase v. Swain*, 9 Cal. 130; *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994; *Harvey v. State*, 94 Ind. 159; *Gilbert v. Thompson*, 9 Cush. 348; *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806; *Richardson v. Richards*, 36 Minn. 111, 30 N. W. 457; *McGill v. Wallace*, 22 Mo. App. 675; *Gardner v. Raisbeck*, 28 N. J. Eq. 71; *Rodman v. Devlin*, 23 Hun, 590; *Rhoads v. Armstrong County*, 41 Pa. 92. Thus an action *in rem* against a vessel does not merge a subsequent action on the same contract against the owners of the vessel. *Toby v. Brown*, 11 Ark. 308. See also *Tabor v. The Cerro Gordo*, 54 Fed. 391.

¹¹ *Norfolk Ry. v. McNamara*, 3 Ex. 628; *Snyder's Admr. v. McComb's*

Exr., 39 Fed. 292; *Chapman v. Brainard*, 2 Root, 375; *Illinois Central R. Co. v. Schwartz*, 13 Ill. App. 490; *Wilson v. Binford*, 81 Ind. 588; *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707; *Brou v. Becnel*, 22 La. Ann. 610; *Lehan v. Good*, 8 Cush. 302; *Harding v. Hale*, 2 Gray, 399; *Parr v. Greenbush*, 112 N. Y. 246, 19 N. E. 684; *Vinal v. Continental Co.*, 53 Hun, 247, 6 N. Y. S. 595; *Raven v. Smith*, 87 Hun, 90, 33 N. Y. S. 972; *Knott v. Stephens*, 5 Oreg. 235; *Kaster v. Welsh*, 157 Pa. 590, 27 Atl. 668.

¹² *Hall v. Odber*, 11 East, 118; *Smith v. Nicolls*, 5 Bing. N. C. 208; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661; *Lyman v. Brown*, 2 Curt. 559; *New York, etc., R. Co. v. McHenry*, 17 Fed. 414; *Wood v. Gamble*, 11 Cush. 8, 59 Am. Dec. 135; *Hays v. Cage*, 2 Tex. 501; *Frazier v. Moore's Admr.*, 11 Tex. 755; *Eastern Township Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665. *Contra*, *Jones v. Jamison*, 15 La. Ann. 35 (statutory). If the foreign judgment has been paid, however, the cause of action is fully satisfied. *Barber v. Lamb*, 8 C. B. (N. S.) 95.

subject-matter of the dispute.¹³ A judgment of a court of the United States is not, however, treated as a foregone conclusion for the purposes of this rule. Such a judgment settles the cause of action throughout the country.¹⁴

§ 1922. Payment by bill or note.

A negotiable bill or note is so far recognized as a discharge that one who is indebted by simple contract may discharge the debt by his own negotiable instrument for the full amount of the debt when the instrument is given and accepted in full satisfaction.¹⁵ Whether it is so received depends on the expressed intention of the parties.¹⁶ Generally, no intention is clearly expressed, and the presumption of law is that the universal discharge of the debt is not to be inferred.

¹³ *Ricardo v. Garcias*, 12 Cl. & F. 368; *Nouvion v. Freeman*, 15 A. C. 1; *Eastern Township Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665.

¹⁴ *Union Pacific Ry. Co. v. Baker*, 5 Kan. App. 253, 47 Pac. 563; *North Bank v. Brown*, 50 Me. 214, 79 Am. Dec. 609; *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Harrington v. Harrington*, 154 Mass. 517, 28 N. E. 903; *Graef v. Bernard*, 162 Mass. 300, 38 N. E. 503; *Stearns v. Wiborg*, 123 Mich. 584, 588, 82 N. W. 283; *Child v. Eureka Powder Works*, 45 N. H. 547; *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210; *Traflet v. Empire Life Ins. Co.*, 64 N. J. L. 387, 46 Atl. 204; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; *Baxley v. Linah*, 16 Pa. 241; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *McGilvray v. Avery*, 30 Vt. 538; *Green v. Starr*, 52 Vt. 426. See also *Hatch v. Spofford*, 22 Conn. 485, 500, 58 Am. Dec. 433.

¹⁵ *Re Morrill*, 2 Sawy 356; *Carlton v. Buckner*, 28 Ark. 66; *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 78; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Thom v. Wilson's Exec.*, 27 Ind. 370; *Farwell v.*

Salpaugh, 32 Ia. 582; *Iov v. Foster*, 49 Iowa, 676; *French*, 84 Ia. 655, 660, 51 15 L. R. A. 300; *Smith v. Jr. Mass.* 50, 52, 112 N. E. *Middlesworth v. Van M.* 32 Mich. 183; *Curtis v. I.* Mo. App. 431; *Parchen v.* 49 Mont. 326, 142 Pac. 631, 1916 A. 681; *Boyd v. Hit.* Johns. 76, 11 Am. Dec. 24 *v. Hawkins*, 38 R. I. 116, 9 *Ferguson v. Harris*, 39 S. S. E. 782, 39 Am. St. Rep. 7 *v. Fly*, 137 Tenn. 358, 193 *Morris v. Harveys*, 75 *Cushwa v. Improvement*, e 45 W. Va. 490, 32 S. E. 259 cases cited *infra*, n. 20. On ability of discharging a debt by a negotiable instrument for less than the amount of the debt, see *supra*.

¹⁶ *Baker v. Walker*, 14 M. *Weaver v. Nixon*, 69 Ga. 6 *ville Sav. Bank v. Bornman* 200, 16 N. E. 210; *Lyon v.* 17 Ia. 314; *Stewart v. Union Ins. Co.*, 155 N. Y. 257, 49 42 L. R. A. 147; *Bolt v. De S. C.* 198; and see cases in *the passim*.

from taking the debtor's negotiable instrument for a debt. Unless the contrary is clearly indicated, the instrument operates merely as conditional payment;¹⁷ that is, all right of action upon the debt is suspended until the dishonor of the negotiable instrument, but revives upon such dishonor, the instrument thereafter being held as security.

The principle of conditional payment applies where a new note is given in renewal of an old one, as well as where the original debt was on simple contract.¹⁸ Even though the debtor

¹⁷ *Ward v. Evans*, 2 Ld. Ray. 928; *Ex parte Barclay*, 7 Ves. 597; *Sayer v. Wagstaff*, 5 Beav. 415; *Keay v. Fenwick*, 1 C. P. D. 745; *Lyman v. Bank of United States*, 12 How. 225, 13 L. Ed. 965; *Segrist v. Crabtree*, 131 U. S. 287, 33 L. Ed. 125, 9 S. Ct. 687; *Leschen & Sons Rope Co. v. Mayflower &c. Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1; *National Bank of Commerce v. Rockefeller*, 174 Fed. 22, 25, 98 C. C. A. 8; *Keel v. Larkin*, 72 Ala. 493; *Lee v. Green*, 83 Ala. 491, 3 So. 785; *Caldwell v. Hall*, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; *Smith v. Owens*, 21 Cal. 11; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *King v. McConnell*, 57 Fla. 77, 49 So. 539; *Georgia Code*, § 2867; *Troutman Lumber Co. v. National Mfg. Co.*, 145 Ga. 315, 89 S. E. 198; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Cheltenham Stone Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. 923; *Stephens Engineering Co. v. Industrial Commission (Ill.)*, 124 N. E. 869; *McLaren v. Hall*, 26 Iowa, 297; *Bradley v. Harwi*, 43 Kan. 314, 23 Pac. 566; *Bradbury v. Van Pelt*, 4 Kan. App. 571, 45 Pac. 1105; *Bank of Napoleonville v. Knoblock (La.)*, 80 So. 214; *Matthews v. Dare*, 20 Md. 248; *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. 152; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Guion v. Doherty*, 43 Miss. 538; *Wileman v. King*, 120 Miss. 392, 82

So. 265; *Wiles v. Robinson*, 80 Mo. 47; *Holland v. Rongey*, 168 Mo. 16, 67 S. W. 568; *Young v. Hibbs*, 5 Neb. 433; *Spear v. Olson (Neb.)*, 175 N. W. 1012; *Woodward v. Holmes*, 67 N. H. 494, 41 Atl. 72; *Fry v. Patterson*, 49 N. J. L. 612, 10 Atl. 390; *Burdick v. Green*, 15 Johns. 247; *St. Albans Beef Co. v. Aldridge*, 112 N. Y. App. D. 803, 99 N. Y. S. 398; *Page v. Carton*, 64 N. Y. Misc. 645, 120 N. Y. S. 277; *Rukeyser v. Fountain*, 173 N. Y. S. 21; *Bombas v. Fisher*, 180 N. Y. S. 449; *Delafield v. Construction Co.*, 118 N. C. 105, 24 S. E. 10; *State v. Royal Indemnity Co. (N. Dak.)*, 175 N. W. 625; *Sutliff v. Atwood*, 15 Oh. St. 186; *Berlin Iron Bridge Co. v. Bonta*, 180 Pa. 448, 36 Atl. 867; *Philadelphia v. Neill*, 211 Pa. 353, 60 Atl. 1033; *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727; *Baker v. Baker*, 2 S. Dak. 261, 49 N. W. 1064, 39 Am. St. 776; *Union Bank v. Smiser*, 1 Sneed, 501; *McGuire v. Bidwell*, 64 Tex. 43; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Morriss v. Harveys*, 75 Va. 726; *Boston Nat. Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026; *Hopkins v. Detwiler*, 25 W. Va. 734; *Mehlberg v. Fisher*, 24 Wis. 607; *Wagener v. Old Colony L. Ins. Co. (Wis.)*, 172 N. W. 729.

¹⁸ *Ex parte Barclay*, 7 Ves. 597; *Kendrick v. Lomax*, 2 Crompt. & J. 405; *Bishop v. Rowe*, 3 Maule & S. 362; *Anniston Loan & T. Co. v. Stickney*, 108 Ala. 146, 19 So. 63; *Savings Bank*

is not a party to the instrument the transaction has still been held presumptively only a conditional payment.¹⁹ In a few jurisdictions, however, the presumption is reversed, and the acceptance of even the debtor's negotiable instrument for a precedent debt is presumed to be in full and final satisfaction, unless a contrary intention appears.²⁰

It has thus far been assumed that a debt existed prior to the transfer of the negotiable instrument. When a bill or note is given for a debt contemporaneously created, there is more difference of opinion;²¹ but generally here also it would be held merely conditional payment.²² Even where the instru-

v. Central Market Co., 122 Cal. 28, 54 Pac. 273; *First Nat. Bank v. Newton*, 10 Colo. 161, 14 Pac. 428; *Askins v. Hott*, 188 Ill. App. 235, 240; *Godfrey v. Crisler*, 121 Ind. 203, 22 N. E. 999; *McMorrin v. Murphy*, 68 Mich. 246, 36 N. W. 60; *Citizens' Bank v. Carson*, 32 Mo. 191; *Reynolds v. Schade*, 131 Mo. App. 1, 109 S. W. 629; *Lebanon Nat. Bank v. Long*, 220 Pa. 556, 69 Atl. 1033; *Grissel v. Bank of Woonsocket*, 12 S. Dak. 93, 80 N. W. 161. See, however, *Union Brewing Co. v. Interstate, etc., Trust Co.*, 240 Ill. 454, 88 N. E. 997.

¹⁹ *Robinson v. Read*, 9 B. & C. 449; *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Fickling v. Brewer*, 38 Ala. 685; *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64; *Brown v. Olmsted*, 50 Cal. 162; *Zook v. Odle*, 3 Colo. App. 87, 32 Pac. 82; *Clark v. Savage*, 20 Conn. 258; *Chicago Times Co. v. Benedict*, 37 Ill. App. 250; *Huse v. McDaniel*, 33 Iowa, 406; *Vogel v. Wadsworth*, 48 Ia. 28; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Park v. Best*, 176 Ia. 7, 157 N. W. 233; *Webb v. National Bank*, 67 Kan. 62, 72 Pac. 520; *Graham v. Sykes*, 15 La. Ann. 49; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Thompson v. Briggs*, 28 N. H. 40; *American Brick & Co. v. Drinkhouse*, 59 N. J.

L. 462, 36 Atl. 1034; *Bates v. Rosekrans*, 37 N. Y. 409 (*Cf. Fleischman v. Bishop*, 174 N. Y. S. 142); *Lokken v. Miller*, 9 N. Dak. 512, 84 N. W. 368; *League v. Waring*, 85 Pa. 244; *Philadelphia v. Stewart*, 195 Pa. 315, 45 Atl. 1093; *Nightingale v. Chafee*, 11 R. I. 609, 23 Am. Rep. 531; *Hopkins v. Detwiler*, 25 W. Va. 734; *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. 762. See also *Woods v. Woods*, 127 Mass. 141. But see *Dennis v. Williams*, 40 Ala. 633.

²⁰ *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *Scott v. Edgar* (Ind. App.), 60 N. E. 468; *Gates v. Fauvre*, (Ind. App.), 119 N. E. 155; *Wise v. Hilton*, 4 Greenl. 435; *Newall v. Hussey*, 18 Me. 249, 36 Am. Dec. 717; *Mehan v. Thompson*, 71 Me. 492; *Miller v. Hilton*, 88 Me. 429, 34 Atl. 266; *Bryant v. Grady*, 98 Me. 389, 57 Atl. 92; *Ely v. James*, 123 Mass. 36; *Brigham v. Lally*, 130 Mass. 485; *O'Conner v. Hurley*, 147 Mass. 145, 16 N. E. 764; *Paddock & Co. v. Simmons*, 186 Mass. 152, 71 N. E. 298; *Farr v. Stevens*, 26 Vt. 299; *Dickinson v. King*, 28 Vt. 378; *Collamer v. Langdon*, 29 Vt. 32.

²¹ *Daniel, Neg. Instr.*, § 1261.

²² *Williams v. Evans*, L. R. 1 Q. B.

ment is made by a stranger if it is drawn, indorsed or guaranteed by the debtor, this is true.²³ But if the instrument is made by a stranger and not indorsed or guaranteed by the transferor, it is presumptively an absolute payment.²⁴

§ 1922a. A debt may be discharged by laches in regard to a bill or note given in payment or as security.

Where a negotiable instrument is taken in conditional payment or as collateral security the creditor is bound to use proper diligence in charging the parties thereto, and is liable for consequences of any failure in this regard even though the debtor is not a party to the instrument;²⁵ but if the debtor is a party secondarily liable on the instrument, and it was given in payment, absolute or conditional, a failure to charge the debtor as a party to the instrument destroys the creditor's right on the debt for which the instrument was given, as fully as it does his right on the instrument itself.²⁶ Under this rule

352; *Menzel v. Primm*, 6 Cal. App. 204, 91 Pac. 754; *Charleston &c. R. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374; *Hoodless v. Reid*, 112 Ill. 105; *Kirkpatrick v. Bessalo*, 116 Mich. 657, 74 N. W. 1042; *Guilford v. Mulkin*, 85 Hun, 489, 33 N. Y. S. 134; *Kirkham v. Bank of America*, 26 N. Y. App. Div. 110, 49 N. Y. S. 767; *Wagener v. Old Colony L. Ins. Co. (Wis.)*, 172 N. W. 729.

²³ *Alcock v. Hopkins*, 6 Cush. 484; *Marinette Iron Works Co. v. Cody*, 108 Mich. 381, 66 N. W. 334; *Whitney v. Goin*, 20 N. H. 354; *Butler v. Haight*, 8 Wend. 535; *Shriner v. Keller*, 25 Pa. 61.

²⁴ *Emly v. Lye*, 15 East, 7; *Noel v. Murray*, 13 N. Y. 169; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; *Dibble v. Richardson*, 171 N. Y. 131, 63 N. E. 829; *Bicknall v. Waterman*, 5 R. I. 43; *Eaton v. Cook*, 32 Vt. 58; *Hoefinger v. Wells*, 47 Wis. 628, 3 N. W. 589; *Challoner v. Boyington*, 91 Wis. 27, 64 N. W. 422.

In *Security Warehousing Co. v. The American Exchange Nat. Bank*,

118 N. Y. App. Div. 350, 355, 103 N. Y. S. 399, the court said: "If the note of a third person is given at the time an obligation is entered into the presumption is that such note was accepted in payment, and the burden is upon the one accepting to show that it was not thus received. (*Gibson v. Tobey*, 46 N. Y. 637.) If the note of a third person be given for a past indebtedness, the burden is upon the person giving it to establish that it was accepted in payment. (*Noel v. Murray*, 13 N. Y. 167.)"

²⁵ See *infra*, n. 29, 30.

²⁶ *Darrach v. Savage*, 1 Show. 155; *Hill v. Lewis*, *Skinner*, 410; *Bridges v. Berry*, 3 Taunt. 584; *Minehart v. Handlin*, 37 Ark. 276; *Brown v. Cronise*, 21 Calif. 386; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756, 13 Mich. 191; *Whitten v. Wright*, 34 Mich. 92; *Jones v. Savage*, 6 Wend. 658; *Dayton v. Trull*, 23 Wend. 345; *Woodcock v. Bennet*, 1 Cow. 711, 13 Am. Dec. 568; *Darnall v. Morehouse*, 45 N. Y. 64; *Mauney v. Coit*, 80 N. Car. 300, 30 Am. Rep. 80; *Betterton*

the drawer of a bill of exchange (other than a check) and the indorser of a promissory note, bill of exchange or check is discharged to the extent of the amount of the instrument from liability for the debt for which the instrument was given, by any unexcused failure to make demand at maturity on the party primarily liable, or to give seasonable notice to the secondary party if the instrument is dishonored, irrespective of any injury this laches may have caused. As the drawer of a check is freed from liability on the instrument only to the extent that he may be injured by unexcused delay in presentment,²⁷ his discharge from a debt for which a check was given in conditional payment is similarly restricted.²⁸

If the debtor is not a party to the instrument given in conditional payment, the creditor must exercise reasonable diligence, and failing to do so is chargeable with the consequences;²⁹ and so if a negotiable instrument is given as collateral security. The extent of the creditor's duty, as in the case of pledged property of other kinds, is measured by reasonable care; and this includes charging parties secondarily liable by proper presentment and notice.³⁰

§ 1923. Effect of conditional payment.

When a negotiable instrument is taken in conditional pay-

v. Roope, 3 Lea, 215, 221, 31 Am. Rep. 633; *Mehlberg v. Fisher*, 24 Wis. 607; *Allan v. Eldred*, 50 Wis. 132, 6 N. W. 132; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724; *Byles on Bills* (17th Eng. ed.), 280; *Chalmers, Bills of Exch.* (7th Eng. ed.) 169; 2 Ames, Cas. B. & N. 584, 585. But in a few cases the extent of the discharge has been held limited to the amount of injury caused by the creditor's laches. *Gallagher v. Roberts*, 2 Wash. C. C. 191; *McCrary v. Carrington*, 35 Ala. 698; *Kephart v. Butcher*, 17 Iowa, 240.

²⁷ See *supra*, § 1209.

²⁸ *Burns v. Yocum*, 81 Ark. 127, 98 S. W. 956; *Wileman v. King*, 120 Miss. 392, 82 So. 265; *Herider v. Phoenix Loan Assoc.*, 82 Mo. App. 427; *Kilpatrick v. Home Building & Assoc.*,

119 Pa. 30, 12 Atl. 754; *Manitoba Mortgage & Co. v. Weiss*, 18 S. Da. 459, 101 N. W. 37, 112 Am. St. 799.

²⁹ *Swinyard v. Bowes*, 5 M. & S. 62. See also *Mordis v. Kennedy*, 23 Kan. 408; *Blanchard v. Tittabawassee Boom Co.*, 40 Mich. 566; *Grube v. Stille*, 61 Mo. 473, 33 Am. Rep. 169. Cf. *Camidge v. Allenby*, 6 B. & C. 373; *Smith v. Mercer*, L. R. 3 Exch. 51.

³⁰ *Peacock v. Pursell*, 14 C. B. (N. S.) 728; *Pickens v. Yarborough*, 26 Ala. 417, 62 Am. Dec. 728; *Kennedy v. Rosier*, 71 Iowa, 671, 33 N. W. 226; *Whitten v. Wright*, 34 Mich. 92; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690; *Roberts v. Thompson*, 14 Ohio St. 1; *Hanna v. Holton*, 78 Pa. 334, 21 Am. Rep. 20.)

ment, it operates as a suspension of the creditor's right to sue until the maturity and the dishonor of the instrument.³¹ The creditor to whom the instrument has been given in conditional payment, and who on dishonor thereof endeavors to recover on the original claim, must surrender the instrument at the trial or satisfactorily account for his failure to do so. Otherwise there would be no proof that the creditor had not transferred it for value before maturity.³² It follows, that if the creditor has discounted or sold an instrument given in conditional payment, the original debt will not revive unless he regains the ownership of the instrument.³³ And if the debtor was liable only secondarily on the instrument given in conditional payment, any laches on the part of the creditor which discharges the debtor as a party to the instrument, will also discharge him from liability on the debt.³⁴ And the discharge

³¹ *Price v. Price*, 16 M. & W. 232; *Belshaw v. Bush*, 11 C. B. 191; *Bottomley v. Nuttall*, 5 C. B. (N. S.) 143, 144; *Metsarott v. Ward*, 10 App. D. C. 514; *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690; *Lane v. Jones*, 79 Ala. 156; *Anniston L. & T. Co. v. Stickney*, 108 Ala. 146, 19 So. 63, 31 L. R. A. 234; *Higgins v. Wortell*, 18 Cal. 330; *Goodrich v. Friedman*, 92 Conn. 262, 102 Atl. 607; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Taylor v. Wahl*, 72 N. J. L. 10, 60 Atl. 63; *Putnam v. Lewis*, 8 Johns. 389; *Bank of New Hanover v. Bridgers*, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142, 32 Am. Rep. 364; *Otto v. Half*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56. This is otherwise if the original obligation was under seal in jurisdictions where seals still retain their old efficacy. *Drake v. Mitchell*, 3 East, 251; *Standard Oil Co. v. Sowden*, 55 Oh. St. 332, 45 N. E. 320. But see per Parke, B., in *Baker v. Walker*, 14 M. & W. 465.

³² *Miller v. Lumsden*, 16 Ill. 161; *Matthews v. Dare*, 20 Md. 248; *Alcock v. Hopkins*, 6 Cush. 484; *Schepflin*

v. Deesar, 20 Mo. App. 569; *Cole v. Sackett*, 1 Hill, 516; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392, 31 Am. Rep. 768.

³³ *Looney v. District of Columbia*, 113 U. S. 258, 28 L. Ed. 974, 5 S. Ct. 463; *Donnelly v. District of Columbia*, 119 U. S. 339, 30 L. Ed. 465, 7 S. Ct. 276; *Fitch v. McDowell*, 145 N. Y. 498, 40 N. E. 205.

³⁴ *Bridges v. Berry*, 3 Taunt. 130; *Cheltenham Stone Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. 923; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 13 Mich. 191, 83 Am. Dec. 756; *Whitten v. Wright*, 34 Mich. 92; *Dayton v. Trull*, 23 Wend. 343; *Hawley v. Jette*, 10 Oreg. 31, 45 Am. Rep. 129; *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 35 Am. St. 182; *Mehlberg v. Fisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724. But see *McCrary v. Carrington*, 35 Ala. 698; *Small v. Franklin Co.*, 99 Mass. 277; *Cook v. Beech*, 10 Humph. 413, where it was held that unless the creditor's laches had damaged the debtor, he would not be discharged from liability on the original debt. See also *Kephart v. Butcher*, 17 Ia. 240.

of the original debt is a consequence also of the discharge of the creditor's laches of a third party from liability on the instrument given by the debtor as collateral security for the original debt.³⁵

It should be remembered that however clearly the creditor may have agreed that a negotiable instrument shall be given in full satisfaction, if the agreement was induced by fraud or by such mistake as renders a contract voidable,³⁷ the instrument may be avoided by returning the instrument to the creditor and the creditor will be remitted to his previous rights.

§ 1924. Note given in payment of an unenforceable claim

It was held in an English case³⁸ that a promise by a third person in consideration of forbearance of a claim against the estate of a deceased debtor was invalid for want of consideration where the deceased debtor left no assets, and no administration had been taken out or could be taken out. For this decision it has been held that a note given by a third person in payment of such a debt could not be enforced for lack of consideration;³⁹ and even though administration had been taken out, such a note has been held unenforceable against the estate of a deceased debtor if the estate was insolvent and the debt uncollectible,⁴⁰ or where the debt of the deceased was barred by the Statute of Limitations.

³⁵ *Peacock v. Purcell*, 14 C. B. (N. S.) 728; *Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326; *Haines v. Pearce*, 41 Md. 221; *Mauney v. Coit*, 80 N. C. 300, 30 Am. Rep. 80; *Roberts v. Thompson*, 14 Ohio St. 1.

³⁶ *Stedman v. Gooch*, 1 Esp. 3; *Vallier v. Ditsen*, 74 Me. 553; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Bridge v. Batchelder*, 9 Allen, 394.

³⁷ *Durfee v. Seale*, 139 Cal. 603, 73 Pac. 403; *Root v. Burt*, 118 Mass. 521; *Miller v. McCarty*, 47 Minn. 321, 50 N. W. 235, 28 Am. St. 375; *Davis v. McPherson* (Miss.), 1 So. 100; *Fleig v. Sleet*, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800.

³⁸ *Jones v. Ashburnham*, 4 East, 455.

³⁹ *Schroeder v. Fink*, 60 1 Williams v. Nichols, 10 Gray

⁴⁰ *Paxson v. Nields*, 137 Pa. Atl. 1016. See also *Gilbert v. 123 Ky. 703*, 97 S. W. 40, 7 (N. S.) 1053. In the latter case a note of a widow for her husband's debt was held unenforceable, but did not appear that she had received anything from the estate of the husband. This reason is certainly a criticism, for a detriment to the creditor, if there was any, would be as effective consideration for the benefit received by the wife.

⁴¹ *Didlake v. Robb*, 1 Woc 680. See also as to a similar discharge in bankruptcy, *1 Baxter*, 190 Mass. 130, 76 N

Whatever may be said of the correctness of decisions denying validity to the note of a third person because the debtor had died insolvent and administration had not been taken out, it seems clearly immaterial to the validity of such a note that the debt for which it was given was that of an insolvent third person still *in esse*.⁴² It is clear that even a debt on which the remedy is barred because of the Statute or Limitations or bankruptcy will support the debtors bill or note given in payment of it.⁴³ And though the mere existence of an antecedent debt will not support a promise by any one other than the debtor to pay it, there seems sufficient present consideration. The acceptance of the instrument by the creditor must involve assent to surrender at least conditionally his claim against his debtor.

§ 1925. Arbitration and award generally merge claim.

If a claim arising from contract is by agreement of the parties submitted to arbitration and an award is made by the arbitrators, although the award has not been performed, this is conclusive upon the parties. If the award merely fixes the amount due upon the original cause of action, the plaintiff may still sue upon that cause of action⁴⁴ (though he may also sue upon the award or agreement of arbitration), but the defendant may set up the award as a bar to any recovery in excess of the amount awarded.⁴⁵ If, however, the award substitutes a new debt or duty for the original cause of action, the plaintiff's remedy is exclusively upon the award or agreement for arbitration.⁴⁶

3 L. R. A. (N. S.) 436, as explained in *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1.

⁴² The case of *Citizens' Trust Co. v. McDougald*, 132 Tenn. 323, 178 S. W. 432, L. R. A. 1917 C. 840, where the note of a third person given in payment of the debt of an insolvent corporation was held invalid for lack of consideration, must therefore be deemed erroneous. A contrary decision is *Union Bank v. Sullivan*, 214 N. Y. 332, 108 N. E. 558.

⁴³ *Baxter v. Brandenburg*, 137 Minn.

259, 163 N. W. 516. See also *supra*, §§ 158, 162 *et seq.*

⁴⁴ *Allen v. Milner*, 2 C. & J. 47; *Whitehead v. Tattersall*, 1 A. & E. 491; *Keeler v. Harding*, 23 Ark. 697; *Howett v. Monical*, 25 Ill. 122.

⁴⁵ *Freeman v. Bernard*, 1 Ld. Raym. 247; *Bates v. Townley*, 2 Ex. 152, 157; *Commings v. Heard*, L. R. 4 Q. B. 669. See also *Sanborn v. Maxwell*, 18 App. D. C. 245; *Yarbro v. Purser*, 114 Miss. 75, 74 So. 425.

⁴⁶ *Allen v. Harris*, Ld. Raym. 122; *Gascoyne v. Edwards*, 1 Y. & J. 19;

§ 1926. Exceptions at common law.

The common law made an exception to this rule if the cause of action was for a debt upon a bond,⁴⁷ or a The dignity of the bond or record was regarded as such that it could not be merged in an award. But if the bond was for the parties to any performance other than the payment of money, arbitration and award was conclusive as to the amount of damages recoverable for breach of the bond.⁴⁸ This rule, which also obtained in the doctrines of accord and satisfaction, is probably obsolete everywhere, and doubtless arbitration and award upon a sealed contract is subject to the same rule as upon rights growing out of simple contracts.

§ 1927. Authority to arbitrate revocable before award.

Until the award is made, the original claim still exists. The agreement to arbitrate, like an unexecuted accord, is subject to an action upon the claim.⁵¹ It seems possible, however,

Parkes v. Smith, 15 Q. B. 297; *Gardner v. Newman*, 135 Ala. 522, 33 So. 179; *Gurley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Merritt v. Merritt*, 11 Ill. 565; *Walters v. Hutchins*, 29 Ind. 136; *Groat v. Pracht*, 31 Kan. 656, 3 Pac. 274; *Duren v. Getchell*, 55 Me. 241; *Knowles v. Shapleigh*, 8 Cush. 333; *Bentley v. Davis*, 21 Neb. 685, 33 N. W. 473; *Varney v. Brewster*, 14 N. H. 49; *Pickering v. Pickering*, 19 N. H. 389; *Armstrong v. Masten*, 11 Johns. 189; *West v. Stanley*, 1 Hill, 69. See further *Macdonald v. Bond*, 195 Ill. 122, 62 N. E. 881; *Weichardt v. Hook*, 83 Pa. 434; *Vaughn v. Hernndon*, 91 Tenn. 64, 17 S. W. 793; *Dickie Mfg. Co. v. Sound Constr. &c. Co.*, 92 Wash. 316, 159 Pac. 129. Cf. *Young v. First Congregational Church*, 91 N. J. L. 310, 102 Atl. 358; *Matter of Lurman*, 90 Hun, 303, 35 N. Y. S. 956, *affd.*, 149 N. Y. 588, 44 N. E. 1125; *Crossman v. Lurman*, 33 N. Y. App. Div. 422, 54 N. Y. S. 72, 57 N. Y. App. Div. 393, 68 N. Y. S. 311.

⁴⁷ *Morris v. Creach*, 1 L. R. 436; *Blake's Case*, 6 Co. 43b.

⁴⁸ *Viner's Ab., Arbitramen*

⁴⁹ *Blake's Case*, 6 Co. 43b; *head v. Tattersall*, 1 A. & E.

⁵⁰ See *supra*, § 1849.

⁵¹ *Wright v. Evans*, 53 A. 2d 1; *Gaither v. Dougherty*, 18 Ky. 709, 38 S. W. 2; *Nelson v. I* 41 Nev. 69, 167 Pac. 690; *Miller*, 70 Vt. 108, 39 Atl. 74; *v. Owen*, 83 Vt. 132, 74 A.

The case supposed is one where the agreement to arbitrate is subject to the contract on which the claim is based. For cases where the original contract arbitration is a condition precedent to recovery, see *supra*, §§ 1719-1724.

This power of revocation is taken away in statutory provisions for arbitration. *Atterbury v. I* 66 N. Y. Misc. 273, 123 N. Y. 382, 125 N. Y. S. 369; *Diel Co. v. Sound Constr. &c. Co.*, 92 Wash. 316, 159 Pac. 129.

only to provide by a contract, even though made subsequently to that on which the claim is made, that the award of arbitrators on a certain question involved therein shall be a condition precedent to any cause of action,⁵² but also, at any time, though a cause of action has arisen, to substitute for that and take in full satisfaction of it, an executory agreement to pay whatever arbitrators should award. This seems a necessary consequence of the modern recognition of the possibility of an executory promise being taken, if so intended, as final accord and satisfaction;⁵³ but it has certainly not hitherto been the ordinary construction put on agreements to arbitrate; and undoubtedly cases are rare where it could be found as a fact that the parties intended, to substitute the mere agreement to arbitrate for the original cause of action. It follows from the revocability of a submission that a revocation by either party to the arbitration of the authority given by him to the arbitrators will invalidate any award made thereafter.⁵⁴ The only redress for breach of an agreement to refer is an action for damages,⁵⁴ and in such an action if arbitration has not been begun and no expenses incurred, only nominal damages can be recov-

⁵² *Jones v. Enorree Power Co.*, 92 S. Car. 263, 75 S. E. 452, Ann. Cas. 1914 B. 293.

⁵³ See *supra*, § 1846.

⁵⁴ *Vynior's Case*, 8 Coke 80a; *Re Rouse and Meier*, L. R. 6 C. P. 212; *Fraser v. Ehrensperger*, 12 Q. B. D. 310; *Fooks v. Lawson*, 40 Atl. Rep. 661, 1 Marvel (Del.), 115; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Boston &c. R. Corp. v. Nashua, &c. R. Corp.*, 139 Mass. 463, 31 N. E. 751; *Jones v. Harris*, 59 Miss. 214; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Allen v. Watson*, 16 Johns. 205; *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943; *Martin v. Vansant*, 99 Wash. 106, 168 Pac. 990. But see *contra*, *McGeheen v. Duffield*, 5 Pa. 497; *McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190; and *cf.* *Toledo Steamship Co. v. Zenith Transportation Co.*, 184 Fed. 391, 106 C. C. A. 501; *Ivins v. Ivins*, 77 N. J. L. 368,

72 Atl. 94. Death of one of the parties effects a revocation of the arbitrators' authority. *Cooper v. Johnson*, 2 B. & Ald. 394; *Gregory v. Boston Safe Deposit Co.*, 36 Fed. 408; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Marseilles v. Kenton*, 17 Pa. 238; *Sutton v. Tyrrell*, 10 Vt. 91.

⁵⁴ *Noble v. Harris*, 3 Keb. 746; *Warburton v. Storr*, 4 B. & C. 103; *Aktieselskabet &c. Kompagniet v. Rederiaktiebolaget Atlanten*, 250 Fed. 935, 163 C. C. A. 185 (cert. granted 248 U. S. 553, 39 S. Ct. 8); *Reg. v. Hardey*, 14 Q. B. 529; *Brown v. Leavitt*, 26 Me. 251; *Call v. Hagar*, 69 Me. 521; *Quimby v. Melvin*, 28 N. H. 250; *Dexter v. Young*, 40 N. H. 130; *Miller v. Junction Canal Co.*, 53 Barb. 590, 41 N. Y. 98; *Craftsbury v. Hill*, 28 Vt. 763; *Mead v. Ewen*, 83 Vt. 132, 74 Atl. 1058; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165. See also *Ferguson v. Rogers*, 129 Ark. 197, 19 S. W. 22.

ered.^{54a} A court of law will not enforce the stipulation by disregarding any attempted revocation, nor will a court of equity enforce specifically the agreement.⁵⁵ Institution of suit on the original claim is by implication a revocation of an agreement to arbitrate.^{55a}

§ 1928. When writing necessary.

"A submission to arbitration may be either oral, in writing or under seal, depending on the subject-matter of the arbitration. If a writing is necessary to pass title to the thing in controversy, an award, disposing of such title, to be valid must be in writing."⁵⁶

§ 1929. Arbitrators must follow authority.

In order that an award shall be binding, the arbitrators must follow exactly the authority given them by the agreement of the parties.⁵⁷ Therefore, though the submission authorizes a

^{54a} Aktieselskabet &c. Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935, 163 C. C. A. 185 (cert. granted 248 U. S. 553, 39 S. Ct. 8.) See *supra*, §1719.

⁵⁵ Street v. Rigby, 6 Ves. 815; Vickers v. Vickers, L. R. 4 Eq. 529; Tobey v. Bristol County, 3 Story, 800; Hill v. More, 40 Me. 515; Rowe v. Williams, 97 Mass. 163; St. Louis v. St. Louis Gas-light Co., 70 Mo. 69; March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Hurst v. Litchfield, 39 N. Y. 377; Rison v. Moon, 91 Va. 384, 22 S. E. 165; Cogswell v. Cogswell, 70 Wash. 178, 126 Pac. 431.

^{55a} Bullock v. Mason, 194 Ala. 663, 69 So. 882; Osgood v. Poole, 165 Ill. App. 63; Ferrell v. Ferrell, 253 Mo. 167, 161 S. W. 719. Cf. Williams v. Branning Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954.

⁵⁶ Brown v. Mize, 119 Ala. 10, 17, 24 So. 453. Oral submission to arbitration is generally good. Gardner v.

Newman, 135 Ala. 522, 33 So. 179; Phelps v. Dolan, 75 Ill. 90; Dilks v. Hammond, 86 Ind. 563; Peabody v. Rice, 113 Mass. 31; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; Moore v. Collins, 24 N. Mex. 235, 173 Pac. 547; Johnsen v. Wineman, 34 N. Dak. 116, 157 N. W. 679; Deal v. Thompson (Okla.), 151 Pac. 856. Otherwise in Louisiana by statute. McClendon v. Kemp, 18 La. Ann. 162. Where title to land is involved a deed or writing is necessary. Walden v. McKinnon, 157 Ala. 291, 47 So. 874, 22 L. R. A. (N. S.) 716; Copeland v. Wading River Co., 105 Mass. 397; French v. New, 28 N. Y. 147; Fort v. Allen, 110 N. C. 183, 14 S. E. 685. Cf. Smith v. Seitz, 87 Conn. 678, 89 Atl. 257.

⁵⁷ McCormick v. Gray, 13 How. 26; De Groot v. United States, 5 Wall. 419, 18 L. Ed. 700; Reynolds v. Reynolds, 15 Ala. 398; Comer v. Thompson, 54 Ala. 265; Brown v. Mize, 119 Ala. 10, 24 So. 453; Lee v. Onstott, 1 Ark. 206; Waller v. Shannon, 44

majority of the arbitrators to make an award, the award is void if all of the arbitrators did not participate in the consideration of the case.⁵⁸

An award when once made exhausts the authority of arbitrators, and unless there is what amounts to a new submission, they cannot make a substituted or supplementary award.⁵⁹ If arbitrators exceed their authority the award is void to that extent, and if the part which is void cannot be separated from the rest without injustice, the whole award is void.⁶⁰

"Unless an arbitrator renders his award on all matters within the submission, and of which he had notice, the award is wholly void,"⁶¹ and it is essential to the validity of an award that it be final, that is, a termination of the question under

Conn. 480; *Fountain v. Harrington*, 3 Har. (Del.) 22; *Denman v. Bayless*, 22 Ill. 300; *Buntain v. Curtis*, 27 Ill. 374; *Sthreshly v. Broadwell*, 1 J. J. Marsh. 340; *Boynnton v. Frye*, 33 Me. 216; *Sawtells v. Howard*, 104 Mich. 54, 62 N. W. 156; *Gibson v. Powell*, 13 Miss. 712; *Adams v. Adams*, 8 N. H. 82; *Hiscock v. Harris*, 74 N. Y. 108; *McCracken v. Clarke*, 31 Pa. 498; *Toomey v. Nichols*, 6 Heisk. 159; *Bailey v. Triplett* (W. Va.), 98 S. E. 166. Cf. *O'Neill v. Clark*, 57 Neb. 760, 78 N. W. 256.

⁵⁸ *Fraley v. Nickels*, 121 Va. 377, 93 S. E. 636. Unless the submission expressly or impliedly authorizes a majority to make an award, all must concur therein. *Tennessee Lumber Mfg. Co. v. Clark Bros. Co.*, 182 Fed. 618, 105 C. C. A. 156; *Whitman v. Bartlett*, 156 Ala. 546, 46 So. 972; *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

⁵⁹ *St. Charles v. Stookey*, 154 Fed. 772, 85 C. C. A. 494, cert. denied 208 U. S. 617, 28 S. Ct. 569, 52 L. Ed. 647; *Black v. Woodruff*, 193 Ala. 327, 69 So. 97; *Hightower v. Georgia Fertilizer & Oil Co.*, 145 Ga. 780, 89 S. E. 827; *Hackney v. Adam*, 20 N. Dak. 130,

127 N. W. 519. Cf. *Frederick v. Margwarth*, 221 Pa. 418, 70 Atl. 797, 18 L. R. A. (N. S.) 1246.

⁶⁰ *Falkingham v. Victorian Ry. Commissioners*, [1900] A. C. 452; *Reynolds v. Reynolds*, 15 Ala. 398; *Brown v. Mise*, 119 Ala. 10, 24 So. 453; *Boynnton v. Frye*, 33 Me. 216; *Orcutt v. Butler*, 42 Me. 83; *Skillings v. Coolidge*, 14 Mass. 43; *Gibson v. Powell*, 13 Miss. 712; *Yeaton v. Brown*, 52 N. H. 14; *Cox v. Jagger*, 2 Cow. 638, 14 Am. Dec. 522; *Clark Millinery Co. v. National Union F. Ins. Co.*, 160 N. C. 130, 75 S. E. 940, Ann. Cas. 1914 C. 367; *Scott v. Barnes*, 7 Pa. 134.

⁶¹ *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *Porter v. Scott*, 7 Cal. 312; *Buntain v. Curtis*, 27 Ill. 374, 379; *Stearns v. Cope*, 109 Ill. 340; *Steere v. Brownell*, 113 Ill. 415; *McGregor & Co. R. Co. v. Sioux City & Co. R. Co.*, 49 Ia. 604; *McNear v. Bailey*, 18 Me. 251; *Rollins v. Townsend*, 118 Mass. 224; *Kabatchnick v. Hoffman*, 226 Mass. 221, 115 N. E. 309; *Harker v. Hough*, 2 Halst. 428; *Jones v. Welwood*, 71 N. Y. 208; *Young v. Kinney*, 48 Vt. 22; *Bean v. Bean*, 25 W. Va. 604; *Blakeston v. Wilson*, 14 Manitoba, 271.

arbitration.⁶² Further, the award must be certain, a reasonable question can be made as to its meaning.⁶³

§ 1929a. Circumstances invalidating arbitration; wa

An award may be invalidated not only by fraud, in misconduct of an arbitrator, in failing to give a fair l but also where it is founded on such a basic mista make it clearly fail to express the judgment of the ar on the actual facts.⁶⁵

Partiality, interest, or relationship to the adverse par an adequate reason for attacking an award when the fa known prior to the arbitration;⁶⁶ and generally it may

⁶² *Baillie v. Edinburgh Oil Gas-light Co.*, 3 Cl. & F. 639; *The Nineveh*, 1 Low. 400; *Comer v. Thompson*, 54 Ala. 265; *Manuel v. Campbell*, 3 Ark. 324; *Colcord v. Fletcher*, 50 Me. 398; *Carter v. Calvert*, 4 Md. Ch. 199; *Paine v. Paine*, 15 Gray, 299; *Smith v. Holcomb*, 99 Mass. 552; *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356, 84 N. W. 48; *Rhodes v. Hardy*, 53 Miss. 587; *Spofford v. Spofford*, 10 N. H. 254; *Parker v. Dorsey*, 68 N. H. 181, 38 Atl. 785; *McKeen v. Olyphant*, 18 N. J. L. 442; *Waite v. Barry*, 12 Wend. 377; *In re Williams*, 4 Denio, 194; *Herbst v. Hageners*, 137 N. Y. 290, 33 N. E. 315, affg. 62 Hun, 568, 17 N. Y. S. 58; *Spalding v. Irish*, 4 S. & R. 322; *Connor v. Simpson*, 104 Pa. 440; *Conger v. James*, 2 Swan, 213; *Hooker v. Williamson*, 60 Tex. 524.

⁶³ *Alexander v. McNear*, 28 Fed. 403; *Evans v. Sheldon*, 69 Ga. 100; *Stanford v. Treadwell*, 69 Ga. 725; *Ingraham v. Whitmore*, 75 Ill. 24; *Alfred v. Kankakee &c., R. Co.*, 92 Ill. 609; *Hollingsworth v. Pickering*, 24 Ind. 435; *Woodward v. Atwater*, 3 Ia. 61; *Crawford v. Berry*, 11 Gill & J. 310; *Calvert v. Carter*, 6 Md. 135; *Fletcher v. Webster*, 5 Allen, 566; *Mather v. Day*, 106 Mich. 371, 64 N. W. 198; *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356, 84 N. W. 48; *Parker v.*

Dorsey, 68 N. H. 181, 38 *Hoffman v. Hoffman*, 2 D *Jackson v. DeLong*, 9 Johns. *v. Magoun*, 167 N. Y. 540, 1112; *Carson v. Carter*, 64 I *Barnet v. Gilson*, 3 S. & R. 3 *v. Gratz*, 4 Rawle, 411; *Southwood*, 45 Pa. 189; *Social Mfg. Co.*, 9 R. I. 99 Rep. 224.

⁶⁴ *Campbell v. Campbell*, D. C. 142; *Johnson v. Wells*, 290, 73 So. 188; *Dominior Co. v. Morrow*, 130 Md. 255, 292; *Central Union Stocky v. Uvalde Asphalt Pav. Co.*, Eq. 246, 87 Atl. 235; *Don Buhlman*, 134 Wis. 117, 11 431. It is contrary to natu for one to be arbitrator to amount of his own liability. *hurst &c. Co. v. Marsch*, 225 113 N. E. 646.

⁶⁵ *Oregon-Washington Ry. Co. v. Spokane &c. Ry. Co.*, 528, 163 Pac. 600, 989. takes based on erroneous co from known facts will not c invalidate an award. *Jol Wells*, 72 Fla. 290, 73 So. 188; *Adm. v. Pennsylvania Co.*, 479, 184 S. W. 395.

⁶⁶ *State v. Bowlby*, 74 W 132 Pac. 723. See also *Duva*

that defects in the conduct of an arbitration may be waived by continuing to take part in the proceedings after acquiring knowledge of the defects.⁶⁷

§ 1930. Statutory arbitration.

In England and in most of the United States a form of arbitration under direction of the courts is provided for by statute. The reference is made by order of court and the award is returned into court and becomes the basis of a judgment. Such statutes generally do not supersede arbitration at common law, but give an alternative and sometimes more desirable mode of procedure.⁶⁸

ner, 155 Fed. 910; *Central Union Stockyards Co. v. Uvalde Asphalt Pav. Co.*, 82 N. J. Eq. 246, 87 Atl. 235.

⁶⁷ *Chicago, Rock Island &c. Ry. v. Union Pac. R.*, 254 Fed. 235, 165 C. C. A. 523; *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817; *Ramish v. Marsh*, 178 Cal. 217, 172 Pac. 1100; *Williams v. Henkle*, 201 Ill. App. 362; *Hackney v. Adam*, 20 N. Dak. 130, 127 N. W. 519; *Travelers' Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103. There is no power to waive express statutory requirements. Con-

way v. Roth, 179 N. Y. App. D. 108, 166 N. Y. S. 182.

⁶⁸ *Utah Construction Co. v. Western Pac. Ry.*, 174 Cal. 156, 162 Pac. 631; *Evans v. Stinson*, 21 Ga. App. 612, 94 S. E. 826; *Thatcher Implement &c. Co. v. Brubaker*, 193 Mo. App. 627, 187 S. W. 117; *Johnsen v. Wineman*, 34 N. Dak. 116, 157 N. W. 679; *Hill v. Walker* (Tex. Civ. App.), 140 S. W. 1159. Cf. *Conway v. Roth*, 170 N. Y. S. 176; *Dickie Mfg. Co. v. Sound Constr. &c. Co.*, 92 Wash. 316, 159 Pac. 129; *Suksdorf v. Suksdorf*, 93 Wash. 667, 161 Pac. 465.

CHAPTER LIII

IMPOSSIBILITY

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§ 1931. The defence of impossibility is modern.

The form in which the early English law was habitually stated may be found in Serjeant Williams' Notes to Saunders' Reports.¹ "When the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. So in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused.² But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And therefore if a lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he is bound to repair it."³

Though impossibility as a defence to an express promise was thus flatly denied, a promise of personal service must have been held excused by death or unavoidable illness from very early times;⁴ and that a supervening statute making performance illegal would discharge a covenant was also early recognized.⁵ But as to other cases of impossibility, it was thought enough to say that if the promisor wished to protect himself he might have done so by proper conditions or qualifications.

¹ 2 Williams' Saunders, 422, note 2.

² Citing Y. B. 33 Henry VI. 1. See also Paradine v. Jane, Aley, 26.

³ Citing Bro. Covenant 4. Paradine v. Jane, Dyer, 33 a. pl. 10.

⁴ Hyde v. Dean of Windsor, Cro. Eliz. 552, 553. See also Sparrow v. Sowgate, W. Jones, 29.

⁵ Brewster v. Kitchell, 1 Salk. 198, overruling Brason v. Dean, 3 Mod. 39.

This statement, originating far back in the law, and then substantially true, is still repeated as a general formula,⁶ though in view of the exceptions, now well recognized to the enforceability of an impossible promise, it has no longer universal or even general validity.⁷ "The law upon the matter is undoubtedly in process of evolution."⁸ So modern are the exceptions to the general principle, that it was not until after the middle of the nineteenth century that it was held that the destruction or non-existence of inanimate subject-matter to which a contract related would excuse a promisor from liability.⁹ When it

⁶In *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540, 543, *McCardie, J.*, quoted this rule saying that it "has again and again been restated. I only refer to *Spence v. Chodwick* (1847), 10 Q. B. 517, 530, *per Wightman, J.*, and to *Ford v. Cotesworth* (1868), L. R. 4 Q. B. 127, *per Blackburn, J.*" The learned judge then indicated the present inaccuracy of such a rule. In other modern decisions the rule is stated with little recognition of how much modern law it contradicts. See, *e. g.*, *Prather v. Latahaw (Ind.)*, 122 N. E. 721; *Runyan v. Culver*, 168 Ky. 45, 181 S. W. 640, L. R. A. 1916 F. 3; *North Hempstead v. Public Service Corp.*, 107 N. Y. Misc. 19, 176 N. Y. S. 621 (citing many other cases at p. 624); *Monaca v. Monaca & Co. St. Ry.*, 247 Pa. 242, 93 Atl. 344; *Kingsville Cotton Oil Co. v. Dallas Waste Mills (Tex. Civ. App.)*, 210 S. W. 833. See also 13 C. J., § 706; 3 Elliott, Cont., § 1891.

⁷See *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540; *Kinzer Const. Co. v. State*, 125 N. Y. S. 46, 50. The same statement of general principle is often made in regard to the excuse of the defendant from liability by breach of contract by the plaintiff—namely, that if the parties had so desired they could have expressly provided that the plaintiff's performance should be a condition of

the defendant's obligation. *Winstone v. Linn*, 1 B. & C. 460, *per Bayley, J.*; *Tarrabochia v. Hickie*, 1 H. & N. 183, *per Bramwell, B.*; *Phillips v. Clift*, 28 L. J. Exch. 153, *per Martin, B.*; *Seeger v. Duthie*, 29 L. J. (C. P.) 253, *per Byles, J.*, and in view of the development of the doctrine of implied conditions, such statements are open to similar criticism to that made in the text.

⁸*McCardie, J.*, in *Blackburn Bobbin Co., Ltd., v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540, 542, citing "*per Atkin, J.*, in *Lloyd Royal Belge Société Anonyme v. Stathatos*, [1917], 33 Times L. R. 390, and *per Pickford, L. J.*, in *Hulton & Co. v. Chadwick & Taylor* [1918] 34 Times L. R. 230."

⁹This was settled by the case of *Taylor v. Caldwell*, 3 B. & S. 826. *Blackburn, J.*, who delivered the opinion of the court, relied greatly on the Civil law, which clearly supports his conclusion (see *infra*, § 1979), but is equally clearly at variance with the early common law. The few English authorities cited, related to the death of one under a personal contract, or the death of an animal. The most pertinent case was *Williams v. Lloyd, W. Jones*, 179, where a contract to deliver a horse was held excused by the death of the horse. A short time before the decision of *Taylor v. Caldwell*, in *Hills v. Sughrue*, 15 M. & W. 253, a contract to load a full cargo of

is now said that courts "will neither make nor modify contracts, nor dispense with their performance,"¹⁰ if it is meant that such power will not be exercised except in accordance with legal principles, the statement is sound; but if the meaning is that parties to contracts are always liable in accordance with their terms, it is far too narrow a limitation of the functions of the common law, and a court which insists upon such a statement obliges itself in various situations to use the confusing language of fiction in order to achieve correct results. Under the name of implied contracts (quasi-contracts) courts have wisely imposed obligations on parties to contracts which they never agreed to assume; and because of fraud, mistake, duress, impossibility and illegality, have modified contracts or dispensed with their performance, simply because justice required it.

§ 1932. Objective and subjective impossibility.

Impossibility may be due to the nature of the thing to be done or to the capacity of the person who has undertaken to do it. The first is called objective, the second-subjective. In personal contracts these two kinds of impossibility unite. As the act to be done is bound up with the person who is to do it, and the act would not be that called for by the contract if it were performed by any one else, the incapacity of the promisor involves not only subjective impossibility but objective as well. Subjective impossibility except in the cases where it is also objective, does not excuse non-performance of a

guano at a certain island, was held to impose liability upon the promisor though, as it proved, there was not enough guano upon the island to make a cargo. See also *Barr v. Gibson*, 3 M. & W. 390; *Hall v. Wright*, E. & B. 746, for illustrations of technical severity.

Of the development of the law subsequent to the decision of *Taylor v. Caldwell*, 3 B. & S. 826, *McCardie, J.*, said in *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.* [1918], 1 K. B. 540, 544: "The doctrine of *Taylor v. Caldwell*, 3 B. & S. 826, was extended by *Nickoll v. Ashton*, [1901], 2 K. B.

126, and still more strikingly enlarged by the *Coronation cases*, of which *Krell v. Henry*, [1903], 2 K. B. 740, is the most vivid example, for in *Krell v. Henry* the Court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved. *Krell v. Henry* has been frequently cited and adopted in the highest tribunal."

¹⁰ *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 381, 101 N. E. 162, 49 L. R. A. (N. S.) 922.

contract. Insolvency or inability to obtain necessary funds is a perfect illustration of subjective impossibility. It absolutely precludes making a payment contracted for; but whatever the cause of insolvency it is no excuse. And all kinds of impossibility arising from a promisor's inadequate pecuniary resources are equally immaterial.¹¹ An agreement to ship and deliver goods is not discharged by the inability, without fault on his part, of the promisor to get the means of shipment. Nor is an agreement to find a purchaser at an advance price within a stated time by the impossibility of procuring a purchaser.¹³

One who makes a promise which cannot be performed without the consent or coöperation of a third person, is not released from liability because of inability to secure the required consent or coöperation,¹⁴ unless the terms or nature of the contract

¹¹ *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139; *Dean v. Lowey*, 50 Ill. App. 254; *Western Drug &c. Co. v. Board of Administration*, (Kan.) 187 Pac. 701; *Pratt v. McCoy*, 128 La. 570, 54 So. 1012; *McCreery v. Green*, 38 Mich. 172; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Taylor v. Syme*, 162 N. Y. 513, 57 N. E. 83; *Smith v. Kaufman*, 30 Pa. Super. 265. Prevention by law, therefore, is no excuse when the law is called into action by non-payment of a debt owed by the promisor. *Miller v. Thornton*, 1 Duv. (Ky.) 369 (attachment of specific property to which the contract related).

¹² *Eppens v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811; *Irwin v. Kelly*, 176 Ill. App. 178. See also *Railroad Company v. Reichert*, 58 Md. 261, 274; *Cluley-Miller Coal Co. v. Freund, etc., Mfg. Co.*, 138 Mo. App. 274, 120 S. W. 658; *R. J. Menz Lumber Co. v. McNealey*, 58 Wash. 223, 108 Pac. 621; *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.*, 114 Wis. 654, 90 N. W. 1094. Cf. *Burt v. Garden City Sand Co.*, 141 Ill. App. 603, *affd.* 237 Ill. 473, 86 N. E. 1055.

¹³ *Hurless v. Wiley*, 91 K. 137 Pac. 981, L. R. A. 1915. See also *Ireland Investment Campbell*, 24 Manitoba L. R.

¹⁴ *M'Neill v. Reid*, 9 Bing. 68; *Lewis*, 19 Y. L. R. 127; *M. & St. P. R. Co. v. Hoyt*, 111 Ill. 1, 37 L. Ed. 625, 13 S. Ct. 771; *v. Dennis*, 3 Port. (Ala.) 231; *Howe v. Hayes*, 35 Dist. of Col. 65, 33 L. R. A. (N. S.) 698; *v. Loeb*, 43 Ind. App. 657, 88 N. E. 100; *Hampe v. Sage*, 87 Kans. 53, 137 Pac. 53 (rev'd on ground of illegality of contract in *Sage v. Hampe*, 100 S. 99, 35 S. Ct. 99, 59 L. Ed. 100); *Wareham Bank v. Burt*, 5 Allen 1; *Wright v. Fullerton*, 60 Mo. App. 1, 1 S. W. 176; *Pumpelly v. Pether*, 1 N. Y. 59, 100 Am. Dec. 463; *v. Johnston*, 125 N. Y. App. Div. 109, 109 N. Y. S. 1106, *affd.* in 196 511, 89 N. E. 1104; *Roos Road Co. v. Forbus*, 23 Oh. L. Journal 1; *Bradley v. McHale*, 19 Pa. Super. 1; *Gulf Refining Co. v. Pagach*, 100 Civ. App., 146 S. W. 719. See also *cases supra*, §§ 1422, 1436, where the wife of one who has contracted to sell real estate refuses to release her dower interest.

indicate that he does not assume this risk.¹⁵ And the rule is general that purely subjective impossibility is immaterial,¹⁶ except to the extent that the principle is qualified by what is hereafter stated of the effect of failure of the contemplated means of performance.¹⁷

§ 1933. Existing and supervening impossibility.

Performance of a promise may be impossible at the time the promise was made, or it may become impossible because of supervening circumstances. If the impossibility exists at the time when the contract was made it may be supposed that one or both parties were aware of the fact or that neither was aware of it. It is sometimes said that if the agreement is impossible in itself, it is void.¹⁸ This, however, does not seem necessarily true. Doubtless if the parties know of the impossibility they will not make such an agreement. Merely going through a form of words which they know can mean nothing, will not make a contract,¹⁹ but by mistake it may well happen that parties execute a writing as their contract which contains a provision impossible of performance.²⁰ If it is said the transaction is necessarily void, reformation never will be possible; yet it seems that a case might well be supposed where reformation of such a contract would be appropriate. In disregarding a plainly expressed provision of a contract because it is repugnant to a more vital clause, courts are, it seems, under the guise

¹⁵ In a contract of apprenticeship the promise of the master to instruct is excused by the wilful refusal, *Raymond v. Minton*, L. R. 1 Exch. 244, or total incapacity, *Clancy v. Overman*, 1 Dev. & B. 402, of the apprentice to learn. See also *Barger v. Caldwell*, 2 Dana, 129; *Wright v. Brown*, 5 Md. 37; *Wyatt v. Morris*, 2 Dev. & B. 108.

¹⁶ *Fenwick v. Schmals*, L. R. 3 C. P. 313; *Lind v. United States*, 44 Ct. Cl. 558; *Jones v. Anderson*, 82 Ala. 302, 2 So. 911; *Klauber v. San Diego & Co.*, 95 Cal. 353, 30 Pac. 555; *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 333, 104 Pac. 432, 25 L.

R. A. (N. S.) 609; *Dexter & Co. Paper Co. v. McDonald*, 103 Md. 381, 63 Atl. 958; *Nelson v. Odiorne*, 45 N. Y. 489; *Berry v. Wells*, 43 Okla. 70, 141 Pac. 444; *Reid v. Alaska Packing Co.*, 43 Oreg. 429, 73 Pac. 337; *Virginia Iron & Co. v. Graham (Va.)*, 98 S. E. 659, 662.

¹⁷ See *infra*, § 1951.

¹⁸ See *Wald's Pollock, Contracts*, 3d Am. ed. 520.

¹⁹ See *supra*, § 21.

²⁰ In *Le Roy v. Jakobosky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, the parties entered into a contract on April 28th to convey land on April 23d of the same year.

of construction really reforming an impossible agreement. Existing impossibility known to one party and not to the other would probably render the transaction voidable for that party. If unknown to both parties there is little occasion to distinguish existing impossibility from supervening impossibility. Parties deal with unknown present situations on the same basis as future contingent occurrences, and the law of contract should adopt this method of dealing with them.²³ There is therefore, no more difficulty in finding a binding contract to perform something in fact impossible from the outset than in finding facts or their import are unknown to the parties, than in finding a contract in which a promisor takes the risk of supervening impossibility.²⁴ It may also happen that parties know all the facts, but erroneously believe known difficulties to have been removed. Such an agreement will generally be made on the assumption that the difficulties are not insuperable and will prove to be so (not merely because of a promisor's suit

²³ See *Fitch v. Jones*, 5 E. & B. 238; *Cameron v. White*, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493.

²⁴ See *supra*, §§ 1497, 1548.

²⁵ See *infra*, § 1963.

²⁶ Cases of existing impossibility unknown to the parties, except those based on broken warranties are not very numerous. The most frequent are those where land does not contain the amount of ore which a lessee agrees to mine. See *supra*, § 1567. There are a few other illustrations in the books.

In *Thornborow v. Whitacre*, 2 Ld. Ray. 1164, the court considered a promise to deliver two grains of rye on Monday, and on each alternate Monday thereafter, four, eight, etc., grains in geometrical ratio. Lord Holt, said that the promise was "only impossible with respect to the defendant's ability;" though it was suggested that "all the rye in the world was not so much." There was no judgment rendered.

In *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518, the defendant agreed to secure in England a patent giving

the exclusive right of selling a patented article in Canada. At the time the contract was made the privilege could not be granted in England, but only in Canada. The court, nevertheless, held the defendant liable.

In *Reid v. Alaska Packing Co.*, 429, 73 Pac. 337, a contract was made to sell salmon packed in boxes "exactly like Puget Sound far eye." The promisor was held liable though so far as known, fish of that kind are not found in Alaska. The court suggested that the country had not been completely explored and that the event Sockeye salmon might be exported into Alaska and sold there.

See also *Bennett v. Morse*, 122, 39 Pac. 582; And *Adams*, 43 Or. 621, 74 Pac. 21. *ford Gas Co. v. Stratford*, 109 App. 109.

In some of these cases it has been questioned whether the defendant might not have sought rescission of the contract on the ground of

incapacity), there will be no liability.²⁵ It is obviously possible, however, for a promisor to assume the risk of success.

It is ordinarily supervening impossibility that is referred to when the question of impossibility, as a defence to contracts, is considered.

§ 1934. A promise impossible of performance may be binding.

"A man may contract that a future event shall come to pass over which he has no, or only limited power"²⁶ By apt words he may bind himself that it shall rain to-morrow,²⁷ and not only is this true of supervening impossibility but a promise may be binding though impossible when made.²⁸ Indeed such promises are common. A warranty that a certain state of facts exists which in fact does not exist is an illustration. One who warrants that a horse is sound or a ship tight, staunch and strong is promising something impossible if the horse is unsound or the ship leaky; and though a warranty in effect is a promise to pay damages if the facts are not as warranted, in terms it is an undertaking that the facts exist. And in spite of occasional statements that an agreement impossible in law is void,²⁹ there seems no greater difficulty in warranting the legal possibility of a performance than its possibility in fact,³⁰ subject to this qualification: If a promisor undertakes to do an act whether it

²⁵ In *Anglo-Russian Merchant Traders v. Batt*, [1917] 2 K. B. 679, a contract for the sale of aluminium for export was made. Both parties knew that export was prohibited without a license. The seller used diligence in endeavoring to get a license but failed. He was held not liable.

In *McKenna v. McNamee*, 15 Can. S. C. 311, the defendants engaged the plaintiffs as sub-contractors to do certain Government work. As both parties knew, the Government had cancelled its contract with the defendants, but the defendants thought they could secure its reinstatement. They failed in this, but were held not liable to the plaintiffs.

²⁶ *Sage v. Hampe*, 235 U. S. 99, 104,

35 S. Ct. 94, 59 L. Ed. 147. So in *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589, 603, *per* Bowen, L. J., "A person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by *vis major*."

²⁷ *Canham v. Barry*, 15 C. B. 597, 619; *Krause v. Board &c. of Crothersville*, 162 Ind. 278, 284, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203.

²⁸ *Clifford v. Watts*, L. R. 5 C. P. 577; *Runyan v. Culver*, 168 Ky. 45, 181 S. W. 640, L. R. A. 1916 F. 3.

²⁹ See *Wald's Pollock. Contracts*, 3d ed. 524.

³⁰ See *Odlin v. Insurance Co.*, 2 Wash. C. C. 312.

is legal or not, and it is or becomes illegal, the interest in breaking the law makes the contract illegal and there can be no recovery upon it.³¹ But there seems no reason for forbidding a contract to perform a certain act legal at the time of the contract if it remains legal at the time of performance and if not legal to indemnify the promisee for non-performance.³²

Supervening impossibility of a kind which usually is accepted as an excuse will not do so if the terms of the promise indicate that the promisor assumes the risk.³³

³¹ *Sage v. Hampe*, 235 U. S. 99, 104, 35 S. Ct. 94, 59 L. Ed. 147.

³² In *Osborn v. Nicholson*, 13 Wall. 654, 20 L. Ed. 689, a warranty that a negro was "a slave for life" made in Arkansas in 1861 was held enforceable after the constitutional prohibition of slavery. See also *Smith v. Becker*, [1916] 2 Ch. 86, stated *infra*, § 1938, n. 54.

³³ *Prince v. Haworth*, [1905] 2 K. B. 768, 770; *Henderson v. Stone*, 1 Mart. (N. S.) 639; *Blome v. Wahl-Henius Institute*, 150 Ill. App. 164; *Finney v. Bennett*, 49 N. Y. Misc. 230, 232, 97 N. Y. S. 291; *Kingsville Cotton Oil Co. v. Dallas Waste Mills* (Tex. Civ. App.), 210 S. W. 832. A contract to make specified machinery was held not excused by the fact that the manufacture would infringe existing patents. *E. W. Bliss Co. v. Buffalo Tin Can Co.*, 131 Fed. 51, 65 C. C. A. 289, cert. denied 195 U. S. 630, 25 S. Ct. 788, 49 L. Ed. 352.

In *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415, the plaintiff, Berg, "was a resident of St. Francis, Tex. He had never had any experience of Kansas grass. He sought pasturing for 1,000 cattle. He went from Texas to Kansas and applied to Erickson for this pasturing. Before the contract was made Erickson showed him the pastures into which he proposed to put the cattle and into which they were subsequently driven. Berg

looked at the pastures and objected to them. Erickson said he would guarantee the grass. After this inspection and objection Erickson made the contract to furnish plenty of good grass to pasture during the grazing season of 1914. There was no rain from May to September, but it did not prevent the growth of all grass on the pastures. They produced sufficient to keep cattle alive, and at the end of the season, when they were taken to market in November, they weighed as much as or even more than, when they were placed in the pastures. . . . These facts force the mind to the conclusion that the minds of these contracting parties met in the intention that Erickson should, and that he would guarantee plenty of good grass to these cattle in these pastures throughout the season, without exempting or intending to exempt himself from liability in the case of any impossibility of performance that might result from an unprecedented drought, fire, or any act of God or accident. It was common knowledge that droughts were unusual in Kansas. It was common knowledge that they decreased the growth of grass. It was common knowledge that one could not determine the examination of pastures in the fall of which he had no previous knowledge in the spring of the year before

§ 1935. Classification of excusable impossibility.

Not every kind of impossibility will excuse a promisor from liability for breach of his promise, even though he does not expressly undertake the risk of impossibility. There are, however, three classes of cases where it is well settled that the promisor will be excused unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault; and there is certainly a fourth class of cases where the defence has sometimes been allowed (and the law seems tending in this direction); and perhaps a fifth class may be added. The three classes first alluded to are,

- (1) Impossibility due to domestic law;
- (2) Impossibility due to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance;
- (3) Impossibility due to fortuitous destruction or change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance.

The fourth class of cases, to which allusion was made above as standing on more debatable ground, comprises cases where impossibility is due to the failure of some means of performance, contemplated but not contracted for.³⁴

The fifth class does not strictly fall within the boundaries of impossibility. Performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by supervening accident. There has been but little clear recognition of this

13th of April, whether or not they would produce sufficient grass for 1,000 cattle throughout the coming summer. Berg knew nothing of their productive capacity; Erickson knew all about it. The question whether or not the pastures would produce plenty of grass for 1,000 head of cattle throughout the season, and whether or not the droughts that visited some parts of

Kansas would be so severe as to prevent such production, could not have failed to be present in the minds of each of these parties when they made this contract."

³⁴ This classification is accepted in an able opinion of Rodenbeck, J., in *Kinzer Const. Co. v. State*, 125 N. Y. S. 46, 54, citing 1 Columbia L. Rev. 533, and 15 Harv. L. Rev. 419.

class,³⁵ but its adoption seems involved in some decision their justice is plain.

§ 1936. Excusable impossibility not necessarily act of

The phrase "act of God," or "*vis major*" is frequently in connection with cases on impossibility. In fact it is of general application there. In the law of carriers fortuitous deviation of the carrier's performance does not relieve the carrier from liability, unless the impossibility is due to act of God but except in the law of carriers there is no such distinction. On the one hand impossibility not due to act of God is no excuse. The effect of the destruction of the subject-matter of the contract, or of the means of performance, is the same whether caused by the voluntary or malicious act of a third person or when caused by act of God.³⁶ All that is important is that the promisor himself shall be free from fault. On the other hand, if impossibility due to act of God will not necessarily ex-

³⁵ In *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 251, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467, the court said: "To this general rule there are three exceptions. I know of no other. They are stated in the English notes (6 Eng. Rul. Cas. 611) as follows: 'First, where the subsequent impossibility is imposed by law; secondly, where the continued existence of something essential to the performance is an implied condition of the contract; thirdly, in contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness.'"

³⁶ See *infra*, §§ 1954, 1955.

³⁷ See *supra*, § 1090. The distinction between act of God and inevitable accident is discussed in *Alaska Coast Co. v. Alaska Barge Co.*, 79 Wash. 216, 140 Pac. 334.

³⁸ *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

³⁹ *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589, 603; *Berg v. Erickson*, 234

Fed. 817, 148 C. C. A. 415.

infra, § 1964, *ad fin.* Little weight should be given to occasional decisions not required for the decision of the case before the court, cf. *United States v. Gleason*, 17 Fed. 588, 602, 44 L. Ed. 284, 20 S. Ct. 101, that a promisor is liable "unless his performance is rendered impossible by the act of God, the law, or the act of the party." See also *Lima Locomotive Co. v. National Steel Castings Corp.*, 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; *Zanillo v. Smith Works*, 62 Oreg. 213, 124 Pac. 101. The courts using such language are stating the obligation of a contract rather than of an ordinary contract.

In Georgia, it is true, by statute impossibility must be caused by the act of God in order to be an excuse. *Cannon v. Hunt*, 113 Ga. 501, 39 S. E. 983; *Fish v. Chapman*, 2 Ga. 393, 40 Am. Dec. 393. See also *Rogers v. Rogers*, 96 Cal. 349, 31 Pac. 24. In construing a provision of the California Code. It is open to doubt, however, whether any court would hold

§ 1937. Impossibility as an implied condition.

As in the case where the courts overturned the long prevailing doctrine of independency of promises in a bilateral contract,⁴⁰ so in regard to the defence of impossibility, it was found easier to evade the earlier doctrine by giving a new construction to certain promises than to overthrow it directly; and it is the prevailing mode of expression to say that where impossibility constitutes an excuse for failing to perform the terms of a promise, it is because there is an "implied condition" in the promise.⁴¹

one who had contracted to sell goods, which before the time for performance without negligence of the seller are destroyed by the tortious act of a third person—clearly not the act of God.

⁴⁰ See *supra*, §§ 817 *et seq.*

⁴¹ In *F. A. Tamplin Steamship Co., Ltd., v. Anglo-Mexican Petroleum, etc., Co., Ltd.*, [1916] 2 A. C. 397, 403, Lord Loreburn said:—

"In the recent case of *Horlock v. Beal*, [1916] 1 A. C. 486, this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirms me in the view that, when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my

opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. When this question arises in regard to commercial contracts, as happened in *Dahl v. Nelson, etc., Co.* (1881), 6 App. Cas. 38; *Geipel v. Smith*, L. R. 7 Q. B. 404; and *Jackson v. Union Marine Ins. Co.* L. R. 10 C. P. 125, the principle is the same, and the language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, 'that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.' That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that happens, of course,

As a corollary it is said that impossibility is no excuse for failing to perform an absolute promise.⁴² This was true or very nearly so (for conditions evolved from the sense of justice are of modern creation); but now the help in such a formula, for when is a promise absolute when it is so in terms for there may be an "implied condition and when is there an implied condition? Though they profess to seek for a condition, they do not seek it in the terms of the contract. Of course if the contract makes provision for a contingency which occurs the provision is applicable in cases properly involving the defence of impossibility. If the words of the promise are absolute; and generally the particular intention evinced or sought for in surrounding circumstances.⁴⁴ Any qualification is based on the unfairness or unreasonableness of giving the promise the absolute effect which its words clearly state. In other words, because the court thinks it fair to qualify the promise, it does so accordingly; but clearness of thought would be increased if

it is all over between us?" See also *Metropolitan Water Board v. Dick*, [1917] 2 K. B. 1, 8.

In *Day v. United States*, 245 U. S. 159, 62 L. Ed. 219, 38 S. Ct. 57, 58, the Supreme Court of the United States thus expressed the matter: "One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The *Kronprinzessin Cecilie*, 244 U. S. 12, 22, s. c. *sub nom.* *North German Lloyd v. Guaranty Trust Co.*, 37 S. Ct. 490, 61 L. Ed. 960. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent.

Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 36 Sup. Ct. 60 L. Ed. 576; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 543, 544, 23 Sup. Ct. 754, 4 L. Ed. 1171." See also *Moore v. Shilling Assoc.*, 101 Fed. 591, 593, 10 A. 506; *Piaggio v. Somerville*, 80 So. 342; *People v. Ins.*, 174 N. Y. 174, 179; *Stewart v. St. N. Y.*, 500, 28 N. E. 595, 14 L. Ed. 215; *Buffalo & Co. v. Belle Co.*, 165 N. Y. 247, 59 N. E. 1, 1 L. R. A. 951; *Lovering v. Bucktail Co.*, 54 Pa. 291.

⁴² *Atkinson v. Ritchie*, 10 Es. Hills v. Sughrue, 15 M. & W. 1; *Jacobs v. Credit Lyonnais*, 13 B. D. 589; *Runyan v. Culv*, 45 Ky. 45, 181 S. W. 640, L. R. A. 1905, 10 F. 3.

⁴³ *Elliott v. Crutchley*, [1905] 1 B. 476.

⁴⁴ But see *Berg v. Erickson*, 85 Fed. 817, 148 C. C. A. 415.

plainly recognized that the qualification or defence is not based on any expression of intention by the parties.

In truth the foundation is the same as in the case of mistake, the two defences are substantially identical in principle, and often the same situation will involve both. As the basis for the defence of mistake is the presumed assumption by the parties of some vital supposed fact, so the basis of the defence of impossibility is the presumed mutual assumption of the existence of some vital fact either at the time the contract is made, or at the time it is to be performed, or both, in the absence of which performance would be impossible. The only evidence however, of such mutual assumption is, generally, that the court thinks a reasonable person (that is, the court itself) would not have contemplated taking the risk of the existence of the fact in question.⁴⁵ If the explanation were sound that the promise in question is subject to an implied condition, the burden of proving such a state of facts as to bring him within the terms of the conditional promise would be on the promisee, but the burden should be placed on the promisor to establish the defence of excusable impossibility; and such seems to be the law whether the promisor is sued on his promise,⁴⁶ or as plaintiff seeks to recover on a *quantum meruit* for first performance.⁴⁷

§ 1938. Impossibility due to change of law.

It would obviously be a gross injustice if the law should hold a promisor liable for failing to perform the promised act after the law itself had prohibited its performance, if at the

⁴⁵ A more exact statement than those quoted, *supra*, n. 41, is the following: "The court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made." *Per* Lord Parmoor in *Metropolitan Water Board v. Dick*, [1918] A. C. 119, 127. So Lord Shaw in *Horlock v. Beal*, [1916] 1 A. C. 486, 512. "The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting

parties." So Lord Haldane and Lord Loreburn in *Tamplin Steamship Co. v. Anglo-American Petroleum Products Co.* [1916] 2 A. C. 397, 403, 406, 407. But it is worth emphasizing that the only reason the court has for inferring that a supposed fact was at the basis of the contract is its sense of what is fair and just.

⁴⁶ *Pasquotank &c. Steamboat Co. v. Eastern Carolina Transp. Co.*, 166 N. C. 582, 588, 82 S. E. 956.

⁴⁷ *American Towing &c. Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 677, 84 Atl. 182.

time of the contract the undertaking was legal; and it is said broadly that where the law forbids or prevents the performance of a promise, legal when made, the promisor is free from liability.⁴⁸

Performance of such a promise is illegal as well as impossible, and indeed often, though not always, there is no impossibility in fact. The promisor could keep his promise if he were to break the law. The ordinary principles of illegal contracts

* *Baily v. De Crespigny*, L. R. 4 Q. B. 180, is a leading case. A covenant that land should not be built upon was held excused by the seizure of the land by eminent domain by a railroad company, under authority of an act of Parliament, for the purpose of building a railroad station. Impossibility created by law was held an excuse for non-performance also in *Brewster v. Kitchell*, 1 Salk. 198; *Atkinson v. Ritchie*, 10 East, 530; *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *Louisville, etc., R. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A. (N. S.) 671; *Board of Commissioners v. Young*, 59 Fed. 108, 8 C. C. A. 27; *United States v. Dietrich*, 126 Fed. 671; *Nourse v. United States*, 25 Ct. Cl. 7; *Southern R. v. Wallace*, 175 Ala. 72, 56 So. 714; *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501; *Fresno Milling Co. v. Fresno Canal, etc., Co.*, 126 Cal. 640, 59 Pac. 140; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350; *Hanford v. Connecticut Fair Assoc.*, 92 Conn. 621, 103 Atl. 838; *Hite v. Cincinnati &c. R. Co.*, 284 Ill. 297, 119 N. E. 904 (cf. *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 123 N. E. 631); *Jamieson v. Indiana &c. Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 21 Am. St. 135; *Kuhn v. Freeman*, 15 Kans. 423; *Gammon v. Blaisdell*, 45 Kans. 221, 25 Pac. 580; *Juliene v. La. Ann.* 599; *American Exchange v. Blunt*, 102 M. Atl. 212, 10 L. R. A. (N. S.) 671, 36 Am. St. Rep. 463; *Dingley v. Me.* 93, 90 Atl. 972; *Heaven v. Hahn*, 74 Md. 493, 22 Atl. 26; *v. Miller*, 39 Mich. 581, 33 430; *Hooper v. Mueller*, 1 595, 123 N. W. 24, 133 Am. 399; *Brown v. Dillahunty*, M. 713, 43 Am. Dec. 499; *Hume*, 50 Miss. 419; *Piaggio ville (Miss.)*, 80 So. 342; *Thurleigh*, 66 N. H. 574, 23 Public Service Elec. Co. v. Utility Comm., 87 N. J. L. Atl. 707, 88 N. J. L. 603, 96 1; *Brick Presb. Church v. New Cow.* 538; *Jones v. Judd*, 4 N. J. H. Labaree Co. v. Cross N. Y. App. D. 499, 92 N. Y. affd. without opinion 184 N. 77 N. E. 1189; *Kaiser v. Rice* 5 Daly, 301; *Gesualdi v. P.* 128 N. Y. S. 565; *Monaca v. etc.*, St. Ry. Co., 247 Pa. 242 344; *Burkhardt v. Georgia Township*, 9 S. Dak. 315, 66 16; *Knoxville v. Bird*, 12 Lea, Am. Rep. 326; *Binz v. National Co. (Tex. Civ. App.)*, 105 S. Samson v. Regina, 2 Can. E. Cf. *Klauber v. San Diego &c.* Cal. 353, 30 Pac. 555; *Newpo Co. v. McDonald Brick Co.'s* 109 Ky. 408, 59 S. W. 332; *M. Reitmeier (Minn.)*, 176 N. 1 Baker v. Johnson, 42 N. Bradley v. McHale, 19 Pa. Su

No doubt if the legal proceedings interfering with performance of the promise are in any way due to the fault of the promisor, as an attachment or receivership to collect a debt or debts rightfully due by him, the interference should constitute no defence, not because it is not the act of the law, but because the impossibility is primarily due to the promisor's own fault, not to fortuitous circumstances beyond his control.⁵⁸ Where, however, the proceedings which interfere with the performance of the promise are based on no fault of the promisor there seems no reason why the interference should not be an excuse,⁵⁹ unless the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of it assumed by the obligor.

§ 1940. Impossibility due to death or illness.

One who engages for performance of such personal character that it can be performed only by a particular person is excused from liability by the physical incapacity of that person, before breach of the contract, unless the risk of such incapacity is clearly assumed by the promisor. Cases illustrating this principle relate generally to contracts of employment; and the death or long-continued illness of the employee in effect discharges his promise.⁶⁰ Generally it is the promisor himself who

Central Ky. Lunatic Asylum, 10 Ky. L. Rep. 817; *McQuiddy v. Brannock*, 70 Mo. App. 535; *Whittemore v. Sills*, 76 Mo. App. 248; *Doolittle v. Nash*, 48 Vt. 441.

⁵⁸ See *infra*, § 1959; *Western Drug &c. Co. v. Board of Administration* (Kan.), 187 Pac. 701.

⁵⁹ *Kansas Life Ins. Co. v. Burman*, 141 Fed. 835, 73 C. C. A. 69; *Moller v. Herring*, 255 Fed. 670 (C. C. A.); *Crise v. Lanahan* (Md.), 11 Atl. 842; *Webb Granite, etc., Co. v. Worcester*, 187 Mass. 385, 73 N. E. 639; *Attorney General v. Canadian P. R. Co.*, 1 Brit. Col. Part 2, p. 10.

⁶⁰ *Shep. Touchst.* 180; *Roast v. Firth*, L. R. 4 C. P. 1; *Givhan v. Dailley's Adm.*, 4 Ala. 336; *Herren v. Harris* (Ala.), 78 So. 921; *Williams*

v. Butler, 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300; *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Caden v. Farwell*, 98 Mass. 137; *Piaggio v. Somerville* (Mass.), 80 So. 342; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 197; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 382, 101 N. E. 162, 49 L. R. A. (N. S.) 922; *Shaw v. Ward*, 170 N. Y. S. 36; *Rubin v. Siegel*, 188 N. Y. App. Div. 636, 177 N. Y. S. 342; *Blakely v. Sousa*, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. Rep. 821; *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; *Hubbard v. Belden*, 27 Vt. 645. See also *Odell v. Wells*, 171 N. Y. S. 345; *Calif. Civ. Code*, § 1997; *S. Dak. Civ. Code*, § 4962.

is to render the personal services, but the principle is applied to contracts where the promisor has agreed that a third person shall render such services, and the latter becomes physically unable to do so;⁶¹ and to any contract which by its character requires work of a specific person as a carpenter to paint a portrait,⁶² or to write a book,⁶³ or to care for an animal;⁶⁴ and likewise to promises which require the cooperation with the promisor of some particular person who becomes physically unable to give the required coöperation. The non-performance of a contract to buy goods at a price fixed by a person who becomes incapacitated is excused.⁶⁵ So a contract to teach a pupil for the ensuing year is excused by the illness of the pupil;⁶⁶ but it should be noted that the reason why one who employs such a teacher is excused from paying the agreed price is entirely different. It is perfectly possible for him to pay the price, and the defence of the employer is not impossibility but that without his fault he has not received the benefit for which he bargained.⁶⁷

A right of renewal given in a lease may be exercised after the death of either party.⁶⁸ And wherever an obligation could be performed by an agent of the obligor when he dies, it will survive his death and be performable by his legal representatives.⁶⁹

⁶¹ *Boast v. Firth*, L. R. 4 C. P. 1; *Robinson v. Davison*, L. R. 6 Exch. 269; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Caden v. Farwell*, 98 Mass. 137; and see cases on bail bonds, *infra*, § 1944.

⁶² See *dicta* in *Hall v. Wright*, Ellis, B. & E. 746; *Harrison v. Conlan*, 10 Allen, 85; *Board v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868.

⁶³ See *dicta* in *Marshall v. Broadhurst*, 1 Tyr. 348; *Wentworth v. Cock*, 10 A. & E. 42; *Harrison v. Conlan*, 10 Allen, 85.

⁶⁴ *Siler v. Gray*, 86 N. C. 566.

⁶⁵ See *supra*, § 801.

⁶⁶ *Stewart v. Loring*, 5 Allen, 306. So a contract to form a partnership is excused by the death of one of the

prospective partners. *Dow Bank*, 88 Minn. 355, 93 N. W. 100.

⁶⁷ See *supra*, § 838.

⁶⁸ *Hyde v. Skinner*, 2 P. & F. 1; *Phillips v. Everard*, 5 Sim. 1.

⁶⁹ In the following cases it is held that the obligation of a promisee is not broken prior to the promisee's death if the promise was terminated thereby. *Preston's Est.*, 170 Ill. 179, 688 (a contract to manufacture and promote the sale of patented articles); *Howell v. City Gas, etc., Co.*, 10 App. 311 (a promise by a husband to supply heat for his house); *Marvel v. Phillips*, 162 Mass. 416, 35 N. E. 1117, 26 L. R. A. 416 (a promise to run a business of manufacturing and selling patented articles); *Browne*

In contracts of personal service not only will actual illness or death excuse performance, but the well-founded fear of either also serves as an excuse, "for the law will not compel a man to venture his life;"⁷⁰ unless the risk of the danger must be regarded as assumed by the nature of the employment, as for example nursing in a hospital for contagious diseases, or by the express terms of the contract.⁷¹

A promise otherwise personal may impose liability on the executor of the promisor if the contract so provides;⁷² but even

hall, 218 Mass. 290, 100 N. E. 556, 45 L. R. A. (N. S.) 349 (a promise to pay in property, and notes made in such amount and payable at such times as the buyer might elect); *State v. Oliver*, 78 Miss. 5, 27 So. 988 (undertaking of one who hired convict labor under contract); *In re Daly*, 58 N. Y. App. Div. 49, 68 N. Y. S. 596 (a promise by the manager of a theatre to give another the right to supply programs); *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821 (a promise to serve as business manager of a musical organization).

In the following cases promises were held not personal and therefore not terminated by the death of the promisor. *Dixie Industrial Co. v. Benson* (Ala.), 79 So. 615 (a contract giving the deceased an election to decide whether the price of land should be paid in money, stock or other property); *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460 (a promise to take a certain amount of water for a fixed term although the promisee was aware that the promisor needed the water for a mill held under a lease which was terminated at the death of the promisor); *McDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912 a. 417 (a promise to erect a building where the personal work of the promisor was not contemplated); *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118 (a promise to allow

another to manage the promisor's firm for a salary, and share of the proceeds).

⁷⁰ *Bacon's Abr. Conditions* (Q.) 676; *Sibery v. Connelly*, 22 T. L. R. 174 (seaman excused by breaking out of war from making voyage to dangerous port); *Hanford v. Connecticut Fair Assoc.*, 92 Conn. 621, 103 Atl. 838 (epidemic of infant paralysis excused contract to hold baby show); *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77 (epidemic of cholera excused promise to work); *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865 (strikers threatening physical injury excused promise to work). It will be observed that in the Connecticut case the danger of illness was to third persons rather than the promisor.

⁷¹ In *Foster's Agency v. Romaine*, 32 T. L. R. 331, the contract provided that the plaintiff's commission for securing the defendant an engagement should be payable even though the defendant's engagement was not fulfilled because of the defendant's default for any other cause than illness. The defendant refused to go to Australia to fulfil the engagement because of well-founded fear of submarines. This was held no defence.

⁷² *Cooper v. Simmons*, 7 H. & N. 707 (a contract of apprenticeship in terms bound the apprentice to serve the master's executor).

though a promise in terms states that the promisor binds himself and his legal representatives, courts will not nevertheless hold that the promise may be performed by the representatives unless this is clearly the intention.⁷³ The promise in question may be given some effect if understood as binding the representatives to answer for any default made by the promisor in his lifetime.

If liability has already arisen on a promise of personal service, the question is no longer one of the existence of a promise for non-performance of a promise, but of the survival of the actions.⁷⁴

§ 1941. Death of the employer.

Not only is the contract of an employee who binds himself for personal services discharged by physical inability, but it is generally said that death of the employer has the same effect. And where there are joint employers as in case of a partnership, that the death of one excuses further performance. It is undoubtedly in many contracts of employment the undertaking of the employer is personal in character. But the distinction frequently made in the cases that because the contract of the employee is personal, that of the employer need not be, seems wholly unfounded. There is no necessary logical or legal difference for both the promises in a bilateral contract to be personal in character because one is. The promise of a painter to paint a landscape is discharged by his physical inability to paint, but the death or illness of one who has contracted to buy the painting will not free his estate from liability. Similarly in contracts of employment the nature of the employer's undertaking should be considered in each case.

⁷³ *Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; *Browne v. Fairhall*, 213 Mass. 290, 100 N. E. 556, 45 L. R. A. (N. S.) 349.

⁷⁴ As to the survival of actions, see *infra*, § 1945.

⁷⁵ *Farrow v. Wilson*, L. R. 4 C. P. 744; *Campbell v. Faxon*, 73 Kans. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002; *Harrison v. Conlan*, 10 Allen, 85;

Babcock v. Goodrich, 3 How. S. 52; *Arming v. Steinway*, 31 Misc. 220, 71 N. Y. S. 810; *Getman*, 119 N. Y. 109, 23 N. L. R. A. 728, 16 Am. St. Rep. *Casto v. Murray*, 47 Or. 57, 388, 883; *Yerrington v. Greene*, 589, 84 Am. Dec. 578. See also *hoff v. Murray*, 76 Cal. 508, 435.

⁷⁶ See *supra*, § 316, n. 5.

character of the employment was such that the employer had free power to delegate the oversight of the work to another and no personal coöperation on his part is needed for the proper fulfilment of the contract, there seems no reason why his death should affect the continued obligation of the contract.⁷⁷

§ 1942. Employer's election on employee's illness.

Frequently it cannot be known whether illness will be temporary or permanent; and until the illness has either in fact continued long enough to be material, or the employee's condition is such as to justify the reasonable belief that the incapacity will continue until the breach is material, the contract cannot be terminated, and the employee is entitled to the full agreed compensation.⁷⁸ After the breach has become material, or the prospective incapacity is such as to justify the termination of the contract, the employer has an election to continue the contract or to terminate it under general principles heretofore considered.⁷⁹ Until he manifests his election to terminate the contract, it seems that it continues in force and that even though the illness should afterwards prove of long duration, or should terminate fatally, the employer is bound to perform the contract on his part until he has manifested his election to terminate it, or the employee's death, or perhaps a condition of health rendering any future performance clearly impossible, has made it evident that the employer can derive no further benefit from the contract.⁸⁰ The right of the employee to full

⁷⁷ See the cases at the end of n. 5, *supra*, § 316, where one of several partners died; also *Dumont v. Heigh-ton*, 14 Ariz. 25, 123 Pac. 306, 39 L. R. A. (N. S.) 1187; *Toland v. Steven-son*, 59 Ind. 485; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460; *Hill v. Robeson*, 2 Smedes & M. 541; *Cham-berlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807; *Pugh v. Baker*, 127 N. C. 2, 37 S. E. 82.

In *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282, 56 Am. St. 253, the insanity of an employer was held no excuse for his non-performance of the contract.

The Louisiana Civil Code, Art. 2007, provides that "all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee." See *Tete v. Lanaux*, 45 La. Ann. 1343.

⁷⁸ *K—— v. Raschen*, 38 L. T. (N. S.) 38; *Dartmouth Ferry Commission v. Marks*, 34 Can. S. Ct. 366, 374.

⁷⁹ See *supra*, §§ 838, 875.

⁸⁰ *Miller v. Gidiere*, 36 La. Ann. 201.

compensation during a period of illness would not be everywhere in the United States. On principles of reason or without much discussion of principle some, perhaps courts would hold suitable deduction must be made.⁸

§ 1943. Contracts to marry.

It was held by a divided court in the English E Chamber,⁸² that the fact that a man under contract cannot do so without danger to his life is no excuse for his promise, because though in bad health he might woman "the benefit of social position." The case justly criticised and is opposed to American authority

In *Caden v. Farwell*, 98 Mass. 137, an apprentice fell ill and died after a period of incapacity of some months. During this time the employer did not seek to terminate the apprenticeship and the father of the plaintiff was held entitled to recover wages of the apprentice for this period.

In *Dartmouth Ferry Commission v. Marks*, 34 Can. S. Ct. 366, the court held the representatives of the deceased employee not entitled to recover his compensation for the period intervening between his first incapacity and his subsequent death though no election to terminate the contract had been manifested. The court distinguished between temporary and permanent incapacity saying that the incapacity in the case before it was permanent though not known to be, and that there was therefore failure of consideration. The decision reversed that of the lower court (*Marks v. Dartmouth Ferry Commission*, 36 N. S. 172). Graham, J., there said: "I think an employer, in the case of illness of a servant, must elect. He may discharge the employee, and, if an action is brought for the dismissal, permanent illness will be a defence. While death *ipso facto* terminates the contract, I think permanent illness does not. At what stage would it be terminated?

Here, by retaining him in the and not requiring him to that often happens—they illness as temporary illness preference expressed in Master and Servant (2d ed. n. 3, for the decision of the seems well founded.

⁸¹ See *Hunter v. Waldre* 453; *Wilson v. Smith*, 111 A. So. 134; *McDonald v. Mo* Vt. 357; and *infra*, § 1976.

⁸² *Hall v. Wright*, Ellis B.

⁸³ *Re Oldfield's Est.*, 175 L. N. W. 977, L. R. A. 1916 D. 1 Cas. 1917 D. 1067; *Shad* Hamilton, 93 Ky. 80, 19 S. L. R. A. 531, 40 Am. St. 166 *v. Arnett*, 21 Ky. L. Rep. 1, 840; *Trammell v. Vaughan*, 214, 59 S. W. 79, 51 L. R. A. Ann. St. 302; *Allen v. Baker*, 91, 41 Am. Rep. 444; *Sander* man, 97 Va. 690, 34 S. E. L. R. A. 581. See also *Webster*, 129 Ind. 430, 28 N. 28 Am. St. 199; *Wanecek v. 69 Neb. 770*, 96 N. W. 651, 66 798; *Gulick v. Gulick*, 41 N. A solitary contrary decision *v. Compton*, 67 N. J. L. 548, 386, 58 L. R. A. 480. See also *v. Trowbridge*, 226 Fed. 15, 1 A. 310.

right to refuse to perform a contract to marry because of serious ill health of the other party depends on another principle previously considered,⁸⁴ but is equally well settled.⁸⁵

Whether the physical condition existed and was known to both parties at the time of the engagement introduces a further question—one of public policy. So far as the principles of contract are concerned one who knows at the time of the engagement of the defective physical condition of himself or of the one to whom he engages himself cannot subsequently make a continuance of the same condition ground of objection if such continuance was reasonably foreseeable, and the same is true if the disability supervenes after the engagement, and nevertheless both parties, with knowledge of the facts manifest an election to continue it.⁸⁶ But the marriage of the parties may be so obviously opposed to public policy that the law will not enforce liability on the contract by giving damages to one who entered into the contract knowing the facts.^{86a} If, however, the plaintiff was ignorant of disqualifying facts at the time of the engagement and the defendant was aware of them, there can be no doubt of the plaintiff's right to recover.⁸⁷ Also where supervening ill health precluding marriage is due to the defendant's fault he will be liable in damages for breach of the contract.⁸⁸

The condition of the health of either party may justify a temporary refusal to carry out the engagement without justifying its termination.⁸⁹

⁸⁴ *Supra*, § 838.

⁸⁵ *Vierling v. Binder*, 113 Ia. 337, 85 N. W. 621; *Beans v. Denny*, 141 Ia. 52, 117 N. W. 1091; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Gring v. Lerch*, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314; *Grover v. Zook*, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012; *Travis v. Schnebly*, 68 Wash. 1, 122 Pac. 316, 40 L. R. A. 585, Ann. Cas. 1913 E. 914. See also *Atchison v. Baker*, 2 Peake, N. P. Add. Cas. 103; *Hall v. Wright*, Ellis, B. & E. 746. *Cf. Jefferson v. Paskell*, [1915] 1 K. B. 57.

⁸⁶ *Cf. Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840.

^{86a} *Gulick v. Gulick*, 41 N. J. L. 13.

⁸⁷ *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302. And see *infra*, § 1631.

⁸⁸ See *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. 166; *Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

⁸⁹ *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.

§ 1944. Bail bonds.

The liability of sureties on a bail bond when unable to produce their principal in court because of his death or illness, if contested very early and it was settled, and is still law, the death of the principal excuses the sureties for their failure to produce him in court;⁹⁰ and such illness of the principal which renders his appearance unreasonable is likewise an excuse. If, by authority of the local law, the principal is killed or maimed, and confined,⁹² or surrendered on requisition by the State⁹³ the result is the same,—the sureties are discharged, but confinement in another State is generally held no

⁹⁰ Co. Litt. 206a; Bacon's Abr. Conditions (Q); Sparrow v. Sowgate, Wm Jones, 29; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Pynes v. State, 45 Ala. 52; Ringeman v. State, 136 Ala. 131, 34 So. 351; State v. Cone, 32 Ga. 663; Russell v. State, 45 Ga. 9; Mather v. People, 12 Ill. 9; Piercy v. People, 10 Ill. App. 219; Woolfolk v. State, 10 Ind. 532; Bonner v. Commonwealth, 27 Ky. L. Rep. 652, 85 S. W. 1196; State v. Crane, 17 N. J. L. 191; State v. McNeal, 18 N. J. L. 333; State v. Traphagen, 45 N. J. L. 134; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; People v. Wissig, 7 Daly, 23; People v. Perlstein, 28 N. Y. St. Rep. 171, 7 N. Y. S. 662; Granberry v. Pool, 14 N. C. 155; Bank of Mt. Pleasant v. Pollock, 1 Ohio, 36, 13 Am. Dec. 588.

⁹¹ Chase v. People, 2 Colo. 481; Russell v. State, 45 Ga. 9; Hargis v. Begley, 129 Ky. 477, 112 S. W. 602, 23 L. R. A. (N. S.) 136; Hopkins v. Com., 5 Ky. L. Rep. 419; Baker v. State, 21 Tex. App. 359, 17 S. W. 256; Strey v. State (Tex. Crim. App.) 27 S. W. 137; People v. Tubbs, 37 N. Y. 586; Com. v. Craig, 6 Rand. (Va.) 731. See also Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62. But see Ringeman v. State, 136 Ala. 131, 34 So. 351.

In Com. v. Allen, 157 Ky. 6, 162 S. W. 116, 50 L. R. A. (N. S.) 252, the

unadjudicated insanity and non-appearance of the principal was held no defence to a surety.

⁹² Belding v. State, 25 Ar. Am. Dec. 214, 4 Am. Rep. 21; Tilton v. Smith, 58 Ga. 341; State v. 89 Ia. 581, 57 N. W. 306; Commonwealth v. Webster, 1 Bush, 1; Commonwealth v. Overby, 80 Ky. Am. Rep. 471; People v. 1 Mich. 397, 57 N. W. 257; Hennepin County, 116 Minn. 133 N. W. 469; People v. B. Hill, 570; State v. Funk, 20 145, 127 N. W. 722, 30 L. R. 211, Ann. Cas. 1912 C. 743.

⁹³ Taylor v. Taintor, 16 W. 21 L. Ed. 287; Adler v. State, 517, 37 Am. Rep. 48; State v. 3 Head, 260.

⁹⁴ Taylor v. Taintor, 16 W. 21 L. Ed. 287; Cain v. State, 170; Yarbrough v. Commonwealth, 89 Ky. 151, 12 S. W. 143, 25 524; King v. State, 18 Neb. N. W. 519; Devine v. State, 623. In Hargis v. Begley, 129 477, 112 S. W. 602, 23 L. R. A. 136, the sureties were held not liable for the absence of the principal because he was prevented from appearing by an accidental gunshot wound received in another State to which he had been taken on a visit when under bail.

If the incapacity of the principal is only temporary illness, the excuse of the surety is similarly temporary.⁹⁵

§ 1945. Survival of actions.

Unless a contractual obligation is personal in character death of the obligor will not discharge it, though no right of action had accrued prior to the death,⁹⁶ and though the obligation is a guaranty for which the obligor received no benefit, the consideration inuring to the principal debtor.⁹⁷ The fact that the promise of a surviving party to a bilateral contract is personal in character will not discharge the promise of a deceased party which is not personal.⁹⁸ Though as has been seen in previous sections, the death of a contractor whose promise is personal discharges the obligation of the promisor, yet if a right of action on a contract for personal services has once become vested, the fact that the broken promise is for personal services will presumably not generally prevent the survival of the right against the executor or administrator of the promisor if he dies, or in favor of the promisee's representatives if he dies; though if it appears that death or illness would have prevented complete performance from being rendered, had there been no wrongful breach, damages should be limited.⁹⁹ But a right of action for breach of promise of marriage does not survive against the representatives of a deceased promisor,¹ nor can the personal representative of a deceased promisee sue the surviving promisor for breach of a contract to marry occurring before the death of the decedent.² A pos-

⁹⁵ *Bonner v. Commonwealth*, 27 Ky. L. Rep. 652, 85 S. W. 1196; *Markham v. State*, 33 Tex. Cr. App. 91, 25 S. W. 127; *State v. Edwards*, 4 Humph. 226.

⁹⁶ *Wills v. Murray*, 4 Exch. 843; *Smith v. Wilmington &c. Mfg. Co.*, 83 Ill. 498; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460; *McKeown v. Harvey*, 40 Mich. 226; *Jacobson v. LeGrange*, 3 Johns. 199; *Gray v. Hawkins' Adm.*, 8 Ohio St. 449, 72 Am. Dec. 600.

⁹⁷ *Lloyds v. Harper*, 16 Ch. D. 29. See *supra*, § 1253.

⁹⁸ See *supra*, § 1941.

⁹⁹ See *Beckham v. Drake*, 2 H. L. C. 579; *Stubbs v. Holywell Railroad*, L. R. 2 Exch. 311; *Shropshire v. Bush*, 204 U. S. 186, 51 L. Ed. 436, 27 S. Ct. 178; *Odell v. Wells*, 171 N. Y. S. 345.

¹ *Hovey v. Page*, 55 Me. 142; *Chase v. Fits*, 132 Mass. 359; *Wade v. Kalbfleisch*, 58 N. Y. 282.

² *Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D.

sible exception to the non-survival of actions for breach of promise to marry exists where there can be shown some property injury to the plaintiff within the contemplation of the parties.³

§ 1946. Destruction of specific thing contracted to be leased or bailed.

It is now well-settled that where the existence of a thing is necessary for the performance of a contract, the accidental destruction or non-existence of that thing excuses the promisor, unless he has assumed by his contract the risk of its non-existence. The most obvious application of the principle is where specific property, the subject-matter of a contract of sale or lease, is destroyed before performance. In such a case the seller or lessor is freed from liability. Where the destruction happens before the bargain, mistake as well as impossibility are involved and the matter has already been considered. Where the destruction, though depending on impossibility alone, the result is the same as when the destruction is subsequent to the bargain;⁵

494; *Quirk v. Thomas*, [1916] 1 K. B. 516; *Hovey v. Page*, 55 Me. 142; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33; *Grubb's Adm. v. Sult*, 32 Gratt. 203, 34 Am. St. Rep. 765; *Weeks v. Mays*, 87 Tenn. 442, 10 S. W. 771; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33. Otherwise by Statute in North Carolina. *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

³ Such a qualification to the general rule denying the survival of the action was suggested in *Chamberlain v. Williamson*, 2 M. & S. 408, and *Finlay v. Chirney*, 20 Q. B. D. 494; *Hovey v. Page*, 55 Me. 142, and other cases. But see *Quirk v. Thomas*, [1916] 1 K. B. 516.

⁴ *Supra*, §§ 1560-1564.

⁵ *Taylor v. Caldwell*, 3 B. & S. 826; *Howell v. Coupland*, 1 Q. B. D. 258; *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *Ontario Fruit Assoc. v. Cutting Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. 231; *J. S.*

Potts Drug Co. v. Benedict, 322, 104 Pac. 432, 25 L. R. A. 609; *Martin Emerich Outfit v. Siegel*, 237 Ill. 610, 86 N. 20 L. R. A. (N. S.) 1114; *La. Gregory*, 108 La. 648, 32 La. Adams v. Foster, 5 Cush. 156; *v. Somerville (Miss.)*, 80 So. 3 Berlee v. Jeffcott, 89 N. J. L. Atl. 789; *Dexter v. Norton*, 4 62, 7 Am. Rep. 415; *Curtiss v. ville*, 53 Barb. 186; *Powell v. &c. R.*, 12 Oreg. 488, 8 Pa. McMillan v. Fox, 90 Wis. N. W. 1052. Sec. 8 (1) of the Uniform Sales Act provides: "If there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, the goods wholly or partly are destroyed by fire or other cause, any fault on the part of the seller not constituting a breach of the contract by the buyer, the goods wholly or partly are destroyed by fire or other cause, the contract is thereby avoided."

In *Bigler v. Hall*, 54 N. Y. 1 defendant agreed to sell and deliver certain logs then on the bank

principles of failure of consideration, previously considered,⁶ a buyer of personalty is not liable if the destruction precedes the transfer of title or risk,⁷ and if he has paid the price in advance it may be recovered.⁸ So one who contracts to sell real estate is excused from liability if it is fortuitously destroyed.⁹ The same principles would excuse one who had contracted to lease property which was destroyed before actually leased, and a lessee who had covenanted to return leased goods.¹⁰ For the same reason a bailee is not liable for the loss, injury, or destruction of the bailed property without fault on his part,¹¹ unless he expressly contracts, as he may, to assume the risk of such accidental loss or injury.¹²

stream. The plaintiff paid the price. Some of the logs were thereafter lost because of a freshet, without the seller's fault. The majority of the court held that even though title had passed at the time of the bargain, the absolute promise of the seller to deliver made him liable to restore the contract price of the lost logs. The decision seems wrong and the dissenting opinion of Reynolds, J., correct. The seller if not paid for these logs should be allowed to recover the price, if title had passed (see *supra*, § 799) and, *a fortiori*, having been paid should be allowed to keep the payment, his promise to deliver being excused by the destruction of the logs.

⁶ *Supra*, § 838.

⁷ *Calcutta Co. v. DeMattos*, 32 L. J. Q. B. 322, 335; *Tillson v. United States*, 129 U. S. 101, 9 S. Ct. 255, 32 L. Ed. 636; *Hays v. Pittsburgh Co.*, 33 Fed. 552; *Peace River Phosphate Co. v. Graffin*, 58 Fed. 550; *Jones v. Pearce*, 25 Ark. 545; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609; *Crawford v. Smith*, 7 Dana, 59; *Brown v. Childs*, 2 Duv. 314; *Phillips v. Moor*, 71 Me. 78, 80; *Lingham v. Eggleston*, 27 Mich. 324; *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119; *Wilkinson v. Holiday*, 33 Mich. 386; *Slade v. Lee*, 94 Mich. 127, 53 N. W. 929;

Drews v. Ann. River Logging Co., 53 Minn. 199, 54 N. W. 1110; *Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Terry v. Wheeler*, 25 N. Y. 520; *Kein v. Tupper*, 52 N. Y. 550.

⁸ See *infra*, § 1974.

⁹ As to his right to recover the price in spite of his own non-performance, see *supra*, §§ 928 *et seq.*

¹⁰ *Chamberlen v. Trenouth*, 23 U. C. C. P. 497.

¹¹ *Southcoote's Case*, 4 Co. 83 b; *Kettle v. Bromsall*, Willes, 118; *Sun Printing &c. Assoc. v. Moore*, 183 U. S. 642, 654, 22 S. Ct. 240, 245, 46 L. Ed. 366; *Reeves v. The Constitution*, Gilp. 579, Fed. Cas. No. 11,659; *Mulvaney v. King Paint Mfg. Co.*, 256 Fed. 612, 167 C. C. A. 642; *Francis v. Shrader*, 67 Ill. 272; *Watkins v. Roberts*, 28 Ind. 167; *Field v. Brackett*, 56 Me. 121; *Buis v. Cook*, 60 Mo. 391; *Millon v. Salisbury*, 13 Johns. 211; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Harrington v. Snyder*, 3 Barb. 380; *Hyland v. Paul*, 33 Barb. 241; *Sawyer v. Wilkinson*, 166 N. C. 497, 82 S. E. 840, L. R. A. 1915 B. 295. See also *Philippine Ids. v. Bingham*, 13 Philippine, 558, and *supra*, § 1056. The exceptional liability of carriers and innkeepers is elsewhere considered.

¹² *Sun Printing, etc., Assoc. v. Moore*,

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

The rights given the buyer involve an application of the general doctrine of election to the law of sales. Though the buyer may refuse to take any of the goods if some are destroyed or injured, he may take them if he wishes to do so.¹⁹ He cannot, however, change his own liability in such a case from that provided for by the contract. He must pay the agreed price for what he receives, even though he is not receiving all that the contract required. The provision does not excuse one who has contracted to finish and deliver specific incomplete articles which are injured accidentally after the bargain, unless the injury is so great that they are substantially changed in character,²⁰ for performance is still possible.

§ 1948. Destruction of essential specific thing.

Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. "A contract to manufacture goods in a particular factory is discharged by the destruction of the factory;²¹ a contract to do work on a specific building is discharged by the destruction of that building;²² a contract to carry goods by a particular ship is discharged by the loss of the ship,²³ or by such an injury to it as prevents its use within the

¹⁹ Thus one who has contracted to sell his crop of hops cannot refuse to perform because the crop is of inferior quality. *Livesley v. Johnston*, 45 Oreg. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. 647.

²⁰ *Automatic Time Table Advertising Co. v. Automatic Time Table*

Co., 208 Mass. 252, 94 N. E. 462.

²¹ *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215.

²² See *infra*, § 1975. Cf. *Field v. Haven*, 26 Cal. App. 694, 173 Pac. 108.

²³ *Furness &c. Co. v. Randall*, 124 Md. 101, 91 Atl. 797.

time permitted by the contract;²⁴ and a contract to se employ another on a particular ship is subject to the fence.²⁵ A contract to move a building is excused by destruction;²⁶ a contract to furnish water from a spring failure of the spring;²⁷ a contract to drive logs down a stream a fall in the water in the stream, owing to which performance becomes impossible.²⁸

²⁴ *Nickoll v. Ashton*, [1901] 2 K. B. 126.

²⁵ *The Dawn*, 2 Ware, 121; *Ellis v. Midland R.*, 7 Ont. App. 464.

²⁶ *Jones-Gray Const. Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659.

²⁷ *Ward v. Vance*, 93 Pa. 490.

²⁸ *Clarksville Land Co. v. Harriman*, 68 N. H. 374, 44 Atl. 527. In *Berg v. Erickson*, 234 Fed. 817, 820, 148 C. C. A. 415 (though the case seems well decided on its facts, see *supra*, § 1934, n. 33.), the court manifested its disagreement with the tendency of modern decisions, saying:

"The general rule is that one, who makes a positive agreement to do a lawful act, is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, and thereby induces the other contracting party, in consideration of his positive covenant, to enter into and become bound by the contract, and while courts may enforce, they may not avoid such contracts in the absence of fraud or some similar defence. [Citing 9 Cyc. 627, par. 5; *Paradine v. Jane*, Aleyn, 26; *Dermott v. Jones*, 2 Wall. 1, 7, 8, 17 L. Ed. 762; *The Harriman*, 9 Wall. 161, 172, 173, 19 L. Ed. 629; *Chicago, etc., Ry. Co. v. Hoyt*, 149 U. S. 1, 14, 15, 13 S. Ct. 779, 37 L. Ed. 625; *Jones v. United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Jacksonville, etc., Ry. Co. v. Hooper*,

160 U. S. 514, 528, 16 S. Ct. L. Ed. 515; *Northern Pac. v. American Trading Co.*, 439, 466, 467, 25 S. Ct. 84, 289; *Central Trust Co. v. St. Louis & P. Ry. Co.*, 31 441; *Robson v. Mississippi Co.*, 61 Fed. 893, 900; *Linkneering Co. v. United States*, 243, 247; *Ferguson v. Omaha R. Co.*, 227 Fed. 513, 52 C. A. 145; *McGehee v. Hill* (Ala.) 170, 29 Am. Dec. Meriwether v. Lowndes C Ala. 362, 7 So. 198, 199; *Strick v. Dauchy*, 25 Conn. 53 Dec. 371, 372, 374; *Summebard*, 153 Ill. 102, 38 N. E. Am. St. Rep. 872; *Adams v. 19 Pick.* 275, 277, 278, 31 Am. Rowe v. Peabody, 207 Mass. N. E. 604, 605, 606; *Beach* 2 N. Y. 86, 93, 49 Am. Anderson v. May, 50 Minn. N. W. 530, 17 L. R. A. 558 St. 642; *Hoy v. Holt*, 91 P. 92, 36 Am. Rep. 659].

"There are authorities to that, where it clearly appears the situation of the parties to a contract that they must have when they made it that its performance would be impossible unless or a condition of things then existence should exist at the time of performance, or unless an inducing thing or condition of things in existence should come into existence before and remain in at the time of performance, then in the absence of an express

§ 1949. Destruction of future specific property.

The principle under discussion has been extended to cases where the subject-matter of the sale was not in existence at the time of the bargain, and perhaps never came into existence. For instance, an agreement to sell the crop of a specified piece of land is excused if there is no crop.²⁹ But an agreement to sell a specified quantity of produce is not excused by the fact that the seller expected to fulfill the contract with the crop of particular land, and that crop without fault on his part is a failure.³⁰ A third kind of agreement is possible where both parties assume that the contract will be fulfilled by means of the crop on a certain tract, though they do not make that assumption a term of the contract.³¹

plied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition of the contract that, if that thing or condition is destroyed or prevented from coming into existence before the time for the performance of the contract without fault of the obligor, either by the act of God, or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. . . . But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise."

²⁹ *Howell v. Coupland*, 1 Q. B. D. 258. The defendant in this case agreed to sell 200 tons of potatoes "grown on land belonging to the said Robert Coupland in Whaplode." This was construed as meaning land belonging to the said Robert Coupland at the time the bargain was made. There were sixty-eight acres of such land which would, in an ordinary season, produce a much larger quantity than 200 tons. Without any fault on the part of the defendant a disease

attacked the crop so that the whole marketable produce of the land was but a fraction of 200 tons. It was held that the defendant was excused. To somewhat the same effect, see *Browne v. United States*, 30 Ct. Cl. 124; *Ontario Fruit Assn. v. Cutting Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919; *Losecco v. Gregory*, 108 La. 648, 32 So. 985; *Whipple v. Lyons Beet Sugar Ref. Co.*, 64 N. Y. Misc. 365, 118 N. Y. S. 338.

³⁰ *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642. This was a contract to sell beans, and from the facts the court found that it fairly appeared that the beans were to be grown by the plaintiff, but that it could not be gathered that he was to grow the beans on any particular land. See also *Hayward v. Daniel*, 91 L. T. (N. S.) 319; *Jones v. Cochran*, 33 Okla. 431, 126 Pac. 716; *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487. Compare *Rice v. Weber*, 48 Ill. App. 573.

³¹ For the principle governing such a case, see *infra*, § 1951.

§ 1950. Destruction of all goods of the kind contracted for

It is usually said that it is only where a promise is for a specific thing that impossibility excuses, but there is no reason why the principle should not be applicable to the destruction of an entire class of things where the contract calls for one or a portion of the class. If a promisor contracts to sell a specific horse is excused by the death of that horse, he must also be excused if, after contracting to sell two of several specific horses, all horses of that class die. A contract for the sale of goods by description would be excused by the fortuitous non-existence at the time when the contract should be performed of any goods of that description. It should be observed, however, that the mere fact that goods are not obtainable in the ordinary market is not an excuse. They may exist though not readily obtainable; and if they do not exist, the reason is not necessarily any extraordinary fortuitous circumstance but merely that the ordinary necessities of trade of which the promisor takes the risk have absorbed the entire supply.³³

§ 1951. Destruction of intangible means of performance

There is logically no tenable distinction between a case where a tangible thing is by the terms of a contract necessary for its performance, and a case where an intangible means of performance is similarly essential; and a number of court decisions recognize that fortuitous destruction of the means of performance contracted for excuses a promisor.³⁴ Cf.

³³ In *Browne v. United States*, 30 Ct. Cl. 124, the total failure of the crop of "Montana Upland Hay" was held to excuse performance of a contract to sell a specified quantity of such hay.

³⁴ In *Gilpins v. Consequa*, 3 Wash. C. C. 184, it was held no defence to a promise to sell tea of a certain quality, that only inferior quality could be procured in the market. See also *Youqua v. Nixon*, Peters, C. C. 221; *Carr v. Berg*, [1918] 2 W. W. R. 368, aff'g 24 Brit. Col. 422.

³⁴ In *Scottish Navigation Co. v. Souter*, [1917] 1 K. B. 221, a vessel was chartered for a voyage to the Baltic and was loading cargo in Finland, when war broke out and she was prevented from leaving by Russian authorities. The contract was held to be frustrated.

"In my judgment the charterparty must be taken to have been made into under the implied condition that if supervening events (not due to the default of either party) render the performance of the 'Baltic' voyage indefinitely impossible, the contract is frustrated."

to these cases in principle are sundry cases where foreign law prevented a contractor from using means of performance contracted for.³⁵ There seems no reasons why foreign law should not be as effective a means of destroying the means of performance fixed by the contract as any other fortuitous circumstance.³⁶ But it has been held (it seems erroneously) that prevention of the performance of a contract to ship hemp from the Phillipine Islands within certain dates is not excused by the

should be deemed to be dissolved. *Geipel v. Smith* (1872), L. R. 7 Q. B. 404; and *Horlock v. Beal*, [1916] 1 A. C. 486. Here a contract has been entered into which by a supervening cause beyond the control of either party has become impossible or impracticable in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause. Upon the occurrence of that cause both parties were and are excused from any further performance. The case comes within the principle of *Taylor v. Caldwell*, 3 B. & S. 826, and *Appleby v. Myers*, L. R. 2 C. P. 651."

In *Krell v. Henry*, [1903] 2 K. B. 740, the defendant had contracted to hire a flat on the route of the proposed coronation procession, afterwards abandoned because of the King's illness. It was quite possible for the plaintiff to give possession of the flat in Pall Mall for the occupation of which the defendant had agreed to pay. In that case, *Vaughan Williams, L. J.*, pointed out, [1903] 2 K. B. 748, the wide application of the governing principle and said that it applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance.

In *Merritt v. Haas*, 113 Minn. 219,

129 N. W. 379, a contract to pay the premiums on a specific life insurance policy was excused by the failure of the insurance company. See also *Crane Co. v. National Naassau Bank*, 90 N. Y. Misc. 353, 153 N. Y. S. 260.

In *Anglo-Russian Merchant Traders v. Batt*, [1917] 2 K. B. 679, a contract to sell aluminium for export was made, both parties knowing that export was prohibited without a license. The seller used diligence in trying to get a license but was refused. The seller was held not liable for failing to perform. (*Cf.* with this case, *Cooper v. Mundial Trading Co.*, 105 N. Y. Misc. 58, 172 N. Y. S. 378; *North Hempstead v. Public Service Corp.*, 107 N. Y. Misc. 19, 176 N. Y. S. 621.)

On the other hand, in *Mascall v. Reitmeier* (Minn.), 176 N. W. 486, a farm tenant who had contracted to work out the road taxes assessed against the property was held not freed by a change in the law disallowing payment of taxes in work. The court held that substantial performance by payment in money was possible.

³⁵ See *infra*, § 1938 *ad fin.*

³⁶ See the quotation, *supra*, n. 34, from *Scottish Navigation Co., Ltd., v. Souter*, [1917] 1 K. B. 222; also the *Kronprinzessin Cecilie*, 244 U. S. 12, *s. c. sub nom.* *North German Lloyd v. Guaranty Trust Co.*, 61 L. Ed. 960, 37 S. Ct. 490; *Earn Line S. S. Co. v. Sutherland S. S. Co.*, 254 Fed. 126.

blockade of the islands throughout that time.³⁷ Whether be the propriety of such a decision, certainly the men because of a foreign war greater risk is involved in transporting goods by sea than was the case when the contract was made will afford no excuse,³⁸ if the risk is not borne assumed by current business.³⁹

§ 1952. Distinction between means of performance contemplated and merely contemplated.

Frequently though parties do not contract for specific means of performance, or for the use of a specific tract of land, they contemplate and expect such means or use. A contract was made to sell lumber; both parties know that the seller has one tract from which to fulfill the contract; both parties only expect that source will be used, but assume it as a matter of course. The contract could be literally fulfilled, however, by the use of other tracts which the seller conceivably has or of which he might obtain the use. There is obviously no impossibility in performing such a contract, and the fact that performance has become difficult or expensive, does not itself operate as an excuse. But if the analogy of the contract is mistaken, it may fairly be urged that the party entered into the contract on the assumption that the tract of land was to continue in existence and that the assumption fails without fault of the seller, he should be liable in damages; and this has been so held.⁴⁰ Similar

³⁷ *Ashmore v. Cox*, [1889] 1 Q. B. 436. See also *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540; *Richards v. Wreschner*, 174 N. Y. App. Div. 484, 156 N. Y. S. 1054. As to delay caused by strikes, see *supra*, § 1099.

³⁸ The menace of German submarines was held no excuse in *Furness v. Muller*, 232 Fed. 186; *Piaggio v. Somerville* (Miss.), 80 So. 342. See also *Foster's Agency v. Romaine*, 32 T. L. R. 331.

³⁹ See the *Kronprinzessin Cecilie*, 244 U. S. 12, a. c. *North German Lloyd v. Guaranty Trust Co.*, 61 L.

Ed. 960, 37 S. Ct. 490. Cf. *War on Contracts*, see *Harv. L. Rev.* 64.

⁴⁰ In *International Paper Co. v. Rockefeller*, 161 N. Y. App. Div. 184, 146 N. Y. S. 371, the defendant contracted to deliver a lot of spruce wood for use in a mill at the contract price of \$100,000. The defendant's timberland was mostly burned over, but a small amount was removed from means of transport still remained. It was held that the defendant must deliver the wood but was excused from f

been held that failure of the supply of natural gas excused a gas company from liability on a promise to furnish gas or to lay gas pipes which would be useless;⁴¹ that failure of an anticipated arrangement between the government and a contractor excused the latter from liability to a subcontractor;⁴² that failure of the only available means of transportation, known by the parties to be such, excused a promise to sell and deliver goods;⁴³ and that the destruction of a factory which the parties contemplated as the means of fulfilling a contract to sell goods excused performance though the contract did not mention the factory.⁴⁴

On the other hand, where a contract for manufactured goods may be satisfied by goods from any factory, the destruction of the seller's factory or machinery has been held by a number of courts to afford no excuse;⁴⁵ and there seems to have been

remainder of the contract, though it did not in terms provide that the wood should be obtained from the tract which was burned. The Court said: "We need not say that the defendant could not have furnished live wood of equal quality from other lands, but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished, and when the source is destroyed the defendant is excused from further performance." Cf. *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540, where the contract was for Finland lumber, but the buyer did not know (as was the fact) that such lumber was not kept in stock in England. It was held that impossibility of importing it due to the war did not excuse the seller from liability.

⁴¹ *Bruce v. Indianapolis Gas Co.*, 46 Ind. App. 193, 92 N. E. 189.

⁴² *McKenna v. McNamee*, 15 Can. Sup. Ct. 311.

⁴³ *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291.

⁴⁴ *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. See also *Western Hardware Mfg. Co. v. Ban-*

croft-Charnley Steel Co., 116 Fed. 176, 53 C. C. A. 548. Consider also cases where war between the governments of the contracting parties excuses performance. These decisions go mainly on grounds of public policy, but it seems they may also be rested on unanticipated alteration of circumstances precluding performance. See, e. g., *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A. C. 280; *Naylor, Benson & Co., Ltd., v. Krainische Industrie Gesellschaft*, [1918] 2 K. B. 486.

⁴⁵ *Jones v. United States*, 96 U. S. 24; *Porto Rico Sugar Co. v. Lorenzo*, 222 U. S. 481, 56 L. Ed. 277, 32 S. Ct. 133; *Law v. San Francisco Gas & C. Co.*, 168 Cal. 112, 142 Pac. 52, Ann. Cas. 1915 D. 842; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Hottellet v. American Corn Mill Co.*, 160 Ill. App. 58; *Booth v. Spuyten Duyvil & C. Co.*, 60 N. Y. 487; *Isaacson v. Starrett*, 56 Wash. 18, 104 Pac. 1115. See also *Bates Machine Co. v. Norton Iron Works*, 113 Ky. 372, 68 S. W. 423; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467.

little inquiry in these cases whether the parties contemplated or assumed the continued existence of the factory as a part of their contract. Other cases, too, apparently regard it as essential for a defence that the means of performance should have been contracted for, not merely contemplated.⁴⁶

It is probable that the tendency of the law is toward a larger defence of impossibility, and in a case where it may fairly be said that both parties assumed the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition of affairs will ultimately be held an excuse.⁴⁷ But there certainly can be no excuse where both parties contemplate a particular means of performance and contract on the assumption of its existence. A promise to furnish goods or services is absolute in terms to furnish goods or services, and the mere fact that the promisor contemplated a certain means

⁴⁶ In *Eddy v. Clement*, 38 Vt. 486, it was expressly held that it was not enough that a certain source of supply was understood by the parties as the only one available had failed. Unless the contract required that source the promisor was liable.

In *Ontario Electric L. & P. Co. v. Baxter & Co.*, 5 Ont. L. Rep. 419, a contract to furnish electricity "in the premises" of the consumers for power in running their mill was held not limited to the existing mill and the subscribers were not discharged by its destruction. It may be questioned whether the parties did not contemplate the continued existence of the original mill.

In *Northern Irrigation Co. v. Watkins* (Tex. Civ. App.), 183 S. W. 431, the failure of the contemplated source of supply was held no defence for breach of a promise in terms absolute to furnish water, but the contract provided that in case of failure damages should be paid. See also *Northern Irrigation Co. v. Dodd* (Tex. Civ. App.), 162 S. W. 946. Cf. *Hunter Canal Co. v. Robertson*, 113 La. 833, 37 So. 771;

Raywood & Co. Mill Co. v. Tex. 161, 146 S. W. 155.

In *Whitman v. Anglum*, 392, 103 Atl. 114, the contract was for the sale of milk for to be delivered to the buyer at Wawarrie Avenue." This was the defendant's farm. The cows were killed by the state authorities to prevent the spread of mouth disease and product from farm were quarantined. It was held not even a temporary impossibility because the defendant could not substantially (though not literally) deliver from No. 1 Wawarrie because it had become illegal) and the contract did not require that the milk be produced on the premises.

More clearly a contract of sale as a salesman is not based on assumed continued existence of employer's factory or that he it profitable to continue in *Turner v. Goldsmith*, [1891] 544.

⁴⁷ See the interesting opinion in *Kinzer Const. Co. v. State*, 111 S. 46.

performance and had no other means will not excuse him from liability when this means is accidentally destroyed.⁴⁸

§ 1953. Test for determining whether the contract depended on continued existence of means of performance.

It may be urged as a difficulty with the general adoption of the principle that destruction of contemplated means of performance excuses a promisor from liability that such a principle lacks definite boundaries. It may be said that any change of circumstances not foreseen by the parties which makes performance impossible or even more difficult, falls within the principle. Strikes, war, imposition of taxes, all might be urged as an excuse. The only answer to this is, that the difficulty is no greater than exists in the law governing mistake, and that the defence of impossibility is inherently similar to that of mistake. If it be true that a contract for future performance is made on the assumption that present import duties will continue, or that other existing circumstances will remain the same, there is as good reason for excusing the promisor if those circumstances change, as there would be had the parties been mistaken as to similar circumstances supposed to exist when the contract was made. It should be observed, however, that as in the case of such mistake, it should be necessary for one

* *Hale v. Rawson*, 4 C. B. (N. S.) 85 (contract to sell tallow on arrival of a certain ship, arrival of ship without the expected tallow); *Hunter Canal Co. v. Robertson*, 113 La. 834, 37 So. 771 (contract to supply water; drought); *Pacific Sheet Metal Works v. Californian Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108 (contract to sell cans, not excused by non-arrival of tin from which seller expected to make them); *Oakland Electric Co. v. Union Gas &c. Co.*, 107 Me. 279, 78 Atl. 288 (contract to furnish electricity; dam of company injured); *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467 (contract to furnish water; pipe burst); *Whitehouse v. Staten Island Water Supply Co.*, 101

N. Y. App. D. 112, 91 N. Y. S. 544 (contract to supply water; pressure failed because cold weather led consumers to leave faucets running); *Boker v. Demorest Mfg. Co.*, 28 N. Y. Misc. 263, 59 N. Y. S. 826 (inability to secure goods from a particular factory); *Anderson v. Adams*, 43 Oreg. 621, 74 Pac. 215 (contract to furnish water for irrigation; drought made it impossible except by acquiring further source of supply); *Janes v. Scott*, 59 Pa. 178, 98 Am. Dec. 328 (contract to drill well; accident to tools). See also *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988, 69 Am. St. 542 (loss of boat did not excuse contract to pay share of salary of agent to secure freight for this and other boats); and cases cited *supra*, § 1099.

who seeks relief, because of supervening change of circumstances, from the explicit terms of his promise, to a tribunal that there is more than a mere possibility; probability, that the contract was made on the assumption of a particular situation.

It is true that the doctrine of mistake has been developed in equity while that of impossibility, masquerading as a condition of the contract, has been developed in law; but this difference of tribunals cannot ultimately alter the boundaries of the substantive rules to be applied.

It is frequently said that where an event which was a possibility "might have been anticipated and guarded against in the contract," one who makes an absolute promise by it unconditionally.⁴⁹ Such a test, however, seems of little value. It has descended in the law from a time when it was more nearly true than it now is, because impossibility was more rarely an excuse. Any kind of impossibility is less capable of anticipation. The question is one of fact, and, if anticipated, any circumstance whatever might be guarded against in the contract. In a contract for service, the contingency of possible illness or death is easily anticipated, and the possible destruction of the subject-matter to which a contract relates is also not difficult to anticipate, yet these kinds of impossibility excuse a promisor from liability. Though this test therefore is not helpful, by a suitable adaptation it may be made helpful in the troublesome cases where it is argued that a promisor is excused because the contemplated means of performance has failed. If the event causing the impossibility in question could not only have been anticipated but its occurrence could have been guarded against by the promisor (not the effect of it by a provision in the contract but the occurrence itself by preventing its happening) it is reasonable to assume that the promisor took the risk of the continued possibility of performance.⁵⁰ A similar argu-

⁴⁹ *Bailey v. De Crespigny*, L. R. 4 Q. B. 180; *Chicago, etc., Ry. v. Hoyt*, 149 U. S. 1, 15, 37 L. Ed. 625, 13 S. Ct. 779. See also *Berg v. Erickson*, 234 Fed. 813, 821, 148 C. C. A. 415; *Mahaaska County State Bank v. Brown*,

159 Iowa, 577, 141 N. W. 2d 681; *Spurgin v. Sneed*, 5 Tex. Civ. App. 134.

⁵⁰ *In Middlesex Water Co. v. Mann Whiting Co.*, 64 N. J.

possible where the promisor though having no power to prevent the contingency had superior knowledge of the possibility of its happening.⁵¹ The less the matter was within his control and the less knowledge he had in regard to the probability of the occurrence of the event, the more reason there is to assume that the parties entered into the contract on the mutual assumption that the contemplated means of performance would continue to exist, and that neither party bound himself absolutely for their continuance.

§ 1954. Expected value of performance fortuitously destroyed; Coronation cases.

A step still further than that referred to in the previous two sections has been taken in a few cases. In the "coronation cases" it was held that a supervening circumstance excused performance of contracts though it did not make their performance (hiring and letting of seats) impossible or even difficult but merely deprived it of the value (as giving a view of the coronation procession) which was obviously the sole inducement for entering into the contracts.⁵²

In the argument of one of the cases⁵³—an action to recover the price promised but not paid by the defendant for

Atl. 692, 49 L. R. A. 572, 81 Am. St. 467, a water company was held liable for failing to fulfil its contract to deliver water, whereby the promisee's factory was destroyed by fire, though the water company's failure was due to a break in its pipes caused by accident without neglect.

⁵¹ See *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415.

⁵² *Blakeley v. Muller*, 19 Times L. R. 186; *Clark v. Lindsay*, 19 Times L. R. 202; *Krell v. Henry*, [1903] 2 K. B. 740. See also *Chandler v. Webster*, [1904] 1 K. B. 493.

In *Krell v. Henry*, [1903] 2 K. B. 740, 749, *Vaughan Williams, L. J.*, said: "I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized

by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things." The full effect of the case was noted in a passage from *Scottish Navigation Co. v. Souter*, [1917] 1 K. B. 222, *supra*, § 1951, n. 34; and in *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540, 544, *McArdie, J.*, said: "In *Krell v. Henry* the Court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved. *Krell v. Henry* has been frequently cited and adopted in the highest tribunal."

⁵³ *Krell v. Henry*, [1903] 2 K. B. 740, 750.

seats—it was argued that it would follow from a decision of the defendant that “if a cabman was engaged to take a journey, say £10, both parties to the contract would be charged in the contingency of the race at Epsom the reason becoming impossible.” But Vaughan Williams replied: “I do not think this follows, for I do not think in the cab case the happening of the race would be the condition of the contract. No doubt the purpose of the contract would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualification for the purpose which led to the selection of the cab on that particular occasion. Any other cab would have done. Moreover, I think that, under the cab contract, even if the race went off, could have said, ‘Drive me to the Derby. I will pay you the agreed sum; you have nothing to do but drive me to the Derby for the purpose for which I hired the cab.’”⁵⁴

The right to recover payments already made for a procession which fails should turn upon the same principle as the right to enforce payments, and in some of the coronation cases that first arose it was held that payments made for a procession from which to see the procession might be recovered; in later decisions it was held that if money had already been paid it could not be recovered.⁵⁵ And where a right of action for payment had already accrued before performance became impossible, the situation was held to be the same as

⁵⁴ This distinction is supported by *Herne Bay Steamboat Co. v. Hutton*, 19 T. L. Rep. 680, where the charterer of a steamboat was held bound to pay the agreed hire although the purpose of the charter as stated in the contract was to visit a naval review to be held in connection with the coronation.

⁵⁵ *Krell v. Henry*, 18 T. L. Rep. 1823. On appeal the claim to recover the advanced payment was dropped and the hirer merely successfully contested the claim to collect the balance of the agreed price. [1903] 2 K. B. 740. In *Lumsden v. Barton*, 19 T. L. Rep. 53, the owner of the seats had been to con-

siderable expense in preparing for the procession, and on this a recovery was denied, but it was estimated that except for this fee the party might have been had.

⁵⁶ *Blakeley v. Muller*, 19 T. L. Rep. 186; *Chandler v. Webster*, 19 T. L. Rep. 493. Where, however, the procession was made after the decision on the King had been made, the performance of the contract was held to be impossible, the money was held recoverable as money paid by material mistake of fact. *Lindsay*, 19 T. L. Rep. 202; *Brymer*, 19 T. L. Rep. 434.

payment had already been made.⁵⁷ It was, indeed, truly said: ⁵⁸ "A person who has agreed to pay a sum of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract." But the correct inference to be drawn is that the money if paid should have been recoverable.⁵⁹ So far as the decisions go on the fact that money had been expended by the party receiving the advanced payment which made it inequitable to require the return of the payment they may perhaps be supported,⁶⁰ though where no part of the agreed consideration for a payment has been received, the fact that the party receiving it has made preparations for performance has not generally been made the basis for decision, but beyond this it can only be said that the cases in question are inconsistent with many others which allow recovery of payments made in advance for a consideration which is afterwards not given owing to excusable impossibility.⁶¹

§ 1955. Other cases of fortuitous destruction of value of performance.

A series of cases in principle somewhat similar to the coronation cases, arose in New York on contracts to advertise in a "Souvenir and Program of International Yacht Races," which were to take place in September, 1914. The price of the advertising was payable "upon publication and delivery of one copy." The program was printed as expected some weeks before the date fixed for the races. It was placed on sale and a number of copies sold early in August. About the middle of August the races were given up on account of the war. It was held that the price could not be recovered from those whose

⁵⁷ *Chandler v. Webster*, [1904] 1 K. B. 493.

⁵⁸ By Collins, M. R., at page 497.

⁵⁹ See *infra*, § 1974.

⁶⁰ See *Lumsden v. Barton*, 19 T. L. Rep. 53, where this ground was distinctly taken. In *Chandler v. Webster*, [1904] 1 K. B. 493, it was suggested as

an additional ground of decision by Collins, M. R., that "time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude."

⁶¹ See *infra*, § 1974.

advertisements had been inserted.⁶² The adoption prohibiting the sale of liquor has likewise been held a tenant in terminating a lease of property which th intended to be used as a saloon.⁶³ The great weight c ity, however, is otherwise on this point,⁶⁴ unless th which the premises were leased is confined to maint saloon.⁶⁵ And even though the use of the premises is 1 to "saloon purposes," the tenant has in some cases b bound to continue to perform his covenants.⁶⁶

⁶² *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 N. Y. App. D. 484, 156 N. Y. S. 179; *Alfred Marks Realty Co. v. Smith-Serrell Co.*, 154 N. Y. S. 1109; *Alfred Marks Realty Co. v. "Churchills,"* 90 N. Y. Misc. 370, 153 N. Y. S. 264. Though denial of recovery of the contract price seems defensible, the plaintiff should recover the value of any benefit that such performance as he rendered prior to the abandonment of the races conferred upon the defendants. See § 1973.

⁶³ *In Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. 753, the court said that it was unnecessary to determine whether the lease restricted the use of the property to the sale of liquor. It was enough that it was the purpose so to use it.

⁶⁴ *J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 26 L. R. A. (N. S.) 498, 66 S. E. 1081; *Shreveport Ice &c. Co. v. Mandel*, 128 La. 314, 54 So. 831; *Kerley v. Mayer*, 10 N. Y. Misc. 718, 31 N. Y. S. 818, *affd.* without opinion, 155 N. Y. 636, 49 N. E. 1099; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *San Antonio Brewing Assoc. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 638; *Hayton v. Seattle Brewing &c. Co.*, 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N. S.) 432; *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788, 34 L. R. A. (N. S.) 773, *Ann. Cas.* 1913 E. 258. See also *Newby v. Sharpe*, 8 Ch. D. 39; *Law-*

rence v. White, 131 Ga. 84 631, 19 L. R. A. (N. S.) 966

⁶⁵ *Greil Bros. Co. v. M* Ala. 444, 60 So. 876, 43 L. R. 664; *Kahn v. Wilhelm*, 118 177 S. W. 403; *Hooper v. M* Mich. 595, 123 N. W. 24, 1: Rep. 399; *Stratford v. Seattl &c. Co.*, 94 Wash. 125, 162 L R. A. 1917 C. 931. To effect in principle is *Adler v. N. Y. Misc.* 601, 126 N. Y. where a lease of a tenement for exhibiting moving pictu for no other purposes wh and a supervening ordinance such amusements in tenemer *Rent* was held not recoverab wise in *McCullough Realt; Laemmle Film Service*, 181 165 N. W. 33, where the lease that the "premises are leased Exchange and film and theatr purposes only and are not to for any unlawful or offensive whatever," the tenant was h fied in vacating the premi refusing to pay. rent when ordinance made it illegal to handle inflammable films in a which was not fire-proof. It to be "impracticable," but hardly have been impossible, used the leased premises fc purposes and stored the fil where.

⁶⁶ *O'Byrne v. Henley*, 161 A 50 So. 83, 23 L. R. A. (N.

There is obviously no impossibility or illegality in paying the rent, and the landlord by making the lease has conveyed to the tenant the estate for which rent was promised. Nor has the landlord broken any express or implied covenant. Even though the leased premises are expressly required by the lease to be used for the sale of intoxicants, the analogy which has been invoked, of total destruction of leased premises,⁶⁷ seems scarcely applicable. The landlord has not covenanted that the tenant shall have a right to sell intoxicants, but has imposed a condition for his own benefit; and certainly unless and until he chooses to take advantage of it, the tenant is not deprived of the use of the premises. If it seems just to excuse the tenant the only reason is because the lease was made on the vital assumption that liquor-selling would continue to be legal.⁶⁸ The fact that a lease is a conveyance and not simply a continuing contract, and the numerous authorities enforcing liability to pay rent in spite of destruction of leased premises,⁶⁹ make it difficult to give relief. That the tenant has been relieved, nevertheless, in several cases indicates clearly the gravitation of the law towards a recognition of the principle that fortuitous destruction of the value of performance by a circumstance wholly outside the contemplation of the parties may excuse a promisor. In any event, however, it seems clear that a promise would not be discharged because the performance promised in return had lost value because of supervening fortuitous circumstances, unless these circumstances nearly or quite completely destroyed the purpose of the bargain.⁷⁰

Houston Ice &c. Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098. See also *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 Atl. 661, L. R. A. 1917 C. 929, Ann. Cas. 1918 D. 1143. It was relied upon in all of these decisions except that of Texas, that non-intoxicating drinks and tobacco might be sold by the lessee; and in *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876, 43 L. R. A. (N. S.) 664, a lease for occupation as "a bar and not otherwise" was distinguished, as necessarily requiring the sale of in-

toxicants and the lessee was held excused.

⁶⁷ As to the law in such a case, see *supra*, §§ 944-946.

⁶⁸ These decisions may profitably be compared with those where mutual mistake as to some vital characteristic of a thing contracted for has been held to justify rescission. See *supra*, §§ 1559, 1569-1572.

⁶⁹ See *supra*, §§ 944-946.

⁷⁰ In *Abbaye v. United States Motor Cab Co.*, 71 N. Y. Misc. 454, 128 N. Y. S. 697, the loss of an "all night license" was held not to discharge a contract to

§ 1956. Partial impossibility.

In an instructive opinion in a lower court in New York while using the prevailing terminology of implied contract Rodenbeck, J., recognized that "these terms are implied by force of the law itself, and not because the parties had them in mind; whether we approve of their application upon the theory that had the intention of the parties been called to the conditions giving rise to the application of the rule, they would have omitted any reference to them as obviously covered by the law, or upon the theory that they would have regarded them as just provisions to have in mind. Since the qualification of the literal terms of the contract is imposed by the law, on principles of justice, not because of the expressed intention of the parties, the extent of the qualification depends merely on what is just. "The conditions which rendered performance impossible do not terminate the contract *ab initio*, and vitiate what has been done and leave to be done that is capable of execution. The contract may be of such an extent as to amount to a substantial part of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid permitting a recovery therefor, and they excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course must be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law which is its chief merit." 72

make a monthly payment for a hack-stand in front of the plaintiff's restaurant. See also *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 Atl. 661, L. R. A. 1917 C. 929, Ann. Cas. 1918 D. 1143.

⁷¹ *Kinzer Const. Co. v. State*, 125 N. Y. S. 46, 55 (Ct. Cl.).

⁷² *Ibid.* In *Board of Education v. Townsend*, 63 Oh. St. 514, 59 N. E. 223, 52 L. R. A. 868, in consideration of the conveyance by a board of

education, of a lot on which was situated a school house and other buildings suitable for a public school, the purchaser agreed to convey to the board another lot then vacant, to remove, reconstruct and rebuild thereon, the school house, and to hold the same in a suitable and convenient condition for school purposes. The board held no defence to an action against the purchaser for failure to perform the contract with respect to the school house.

§ 1957. Temporary impossibility.

Not infrequently there may be excusable impossibility of immediate performance at the time when performance is due, but performance may become possible later. Such temporary excusable impossibility will obviously justify at least temporary non-performance by the promisor unless the promisor has assumed the risk.⁷³ If the delay caused by impossibility is excusable and is of short duration, the promisor is still held

it was blown down by a storm, and could not, on that account, be removed as a standing building. The contract was nevertheless capable of substantial performance. The court said: "Intervention of such inevitable accident will not excuse performance when the essential purposes of the contract are still capable of substantial accomplishment, although a literal performance has become physically impossible. 7 Am. & Eng. Ency. of Law, 2d ed. 148, and cases there cited. *White v. Mann*, 26 Me. 361, 368; *Williams v. Vanderbilt*, 28 N. Y. 217, 223, 84 Am. Dec. 333; *Robson v. Mississippi River Logging Co.*, 61 Fed. Rep. 893." See also *Mascall v. Reitmeier* (Minn.), 176 N. W. 486, stated *supra*, § 1951, n. 34.

In *Whitman v. Anglum*, 92 Conn. 392, 103 Atl. 114 (stated *supra*, § 1952, n. 46), the fact that the place fixed upon for delivery of goods had become unavailable by act of the law was held not to discharge a contract.

On the other hand, in *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, a contractor who had undertaken to carry goods by a sailing vessel, was held to be under no liability to transport by another kind of vessel when a government embargo was laid on shipments by sailing vessels.

In *Torgerson v. Hauge*, 34 N. D. 646, 159 N. W. 6, a father had promised to devise land to his son in consideration of an agreement by the son to support

his parents for the remainder of their lives. The son carried out this agreement for fifteen years and then died leaving both parents surviving. The father died four months later, and the mother was then over seventy years of age. The son's wife and executor offered to continue the agreed support but the parents were induced to remove their residence to the house of other relatives in whose favor the father's will was ultimately made. The court enforced a trust in favor of the representatives of the son and in view of the long part performance by the son, and the substantial equivalence of the remaining performance offered with what was contracted for, the decision seems sound, though undoubtedly the obligation of the son was personal in character.

On the other hand, in *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7, where the defendants had contracted to furnish the Wachtel Opera Troop to give a performance, the illness of Wachtel, the star of the troop, was held to justify the defendant's failure to comply with his contract, because Wachtel's "presence was of the essence of the contract," and his appearance "was the principal thing contracted for." See also *Schultz v. Johnson's Adm.*, 5 B. Mon. 497; *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821, where partly performed personal contracts were terminated by death.

⁷³ See *supra*, § 1099.

bound by his promises, except to the extent of such . . . If the impossibility persists for a length of time sufficient to go to the essence of the contract (and only in that case) temporary non-performance on one side will justify the other party in rescinding the contract altogether.⁷⁵ But if the promisee in spite of long delay refuse to take advantage of the excuse and demand performance of the contract as soon as it becomes possible? This depends on whether the promisee would thereby be compelled to render performance of a substantially different from what he contracted for. If so, he is permanently excused.⁷⁶

⁷⁴ *Millar v. Taylor*, [1916] 1 K. B. 402; *Odlin v. Insurance Co.*, 2 Wash. C. C. 312; *Keystone, etc., Mfg. Co. v. Dole*, 43 Mich. 370, 5 N. W. 412; *Green v. Gilbert*, 21 Wis. 395. See also *Moore v. Roxford Knitting Co.*, 250 Fed. 288.

⁷⁵ *Allanwide Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, and see *supra*, § 838.

⁷⁶ See, e. g., cases on illness cited *supra*, § 838.

In *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Co.*, [1916] 2 A. C. 397, the court went to an extreme in holding a charter party not dissolved by the government's seizure of the chartered vessel for an indefinite period. See *infra*, § 1978 for a discussion of this and similar cases.

In *Geipel v. Smith*, L. R. 7 Q. B. 404, the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter party had been made war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter party, relying on an exception of restraints of princes and rulers. It was held that they were justified in their refusal. And as to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, Cockburn, C. J.,

observed: "But it would be wrong to say that in such case the party must wait, for the obligation must be suspended till the restraint be taken away. If a shipper with cargo which is perishable or its market is destroyed, the shipowner will not be lying idle, possibly rotting." Lush, J., said: "A state of war is presumed to be likely to continue long and so to disturb the commerce of merchants as to defeat and destroy the object of commercial adventure." This was quoted with approval in *The Styria v. Malcolmson*, [1917] 1, 17, 22 S. Ct. 731, 16 L. Ed. 111.

In *Metropolitan Water Board v. Dick*, [1917] 2 K. B. 1, 21 L. Ed. 111, [1918] A. C. 119, referring to a contract to build a reservoir, which was suspended by order of the Minister of Munitions, Lord Hardcastle said: "The contract could not be performed after the receipt of notice of February 21, 1916, by the Minister of the lawful act of the Minister of Munitions making it illegal for a criminal offence to continue to work under the contract. This was a temporary prohibition of the continuance of a state of war. In many cases been held to be certain to be regarded as temporary. The contractors treated it as of a temporary nature as to terminate their liability under the contract, and the fact

§ 1958. Impossibility of uncertain duration.

Sometimes it is not possible to foresee whether impossibility of performance will be for a brief period or will continue indefinitely or permanently. Whether under such circumstances the party whose performance has not been rendered impossible is excused from performing the contract altogether, depends upon the reasonableness of such an excuse when all the circumstances are taken into consideration. If circumstances do not make it important for him to change his position he should not be allowed, with or without notice of rescission, to terminate his obligations under the contract merely because the impossibility may continue for so long a period as to be vital to his interests. On the other hand, if immediate action is necessary to protect him from loss he should not be required to take the chance that perhaps the impossibility may cease

the restraint, which had been in force for six months at the date of the trial, has now been in existence for twelve months is a matter we are entitled to have regard to.

"I do not base my judgment on the view that there is no physical possibility of the performance of the contract at the end of the war, and after the removal of the restraint imposed by the Minister of Munitions. Nothing is impossible to an engineer provided sufficient time and money can be secured. Nor do I base my judgment on commercial impossibility or impracticability. The mere circumstance that the contractors might lose money would not suffice to terminate the contract. I base my judgment on the view that it was the manifest intention of the parties that there should be freedom of action on the part of both parties, and that there should be read into the contract an implied term or condition that the liability of performance should cease in the event of the Executive Government, acting lawfully and within their powers, making performance of the contract illegal and impossible."

In the same case Warrington, L. J., said at p. 24: "If the illegality is merely temporary and does not in fact render the lawful performance of the obligations of the contract impossible, then the contract is unaffected and the parties remain bound: *Andrew Millar & Co. v. Taylor & Co.* (1916), 1 K. B. 402. Though the illegality may not be proved to be in fact temporary, the circumstances may be such that the Court may infer that it will last for such a period only and occasion only such a delay as, having regard to the nature of the contract, may be treated as fairly in the contemplation of the parties at the time the contract was entered into. In that case the delay may well be held not to frustrate the objects of the parties and to leave the contract unaffected. The contract may and often does contain provisions in general terms inserted with the object of meeting delays and difficulties in performance and preventing them from having the effect of dissolving the contract. The general terms of such a provision, though wide enough to cover the event which has occurred, will not prevent it from

before his interests are injuriously affected.⁷⁷ Thus tract, although executory, may be suspended merely or posed to dissolved, by one of the parties becoming enemy;⁷⁸ and an embargo may suspend without dissolution a contract of affreightment.⁷⁹ On the outbreak of war between two nations an executory contract between subjects of the two nations is merely suspended, and not dissolved, unless the suspension for the period of the war would have the effect of a new contract upon them. Where postponement of performance of mutual obligations would involve a substantial alteration of the contract, no such postponement is allowed; the contract is wholly dissolved.⁸⁰

Another element also must be considered besides the time of time when performance by one party is impossible. If performance by the other party is still possible—he may be required to pay the full price for the whole performance although he does not receive the whole; and may require the other party whose performance is for the time being rendered impossible to continue ready and willing to perform whenever the possibility may cease. This requirement if made must be complied with unless it involves a burden substantially more onerous than that originally imposed by the contract. An illustration of the point arises where a school has been closed for a definite period for an excusable reason and it has the

effect of dissolving the contract if it is of such a nature as substantially to frustrate the objects of the parties or to render their obligations substantially different to those which they contemplated on entering into the contract." See also *The Progreso*, 50 Fed. 835; *Sherman County v. Howard* (Neb.), 98 N. W. 666; *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291.

⁷⁷ See *Poussard v. Spiers*, 1 Q. B. D. 410.

⁷⁸ *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, 493.

⁷⁹ *Hadley v. Clarke*, 8 T. R. 259; *Andrew Millar & Co. v. Taylor &*

Co., [1916] 1 K. B. 402; *Scotgation Co. v. Souter*, [1916] 1 K. B. 291; *Baylies v. Fettyplace*, 325; *Palmer v. Lorillard*, 16 J. Ogden v. Barker, 18 Johns. early decisions, English and American, cited in this note having been when the doctrines both of mutuality and of mutual dependency in bilateral contracts were not developed go to an extreme in the parties bound in spite of prospective or actual delay.

⁸⁰ *Distington, etc., Iron Co. v. Possehl & Co.*, [1916] 1 K. B. 811.

become impossible for the teacher to render the services entitling him to pay. In such a case as it is possible that the school may be opened at any time the authorities may desire that the teacher shall remain in readiness to perform the services, but if the teacher must do this he should be allowed recovery of his entire salary.⁸¹ Even though the contract is divisible, he cannot be required to hold himself ready without pay while he is idle. If the schoolhouse is burned, as another house may be obtained, the obligations of the contract continue.⁸² In several cases where schools have been closed on account of epidemics the court has allowed recovery on the part of the teacher without considering the probable duration of the closing or whether the teacher was bound or required to remain in readiness to resume work. Sounder decisions deny recovery in the absence of such a requirement, where the impossibility of performance by the teacher is prolonged.⁸³

⁸¹ *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *McKay v. Barnett*, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371. See also *Caden v. Farwell*, 98 Mass. 137.

⁸² *Charlestown School Township v. Hay*, 74 Ind. 127; *Smith v. Pleasant Plains School District*, 69 Mich. 589, 37 N. W. 567; *Cashen v. School District*, 50 Vt. 30. But see *Hall v. School District*, 24 Mo. App. 213; *School Town of Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059; *Dewey v. Union School Dist.*, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206.

⁸³ *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747; *School District v. Howard*, 5 Neb. (Unof.) 340, 98 N. W. 666.

In *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621, the court said: "Had the act of the closing of the schools been intended as permanent on January 6, 1899, or at any date afterward, plaintiff's right to compensation would probably not have existed." In *Chapin v. Little Blue School*, 110 Me. 415, 86 Atl. 838, an

advance payment made by a parent was recovered by him when the illness of his son compelled his withdrawal from school.

Similar in principle to the situation referred to in the text is that under consideration in *Leiston Gas Company v. Leiston-Cum-Sisewell, etc.*, Council, [1916] 1 K. B. 912, 2 K. B. 428. A gas company agreed for five years with a local authority, for the purpose of lighting the streets within their district, to furnish certain street lamps and connect them with the gas mains and to supply gas and to light, extinguish, and maintain the lamps. The local authority agreed to pay an annual sum per lamp, payments to be made in four equal quarterly instalments. While the contract was running, the gas company having so far performed their part of the contract, an Order was made under the Defence of the Realm Acts prohibiting until further order the lighting of the street lamps. The gas company brought suit for three quarterly instalments becoming due since the date of the Order; and though no service had been rendered

§ 1959. Impossibility due to promisor's fault.

It is only fortuitous impossibility that excuses bility and therefore if the illness or death of a prom contract for personal services was due to his own fa seems no reason for excusing him from liability for h to perform the contract;⁸⁴ but the difficulty of det what is fault in this connection, and what is the p cause of an illness would doubtless make a court rel exclude the defence of illness on this ground.⁸⁵ If, physical inability to perform a contract was obvio promisor though unknown to the promisee at the ti the contract was made,⁸⁶ or if during the performan contract injurious consequences of illness could ha foreseen and guarded against,⁸⁷ liability for these cons will not be excused. And the same thing is true of of impossibility known to or foreseeable by the prom caused by him,⁸⁸ or which would not have occurred

during this time the Court held the plaintiff entitled to recover, saying: "In the present case it is impossible from day to day or from week to week to tell whether it may be necessary to stop all or some only of the lights or whether it will be possible to resume lighting altogether, and, in my view, the plaintiffs must be ready on the repeal or relaxation of the restriction to go on providing the light and must keep the whole of the apparatus in working order ready for the purpose, and it does not appear to me to be material that the restriction which might possibly have been a very short one has turned out to be one of considerable length."

⁸⁴ See *supra*, § 1943, n. 88.

⁸⁵ *K——v. Raschen*, 38 L. T. (N. S.) 38.

⁸⁶ *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57; and see dicta in *K——v. Raschen*, 38 L. T. (N. S.) 38.

⁸⁷ *Gem Knitting Mills v. Empire, etc., Co.*, 3 Ga. App. 709, 60 S. E. 365.

⁸⁸ In *Lima Locomotive Co. v. Na-*

tional Casting Co., 155 F. C. C. A. 593, shutting down repairs of a furnace, necessary performance of a contract no excuse for breach since necessity for repairs existed when contract was made. And is liable for avoidable cost of *vis major*. *Pawnee Land Co. v. Jenkins*, 1 Colo. App. Pac. 381; *Cannon v. Hunt*, 501, 38 S. E. 983; *Eugster*, 35 La. Ann. 119, 48 Am. Colorado Canal Co. v. (Tex. Civ. App.), 94 S. W. 2d v. North America Transport Co., 20 Wash. 580, 56 Pa. L. R. A. 557.

⁸⁹ *Nester v. Diamond M*, 143 Fed. 72, 74 C. C. A. 26 v. New York R. R., 59 Conn. Atl. 300, 21 Am. St. 110; v. Louisiana Purchase Expco 245 Mo. 337, 149 S. W. 26 Spuyten Duyvil & Co., 487; *Boswell v. Sutherland*, App. 233. In *Mohr v. Hu-*

promisor originally proceeded with reasonable diligence with the performance of his promise.⁹⁰ But if the injurious accident would have been equally destructive even though the promisor had been diligent, his wrongful delay will not throw the risk of loss upon him.⁹¹

The fact that the immediate cause of impossibility was some voluntary act of the promisor, does not seem necessarily to exclude the conclusion that the ultimate casualty should operate as an excuse, though this seems intimated in a Maryland case.⁹² If in order to escape imminent physical peril a course

ing Club, 164 Wis. 425, 160 N. W. 266, a professional boxer who had contracted to box ten rounds under certain rules, and who, in the middle of the second round, struck a foul blow, and as a result thereof disabled his opponent, and thus by his own act, whether deliberate or not, made the necessary substantial performance of his contract impossible, was not allowed to recover under the contract; and it would seem likewise true that he would be liable for failing to box the agreed ten rounds.

⁹⁰ *Re Arthur*, 14 Ch. D. 603; *Wright v. Meyer* (Tex. Civ. App.), 25 S. W. 1122. See also *Motschman v. United States*, 47 Ct. Cl. 373; *Modern Steel Structural Co. v. English Constr. Co.*, 129 Wis. 31, 108 N. W. 70.

In the leading case of *Howell v. Coupland*, 1 Q. B. D. 258, the defendant had contracted to sell 200 tons of potatoes to be grown on land belonging to him in Whaplode. In due course he appropriated between eighty and ninety acres for the growth of the potatoes. This land would ordinarily have been amply sufficient to produce 200 tons, but, owing to blight, in fact produced less than half that quantity. It was found that if the defendant had had other land to sow with potatoes at the time when the disease was discovered, which, in fact, he had not, it would have been too late to sow it. But so

far as appears the defendant might have procured a larger quantity of land at the time when the contract was made. He seems to have been held excused from supervening impossibility which might have been guarded against had it been reasonable to anticipate it.

⁹¹ *Krause v. Board, etc., of Crothersville*, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203. A builder had entered into a contract to construct an addition to an old building which was to furnish partial support for the roof of the new. The old building was struck by lightning, and everything inflammable destroyed by fire, and the wall of the old building intended as a support for one end of the roof of the new so weakened that it had to be taken down. The fact that the contractor had unnecessarily delayed the completion of the building until its completion was rendered impossible by the destruction of the old building did not render the contractor liable for failure to perform the contract.

⁹² In *American Towing, etc., Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 75 Atl. 341, Ann. Cas. 1914 A. 46, the towing company had contracted to tow certain scows from Charleston to Baltimore, and began the work. Owing to stress of weather, the tug abandoned the scows and they were lost. The court refused to apply the

is adopted which leads, and which might be expected to the destruction of a specific thing to which the contract relates, nevertheless the promisor should be excused.

§ 1960. Effect of dissolution or receivership of corporation

Blackstone makes the statement that "the debts of a corporation, either to or from it, are totally extinguished by dissolution."⁹³ This statement was based on an earlier decision⁹⁴ in which it was held that creditors of a dissolved corporation could not maintain an action at law against a shareholder who had signed a bond on behalf of the corporation. Blackstone failed to observe a later decision in equity,⁹⁵ in which it was held that creditors of the same corporation could sue the members of the dissolved company property which belonged to it, and which they divided among themselves. The court held that the property was "in equity still the estate of the late company," and that the debts of the plaintiffs should be discharged therefrom. This statement that debts of a dissolved corporation are extinguished, was frequently repeated.⁹⁶ It is now well established, however, that whatever may be the remedies necessary to enforce the obligation, the dissolution of a corporation does not free its property from liability to discharge its debts unless an executory contract involves obligations on

doctrines applicable to impossibility caused by the destruction of a specific thing to which the contract relates for the reason (page 680) "that the scows were lost because the plaintiff abandoned them at sea."

⁹³ 1 Comm. 484.

⁹⁴ *Edmunds v. Brown*, 1 Lev. 237.

⁹⁵ *Naylor v. Brown*, Finch, 83.

⁹⁶ This repetition was not simply by text writers, but in some decisions. *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Thornton v. Lane*, 11 Ga. 459; *Commercial Bank v. Chambers*, 8 S. & M. 9; *Port Gibson v. Moore*, 13 S. & M. 157.

⁹⁷ *Bacon v. Robertson*, 15 L. Ed. 499; *Lum v. F. Wall*, 277, 18 L. Ed. 743; *Western & A. R. Co.*, 6 *In re Mullings Clothing Co.* 58, 151 C. C. A. 134, L. R. 539, 252 Fed. 667; *Nantuxet Bank v. First Nat. Bank*, 325, 4 Am. Rep. 8; *Smiley*, 16 Ga. 289; *Hovson*, 20 Fla. 352; *Brown v. Co.*, 3 La. Ann. 177. The matter is covered See, e. g., *Bolles v. Crete Co.*, 53 N. J. Eq. 1061.

of the corporation which cannot be performed by an agent, the dissolution of the corporation, however brought about, will not avoid liability in damages for breach of the contract.⁹⁸

Where, however, the obligation of the corporation is personal in character, the dissolution of the corporation seems analogous to the death of a real person, and, therefore, the obligation should be discharged, if the dissolution can be said to be without fault on the part of the corporation.⁹⁹ But if, however, the corporation voluntarily dissolves itself, or winds up its business, even such a contract, though made impossible of performance, is made so by the act of the corporation, and it or its assets are liable for its failure to fulfill its obligation.¹ And though the dissolution or discontinuance of business is compulsory, it may nevertheless be due to the fault of the corporation, and; in that event also, impossibility should be no excuse. The ordinary cause for compulsory dissolution is the financial condition of the corporation and it would seem, following the analogy of the contracts of real persons, that impossibility originating in financial incapacity should be no excuse.² In a leading decision in New York, however, it was held otherwise.³

⁹⁸ *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Dudley v. Price*, 10 B. Mon. 84; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151.

⁹⁹ See decisions in the following notes.

¹ *Yelland's Case*, L. R. 4 Eq. 350; *Re London, etc., Co.*, L. R. 7 Eq. 550; *Re Dale*, 43 Ch. D. 255; *Reigate v. Union Mfg. Co.*, [1918] 2 K. B. 592; *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, 4 S. Ct. 390; *Macgregor v. Union Life Ins. Co.*, 121 Fed. 493; *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Tiffin Glass Co. v. Stoehr*, 54 Ohio St. 157, 43 N. E. 279; *Seipel v. Insurance Co.*, 84 Pa. 47; *Potts v. Rose Valley Mills*, 167 Pa. 310, 31 Atl. 655. See also *Ex parte Maclure*, L. R. 5 Ch. 737; *Ritter*

v. Mutual Life Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693; *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918 A. 539, 252 Fed. 667. An amendment of the defendants' corporate charter in such a way as to preclude continuance of the business for which the plaintiff had been engaged is similarly ineffectual to free it from liability. *Merchants' Life Ins. Co. v. Griswold* (Tex. Civ. App.), 212 S. W. 807.

² This was so held in *Spader v. Mural Decoration Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Bolles v. Crescent Drug, etc., Co.*, 53 N. J. Eq. 614, 32 Atl. 1061; *Rosenbaum v. United States Credit Co.*, 61 N. J. L. 543, 40 Atl. 591.

³ *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174. See also *Malcolmson v. Wappoo Mills*, 88 Fed. 680; *Ely v. Van Kannell Revolving Door*

Clearly the mere bankruptcy of a corporation, or the appointment of a receiver on account of insolvency, though it may operate as a legal prevention of performance by the corporation, is due to a cause for which it is responsible and therefore it does not discharge even personal contracts.⁴

§ 1961. Impossibility of one alternative.

Where a contract provides that one of two alternatives is to be performed by the promisor, the fact that one of the alternatives is, or becomes, impossible does not excuse the promisor from performing that which remains possible;⁵ unless prior to the existence of the impossibility the promisor, in good faith, has manifested an election to render the performance which subsequently becomes impossible.⁶ Alternative conditions of a bond with penalty are treated as alternative promises and therefore if one becomes impossible the other is obligatory. It is important, however, in considering the application of this rule to be certain that the contract in question is a true alternative contract and does not merely provide for a stipulated or liquidated damages in case the performance intended to be the real object of the contract is not rendered.⁹

Co., 184 Fed. 459; *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146.

⁴ *Re Dale and Plant, Ltd.*, 43 Ch. Div. 255; *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 S. C. Rep. 412, 60 L. Ed. 811, L. R. A. 1917 B. 580; *Ex parte Pollard*, 2 Lowell, 411; *Kinsman v. Fisk*, 37 N. Y. App. Div. 443, 56 N. Y. S. 33; *Potts v. Rose Valley Mills*, 167 Pa. 310, 31 Atl. 655. The contrary decision of *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146, cannot be sustained.

⁵ *Da Costa v. Davis*, 1 B. & P. 242; *Barkworth v. Young*, 4 Drew. 1, 24; *Mellquham v. Taylor*, [1895] 1 Ch. 53, affd. 64 L. J. Ch. 296; *Irvine v. Postal-Tel. Cable Co.*, 28 Cal. App. 840, 173 Pac. 487; *Jacquinet v. Boultron*, 19 La. Ann. 30; *Steelman v.*

Mattix, 36 N. J. L. 34; *Worthington*, 7 Oh. (P. Board of Education v. Teachers' Ass'n) Oh. St. 514, 59 N. E. 223, 868.

⁶ *Essex S. S. Co. v. Larner*, 98 Fed. 98, 162 C. C. A. 270.

⁷ See *supra*, § 810.

⁸ The contrary rule laid down by Lord Coke in *Laughter v. Lord Coke*, 22a, that "Where the condition of a bond consists of two alternatives, disjunctive, and both are to be performed at the time of the bond made, and if afterward one of them becomes impossible by the act of God, the obligor is bound to perform the other, though it is unsound and not law." *Foundery v. Hovey*, 21 Pick. 1, and see cases cited *supra*.

⁹ See *supra*, §§ 781, 1407.

§ 1962. Impossibility of fulfilling all of several contracts.

It sometimes happens that because of excusable impossibility or other legal defence a contractor is unable to fulfill all of a number of similar obligations and yet could fulfill any one of these obligations if he totally disregarded the others. In such a case the contractor may apportion the possible performance *pro rata* among the several contracts, and be excused from further liability.¹⁰ But if the deficiency was due to new contracts not contemplated when the prior contracts were made, the contractor is not excused from liability under the earlier contracts.¹¹

§ 1963. Difficulty of performance will not generally excuse.

The fact that by supervening circumstances performance of a promise is made more difficult and expensive, or the counter-performance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor.¹²

¹⁰ *McKeefrey v. Connellsville Coke & Iron Co.*, 56 Fed. 212, 5 C. C. A. 482; *Jessup & Moore Paper Co. v. Piper*, 133 Fed. 108; *Luhrig Coal Co. v. Jones*, 141 Fed. 617, 72 C. C. A. 311; *Re Bellevue Pipe Co.*, 189 Fed. 169; *Herrmann v. Bower Chemical Co.*, 242 Fed. 59, 155 C. C. A. 3; *Oakman v. Boyce*, 100 Mass. 477; *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.*, 199 Mass. 22, 84 N. E. 1020; *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 89 N. E. 115; *Consolidated Coal Co. v. Mexico Co.*, 66 Mo. App. 296. *Cf. B. P. Ducas Co. v. Bayer Co.*, 163 N. Y. S. 32.

¹¹ *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 89 N. E. 115. Deficiency in this case was due to sales made to other than the seller's regular customers.

Where a seller undertook contracts confessedly in excess of the existing capacity of his plant, the fact that at the same time he undertook additions to the plant adequate to the increased burden will not free him

from liability for furnishing the full amount contracted for. *Davison Chemical Co. v. Baugh Chemical Co.*, 133 Md. 203, 106 Atl. 269.

¹² *The Harriman*, 9 Wall. 161, 19 L. Ed. 629; *Jones v. United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 14, 37 L. Ed. 625, 13 S. Ct. 779; *Jacksonville, etc., R. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284, 20 S. Ct. 228; *Porto Rico Sugar Co. v. Lorenzo*, 222 U. S. 481, 56 L. Ed. 277, 32 S. Ct. 133; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 60 L. Ed. 576, 36 S. Ct. 342; *Day v. United States*, 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219; *United States v. Spearin*, 248 U. S. 132, 39 S. Ct. 59, 61, 63 L. Ed. 166; *Lumberman's Co. v. Gilchrist*, 55 Fed. 677, 5 C. C. A. 239, 6 U. S. App. 599; *Robson v. Mississippi River Logging Co.*, 61 Fed. 889, 69 Fed. 773, 16 C. C. A. 400 & 32 U. S. App. 520; *Coal Iron Ry. v. Reherd*, 204 Fed. 859, 123

Though this principle is frequently stated as one of application, the correctness of this may be questioned, no doubt, parties to a contract, though they

- C. C. A. 155; *Penn Bridge Co. v. Ker-shaw County*, 226 Fed. 728, 141 C. C. A. 484; *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198; *Furness v. Muller*, 232 Fed. 186; *Marx v. Kilby & Co. Works*, 162 Ala. 295, 50 So. 136, 136 Am. St. 24; *Collier v. Dejernett*, 1 Ala. App. 588, 56 So. 101; *Cassady v. Clarke*, 7 Ark. 123; *Klauber v. San Diego & Co.*, 95 Cal. 353, 30 Pac. 555; *Ryan v. Rogers*, 95 Cal. 349, 31 Pac. 244; *Carlson v. Sheehan*, 157 Cal. 692, 697, 109 Pac. 29; *Levy v. Caledonian Ins. Co.*, 156 Cal. 527, 105 Pac. 598; *Metzler v. Thye*, 163 Cal. 95, 124 Pac. 721; *Whitman v. Anglum*, 92 Conn. 392, 103 Atl. 114; *Bacon v. Cobb*, 45 Ill. 47; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Hartje v. Keeler*, 133 Ill. App. 461; *Tartt v. Ramey*, 158 Ill. App. 468; *St. Joseph County v. South Bend & Co.*, 118 Ind. 68, 20 N. E. 499; *David v. Ryan*, 47 Iowa, 642; *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365; *Jackson v. Creswell*, 94 Iowa, 713, 61 N. W. 383; *Newport News & Co. v. McDonald Brick Co.*, 109 Ky. 408, 59 S. W. 332; *Bates Mach. Co. v. Norton Iron Works*, 113 Ky. 372, 68 S. W. 423; *Runyan v. Culver*, 168 Ky. 45, 181 S. W. 640, L. R. A. 1916 F. 3; *American Towing & Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 84 Atl. 182, Ann. Cas. 1914 A. 46; *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18; *Ess-Arr Knitting Mills v. Fischer*, 132 Md. 1, 103 Atl. 91, 93; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Bank v. Burt*, 5 Allen, 113; *Drummond v. Crane*, 159 Mass. 577, 23 L. R. A. 707, 38 Am. St. Rep. 460; *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542; *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642; *Harrison v. I*, 74 Mo. 364, 41 Am. Rep. *v. Somerville (Miss.)*, *Ward v. Haren*, 135 Mo. S. W. 446; *Roseberry Benevolent Assoc.*, 142 552, 121 S. W. 785; *Koesthardt, (Mo. App.)*, 160 *Waite v. Shoemaker*, 50 146 Pac. 736; *Leavitt v N. H.* 94, 32 Atl. 156, 68 *Knappmann Whiting Co. Water Co.*, 64 N. J. L. 692, 49 L. R. A. 572, 81 A. 467; *Harmony v. Binghar* 99, 62 Am. Dec. 142; *Ba son*, 42 N. Y. 126; *Booth Duyvil Rolling Mill Co.*, 6 *Stewart v. Marvel*, 101 N. E. 743; *Ward v. Hu Bldg. Co.*, 125 N. Y. 230 256; *Cameron-Hawn Res Albany*, 207 N. Y. 377, 10 49 L. R. A. (N. S.) 922; *Wreschner*, 174 N. Y. Ap 156 N. Y. S. 1054; *North v. Public Service Corp.*, Misc. 19, 176 N. Y. S. 62 *Wells*, 43 Okl. 70, 141 Pa *gra v. Wheeler*, 24 Oreg. 354, 21 L. R. A. 726; *Quinn*, 42 Oreg. 1, 69 Pac *ned v. Holbrook*, 87 Ore 171 Pac. 222; *Han 4 Whart.* 204; *DuBois v. W Co.*, 176 Pa. 430, 35 Atl. 2 A. 92, 53 Am. St. Rep. 678 *v. Brownsville Av. St. R.*, 55 Atl. 1036; *Corona Coal v. Dickinson*, 261 Pa. 58 741; *Bartlett v. Bisbey*, 2 App. 405, 66 S. W. 70; *Ed ent*, 38 Vt. 486; *Isaacson* 56 Wash. 18, 104 Pac. 1 *v. Ehlinger*, 90 Wash. 58 544; *Vale v. Suiter*, 58 W.

assume all risk of impossibility, do assume the chance that performance may become more difficult and expensive than it was at the time when the contract was entered into, or appeared likely to become; but where a very great increase in expense is caused by a circumstance not only unanticipated but inconsistent with facts which the parties obviously assumed as likely to continue, the basic reason for excusing the promisor from liability seems present.¹³ This is illustrated by cases where illness and especially where a well-founded fear of illness has been held an excuse.¹⁴ So a promise by a mortgagee to furnish money to carry on the business of the mortgagor in the hands of an assignee was held excused by the mortgagor's bankruptcy which removed the assets of the business from the assignee.¹⁵ It can hardly be said that performance was impossible, but it would involve something very different from what the parties contemplated. In a number of cases¹⁶ where performance of a covenant to mine a certain minimum quantity of clay or ore has been excused because of non-existence of the agreed quantity, it seems probable that "non-existence" really means in most cases, not obtainable except by means and with an expense impracticable in a business sense and not contemplated by the parties.¹⁷ In the cases last referred to,

S. E. 313; *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778; *Roberts v. American &c. Lumber Co.*, 76 W. Va. 290, 85 S. E. 535; *Sundy v. Dominion Natural Gas Co.*, 4 Dom. L. R. 663.

¹³ In *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430, the court held, Cooley, J., delivering the opinion, that a covenant in a lease to rebuild was excused by a building law, passed subsequent to the date of the lease, forbidding the use of wood of which the building had previously been built. The covenant was not impossible of performance, since it did not require a wooden construction. A contrary decision is *David v. Ryan*, 47 Iowa, 642. See also *Fire Association v. Rosenthal*, 108 Pa. 474, 1 Atl. 303.

¹⁴ See *supra*, § 1940.

¹⁵ *Mahaska County State Bank v. Brown*, 159 Ia. 577, 141 N. W. 459.

¹⁶ *Clifford v. Watts*, L. R. 5 C. P. 577, and similar cases (see *supra*, § 1567).

¹⁷ In a few cases this is plainly stated. In *Mineral Park Land Company v. Howard*, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916 F. 1, it was held that an agreement to take from certain land all the earth and gravel necessary for the construction of a particular work, and to pay for the same at specified rates, contemplated that the land contained the requisite quantity, available for use; and that performance was excused, notwithstanding there was a sufficiency of such materials on the land, if they were so situated that the promisor could not take them by ordinary means, nor except at a prohibitive cost, amounting to ten or

it is true that the situation giving rise to the defense when the contract was made, but it does not seem affected or should affect the decisions. If the courts were held excused from the literal performance of the contract because so little of the agreed substance existed in question as to make performance of the promise practicable from a commercial standpoint, though it is impossible, surely the same consequence should follow if supervening events produce the same situation. A promisor might better be supposed to assume the risk of the impossibility existing at the time when he contracts than of that supervening arising from fortuitous circumstances.

The true distinction is not between difficulty and impossibility. As has been seen ¹⁸ a man may contract to do the impossible, as well as what is difficult. The important question is whether an unanticipated circumstance, the risk of which should not fairly be thrown upon the promisor, has supervened so that the performance of the promise vitally different from what was reasonably to be expected.¹⁹

twelve times as much as the usual cost thereof.

In *Brick Co. v. Pond*, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than two thousand tons of clay every year, paying therefor twenty-five cents per ton, the court held that the lessees were not bound to pay for two thousand tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out.

In *Virginia Iron &c. Co. v. Graham* (Va.), 98 S. E. 659, the lessee was held excused on the strength of an allegation that ore "could no longer be found on the leased premises either of the quality or in the quantity that could be profitably mined; the cost of such tonnage as could be gotten out being altogether prohibitive."

¹⁸ *Supra*, § 1934.

¹⁹ In *Northern Pac. Ry. Co. v. American Trading Co.*, 191 U. S. 467, 25 S. Ct. 84, 49 L. Ed. 1001, an action against a carrier for breach of a transportation contract, the plaintiff's refusal of clearance was prevented by the proper refusal of clearance. The court said: "It ought not to be held that the mistaken action of the depot in refusing to give the clearance should operate as an excuse for the non-performance of the contract. The contract was not thereby rendered void. It cannot be affirmed that such refusal was not within the contemplation of the contracting parties at the time the contract was made. Manifestly it was known, might operate to the transportation of articles of contraband of war. This particular impediment may not have been actually within the minds of the parties at the time of the contract, but there were agreed facts show, present to the minds of the parties at the time the fact that there

§ 1964. Building contracts.

In many cases where a builder or contractor has undertaken to erect a building or other structure, it has been injured or destroyed without fault of either party while in process of erection. It is uniformly held that the builder or contractor still remains bound by his promise, and will be liable in damages if he fails to complete the structure. Whether the injury or destruction was due to tempest, fire, defective soil, is immaterial.²⁰ And a contract for excavation will not be excused because the character of the soil or rock is more troublesome

trouble in procuring the transportation of the lead, because of its character as contraband of war, and in the light of those facts the contract was made and, in substance, ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it."

²⁰ *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Simpson v. United States*, 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 482; *Phoenix Bridge Co. v. United States*, 211 U. S. 188, 29 S. Ct. 81, 53 L. Ed. 141; *United States v. Spearin*, 248 U. S. 132, 39 S. Ct. 59, 61, 63 L. Ed. 166; *Day v. United States*, 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219; *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29; *Ahlgren v. Walah*, 173 Cal. 27, 31, 158 Pac. 748, Ann. Cas. 1918 E. 751; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Macfarland v. Barber, etc., Co.*, 29 App. D. C. 506; *Prather v. Latahaw (Ind.)*, 122 N. E. 721; *Parker v. Scott*, 82 Iowa, 266, 47 N. W. 1073; *Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354; *Stess v. Leonard*, 20 Minn. 494; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Leavitt v. Dover*, 67 N. H. 94, 32 Atl. 156, 68 Am. St. Rep. 640; *Trustees v. Bennett*, 3 Dutch. 513, 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am.

Dec. 349; *Lawing v. Rintles*, 97 N. C. 350, 2 S. E. 252; *Keel v. East Carolina, etc., Co.*, 143 N. C. 429, 55 S. E. 826; *Newman Lumber Co. v. Purdun*, 41 Ohio St. 373; *Ford v. Shepard Co.*, 36 R. I. 497, 90 Atl. 805; *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. 508; *Loneragan v. San Antonio L. & T. Co.*, 101 Tex. 63, 104 S. W. 1061, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803; *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 78 Atl. 718, 32 L. R. A. (N. S.) 135; *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778. See also *Hogan v. Globe Mut. &c. Assoc.*, 140 Cal. 610, 74 Pac. 153; *Keeling v. Schastey*, 18 Cal. App. 764, 124 Pac. 445; *Doll v. Young*, 149 Ky. 347, 149 S. W. 854; *Peck-Hammond & Co. v. Miller*, 164 Ky. 206, 175 S. W. 347; *Logan v. Consolidated Gas Co.*, 107 N. Y. App. Div. 384, 95 N. Y. S. 163; *Hanthorn v. Quinn*, 42 Oreg. 1, 69 Pac. 817; *King v. Low*, 3 Ont. L. Rep. 234. So where an insurance company elects to restore a partially destroyed building instead of paying insurance money, the election is irrevocable and it must fulfil its undertaking though condemnation of the old structure (*Brown v. Royal Ins. Co.*, 1 E. & E. 858), or change in the building laws (*Fire Association v. Rosenthal*, 108 Pa. 474, 1 Atl. 303. See also *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 451), makes performance more burdensome than anticipated.

than was anticipated.²¹ Even delay is not excuse culities in the construction of a building or other un in process of construction, due to unusual weathe ditions of soil or the like, do not free the contractor bility for breach of his promise to complete the struc given day.²² Vagaries of the weather are of such occurrence that possible delay from that cause shou anticipated. The parties cannot be supposed to have c on the assumption that the weather would be con favorable.²³

§ 1965. Contract to work on building.

Though one who contracts to build is not dischar liability on his contract because of the destruction of or other attempts to perform the contract, the sit different where the contract is to do work on a buil the building is destroyed. Here the parties assu continued existence of the building upon which the v to be done, and if this assumption ceases to be true, th tion is discharged.²⁴ Even though another similar

²¹ *Maryland Dredging Co. v. United States*, 47 Ct. Cl. 557, affd. 241 U. S. 184, 60 L. Ed. 945, 36 S. Ct. Rep. 545; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Fruin v. Crystal R.*, 89 Mo. 397, 14 S. W. 557. But see *Kinzer Const. Co. v. State*, 125 N. Y. S. 46.

²² *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Simpson v. United States*, 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 482; *Phoenix Bridge Co. v. United States*, 38 Ct. Cl. 492; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983; *Harley v. Sanitary Dist.*, 226 Ill. 213, 80 N. E. 771; *Brent v. Head & Co.*, 138 Ia. 146, 115 N. W. 1106, 16 L. R. A. (N. S.) 801; *Stevens v. Lewis-Wilson-Hicks Co.*, 170 Ky. 238, 18 S. W. 873; *Cook & Co. Contracting Co. v. Denis*, 124 La. 161, 49 So. 1014; *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18; *Cochran v. People's R.*, 131 Mo. 607, 33 S. W. 177; *McQuiddy v. Brannock*,

70 Mo. App. 535; *Carter v. Neb.* 723, 121 N. W. 952; *Hudson River Bg. Co.*, 125 26 N. E. 256; *Sands v. Quiq* 476, 69 S. E. 440; *Reichenbe* 13 Wash. 364, 43 Pac. 354, 51; *Cockshutt Plow Co. v. A* Co., 3 Alberta L. R. 503.

Jones v. St. John's College, B. 115, with which compar *Churton*, [1897] 1 Q. B. 563; *State*, 73 Wis. 416, 41 N. W.

²³ *Usrey Lumber Co. v. E* *Lumber Co.*, 135 La. 511, (See also as to carrier's *supra*, § 1099.

²⁴ *Krause v. Board of Tr* *Ind.* 278, 70 N. E. 264, 65 L. 102 Am. St. Rep. 203; *Bu* *Byron*, 153 Mass. 517, 27 N. Am. St. Rep. 654. The c *Chapman v. Beltz*, 48 W. S. E. 1013, and dictum i *Devlin*, 67 Tex. 507, 510, 3

were erected, the contractor would not be bound to work upon that. It would be a different building and a variation of his contract.²⁵ The more troublesome question, whether the builder can recover compensation for the work which he has done, is subsequently considered.²⁶

§ 1966. Liability for defective plans.

Even though the plans upon which a contractor undertakes to construct a building are so defective as to cause the building to fall while in course of erection, he is not generally relieved from liability.²⁷

60 Am. St. Rep. 38, that the contractor must do similar work on a new and similar structure erected by the owner, seem erroneous.

²⁵ Where a contractor agreed to erect a building upon a specific foundation prepared by the owner, accidental destruction of the building when partially finished leaving the foundation intact, did not excuse the contractor from his obligation to complete the structure. *Vogt v. Hecker*, 118 Wis. 306, 95 N. W. 90.

²⁶ See *infra*, § 1975.

²⁷ *Thorn v. London*, L. R. 1 A. C. 120; *N. J. Magnan Co. v. Fuller*, 222 Mass. 530, 111 N. E. 399; *Leavitt v. Dover*, 67 N. H. 94, 32 Atl. 156, 68 Am. St. Rep. 640; *Board of Education v. Empire State Surety Co.*, 83 N. J. L. 293, 85 Atl. 223; *Loneragan v. San Antonio L. & T. Co.*, 101 Tex. 63, 104 S. W. 1061, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803. But see *contra*, *Penn Bridge Co. v. New Orleans*, 222 Fed. 737, 138 C. C. A. 191; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338. See also *Moore v. United States*, 46 Ct. Cl. 139; *William Miller & Sons Co. v. Homeopathic &c. Hospital*, 243 Pa. 502, 90 Atl. 394; *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 142 Pac. 675, L. R. A. 1915 C. 671. In *Ford v. Shepard Co.*, 36 R. I. 497, 90 Atl. 805, 807, the

plaintiff contractors asserted a right to stop performance of their work because of the interference of quicksands, and to recover on a *quantum meruit* for the work which they had done. "The jury returned a verdict for the plaintiffs for \$5,466.72 and found specially: (1) That the defendant corporation, by its officers having authority to bind it in the matter of making the contract sued on, at the time of entering into the same, knew of the presence of the quicksand complained of; (2) that the defendant in causing the plans and specifications to be prepared for the construction of the work intentionally caused, to be omitted therefrom the plans and specifications for dealing with the quicksand for the purpose of deceiving the plaintiffs." The court said: "We think that if the jury were justified by the evidence in finding specially, as they did, the plaintiffs might recover a verdict under the common count, and that such verdict should be sustained;" but in considering the sufficiency of the evidence to justify the special findings, added:—

"We do not think that a knowledge of the quicksand on the part of the defendant, disconnected from any attempt or intention on its part to conceal it from the plaintiffs, or to prevent or deter them from an exam-

Though the builder may be liable if he fails, by reason of defective plans furnished him, to complete work which he has undertaken, yet if he can and does complete it according to the plans he is not liable for subsequent inferiority, injury or destruction of the work, due to the defective character of the plans.³⁰

§ 1967. Covenants to repair.

In the Civil law a lease is regarded as a contract rather than a conveyance and the duty is imposed upon the landlord of keeping leased premises in repair, and even if he is excused by impossibility the tenant is freed from liability to pay rent;³¹ but in the English and American law, in the absence of an express covenant in the lease to that effect, neither the landlord,³² nor (except so far as is necessary to make good the consequences of his own careless or improper use of the premises) the tenant,³³ is under any obligation to repair. An express covenant to repair or to keep in repair demised premises obliges the covenantor not only to repair but to rebuild structures

and *United States v. Stage Co.*, 199 U. S. 414, 424, 26 Sup. Ct. 69, 50 L. Ed. 251, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications."

³⁰ *Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N. S.) 774; *New York v. Pennsylvania Steel Co.*, 206 Fed. 455, 124 C. C. A. 360; *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795; *Porter v. Wilder*, 62 Ga. 520; *Clark v. Pope*, 70 Ill. 128; *Culbertson v. Ashland Cement, etc., Co.*, 144 Ky. 614, 139 S. W. 792; *Hebert v. Weil*, 115 La. 424, 39 So. 389; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583; *Tide Water Building Co. v. Hammond*, 144 N. Y. App. Div. 920, 129 N. Y. S. 355; *McLane v. DeLeyer*, 56 N. Y. 619; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661; *Dwyer v. New York*,

77 N. Y. App. Div. 224, 79 N. Y. S. 17 (see also *Sundstrom v. New York*, 213 N. Y. 68, 106 N. E. 924); *Filbert v. Philadelphia*, 181 Pa. 530, 37 Atl. 545; *Harlow v. Homestead*, 194 Pa. 57, 45 Atl. 87; *Ward v. Pantages*, 73 Wash. 208, 131 Pac. 642.

³¹ See authorities collected in *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. Ed. 776, 7 S. Ct. 962 (holding this rule applicable in Louisiana), also German Civil Code, § § 536, 537.

³² *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507; *Viterbo v. Friedlander*, 120 U. S. 707, 712, 30 L. Ed. 776, 7 S. Ct. 962; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; *Kingsbury v. Westfall*, 61 N. Y. 356.

³³ *Auworth v. Johnson*, 5 C. & P. 239; *Doe v. Amey*, 12 Ad. & E. 476; *United States v. Bostwick*, 94 U. S. 53, 66, 24 L. Ed. 65.

thereon, although the injury or destruction is due to elements, unavoidable accident, or the wrongful act of a third party. A covenant to return leased premises at the end of the term in as good condition as they were at the time of the lease, ordinary wear and tear excepted, has been given a different construction, and if the premises are destroyed without fault of the tenant he is not bound to restore them.³⁵ If for the purpose of the action had been brought in the sixteenth century, the tenant in this form, or in the latter part of the nineteenth century, on a covenant in terms to repair, it may be doubted whether any distinction would have been taken. If the lessor's compliance with a covenant, rebuilds or repairs he has no right to the insurance money received by the landlord,³⁶ but if the contract being a contract of indemnity the landlord cannot recover the insurance on buildings rebuilt by the tenant in

34 Walton v. Waterhouse, 1 Wms.
 Saund. 420; Bullock v. Dommitt, 6
 T. R. 650; Company of Brecknock
 Navigation v. Pritchard, 6 T. R. 750;
 Dermott v. Jones, 2 Wall. 1, 17 L. Ed.
 762; Polack v. Pioche, 35 Cal. 416, 98
 Am. Dec. 115; Meyers v. Myrell, 57
 Ga. 516; Ely v. Ely, 80 Ill. 532;
 Barnhart v. Boyce, 102 Ill. App. 172;
 David v. Ryan, 47 Iowa, 642; Proctor
 v. Keith, 12 B. Mon. 252; Phillips v.
 Stevens, 16 Mass. 238; Leavitt v.
 Fletcher, 10 Allen, 119; Abby v.
 Billups, 35 Miss. 618, 72 Am. Dec.
 143; Fowler v. Payne, 49 Miss. 32;
 O'Neil v. Flanagan, 64 Mo. App. 87;
 Lincoln Trust Co. v. Nathan, 175 Mo.
 32, 74 S. W. 1007; Beach v. Crain, 2
 N. Y. 86, 49 Am. Dec. 369; Young
 v. Leary, 135 N. Y. 569, 578, 32 N. E.
 607; Linn v. Ross, 10 Ohio, 412, 36
 Am. Dec. 95; Hoy v. Holt, 91 Pa. St.
 88, 36 Am. Rep. 659; Armstrong v.
 Maybee, 17 Wash. 24, 48 Pac. 737,
 61 Am. St. 898. See also Brecknock
 & Co. v. Pritchard, 6 T. R. 750;
 People v. Plainfield Ave. & Co., 105
 Mich. 9, 62 N. W. 998; Mitchell v.
 Weston, (Miss.), 45 So. 571, 15 L.
 R. A. (N. S.) 833. But see *contra*,

Wattles v. South Omaha 1
50 Neb. 251, 69 N. W. 781
424, 61 Am. St. Rep. 55
C. C., Art. 2723 (referre
warts v. Saiter, 40 La.
So. 77). See also Gavan
117 Ga. 356, 361, 43 S.
Coleman v. Mississippi, et
114 Minn. 443, 131 N.
L. R. A. (N. S.) 1109, t
who had contracted to c
"maintain" a boom to
plaintiff's land was held
for damage caused by the
of the boom by an un
flood. The defendant
boom. See also Brown
hanna Boom Co., 109 Pa
156, 58 Am. St. Rep. 708.

As to the landlord's r
after destruction of th
see *supra*, §§ 944, 945.

²⁵ *Warren v. Wagner*, 51 Am. Rep. 446; *Wainscott v. Young*, 13 Ind. 497; *Young v. Leavelle*, 569, 578, 32 N. E. 607; *Anderson*, 25 Tex. 557, 7 538. See also *Pollard v. Dall*, (U. S.) 210, 1 L. Ed.

²⁸ *Ely v. Ely*, 80 Ill. 532.

with this covenant, and the insurance company, if it has paid the insurance, may reclaim the payment.³⁷

§ 1968. Clauses relieving from impossible performance.

It has become common for manufacturers and others to insert in their contracts clauses relieving them from liability in case of strikes and other unforeseen casualties. The words of these clauses are not identical and it can only be said that while such agreements are legal, it is essential to prove that a strike or casualty within the terms of the clause in question was the actual cause of non-performance; and also that unless the clause clearly indicates that increased difficulty or enhanced prices (as distinguished from impossibility) due to the casualties in question shall afford an excuse, they will not be held to do so, at least unless extreme in degree.³⁸ If such a

³⁷ *Darrell v. Tibbitts*, 5 Q. B. D. 560; *West of England Ins. Co. v. Isaacs*, [1897] 1 Q. B. 226.

³⁸ In *Tennants, Ltd., v. C. S. Wilson & Co., Ltd.*, [1917] A. C. 495, a clause suspending the seller's duty to deliver "pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labour, fuel, raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article," was held to suspend the seller's liability when war so far hindered performance that though the seller could get enough of the article in question at an enhanced price to satisfy the plaintiff's contract, if the seller's other contracts were disregarded, it could not get enough to satisfy all its requirements. See also *Davison Chemical Co. v. Baugh Chemical Co. (Md.)*, 104 Atl. 404.

In *Cottrell v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 368, a promise to deliver coal from a mine at a certain price "subject to strikes beyond the control" of the seller was held not excused by increased cost of

production caused by suppressing a strike at the mine.

In *Cannistraci v. Chieves*, 165 N. Y. S. 933, 934, the court said: "The condition actually inserted in the contract refers only to 'short crop, fires, strikes, accidents, or other causes beyond seller's control.' That condition, even if given the widest possible construction, can refer only to causes which so limit the amount of tomato sauce coming on the market as to make it impossible for the defendants to carry out all their contracts. If the defendants showed that by reason of short crop, fires, strikes, accidents, or other causes beyond their control, the Windy Hill factory could not and did not manufacture or deliver the tomato sauce in accordance with this contract, so that no sauce of the kind called for by the contract could be obtained by the defendants, either under its contract or in the market, to supply all its contracts, then perhaps the defendants would have made out their defence. In the present case, however, there is no such evidence, but, on the contrary, it appears that the Windy Hill factory did 'divert' to other

clause becomes operative and excuses the promisor from performance, the excuse has been held not merely to be operative only while the casualty continues, but a permanent excuse for non-performance,³⁹ unless the contract provides that delay only shall be excused.⁴⁰ "Shortage of cash or inability to buy at a remunerative price" cannot be regarded as a contingency beyond the seller's control.⁴¹ The proper construction of words in a particular contract must depend upon the circumstances existing when the contract was made and then within the contemplation of the parties.⁴²

jobbers the amount it agreed to sell to defendants, and that this product could be bought in the open market, though at a higher price."

In *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N. E. 629, a promise to sell coal with a proviso that the seller would not be responsible for "loss" of coal en route, nor for damages for delays of transportation, strikes, or causes beyond its control, was held excused by seizure of the coal by the railroad company on account of scarcity of coal produced by a general strike at the mines. The court declined to limit "strikes" to strikes at the seller's mines. See also *Milliken v. Keppler*, 4 N. Y. App. D. 42, 38 N. Y. S. 738. In *Consolidated Coal Co. v. Jones & Adams Co.*, 232 Ill. 326, 83 N. E. 851, however, the Court held that the word "strikes" in a proviso referred only to strikes in the seller's own mine.

See as to the effect of such clauses in relieving the lessee of a mine from paying a minimum stipulated royalty: *Givens v. Providence Coal Co.*, 22 Ky. L. Rep. 1217, 60 S. W. 304; *Bennett v. Howard*, 175 Ky. 797, 195 S. W. 117, L. R. A. 1917 E. 1075; *New York Coal Co. v. New Pittsburgh Coal Co.*, 86 Ohio St. 140, 99 N. E. 198; *Dorris v. Morrisdale Coal Co.*, 215 Pa. 638, 64 Atl. 855; *Holt v. Kelley*, 224 Pa. 620, 73 Atl. 947; *Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505.

In regard to strikes and carriers from liability, see *Transportation Co. v. Federal etc., Co.*, 77 Fed. 919, 920, 156 F. 564, 35 L. R. A. 623, and see *See further on the general nature and effect of such clauses: Tanneries Co. v. Pacific Silk Works*, 144 Fed. 886; *Re Co. v. Standard Silk Dyeing*, Fed. 777 (C. C. A.); *McSavannah River Sales Co.*, 652, 159 C. C. A. 554; *Delaware R. Co. v. Bowns*, 58 N. Y. 57; *v. Wreschner*, 174 N. Y. App. 156 N. Y. S. 1054; *Thaddeus Co. v. Hoffman Co.*, 97 N. Y. 33, 160 N. Y. S. 973; *B. Co. v. Bayer Co.*, 163 N. Y. Smokeless Fuel Co. v. Seaton, 170, 52 S. E. 829.

³⁹ *Hull Coal & Coke Co. v. Coal & Coke Co.*, 113 Fed. C. A. 213; *Metropolitan Coal Billings*, 202 Mass. 457, 89 N. E. New England Concrete Co. v. Shepard & Morse Lumber Co., 220 Mass. 207, 107 N. E. 91.

⁴⁰ As in *McFarland v. River Sales Co.*, 247 Fed. C. C. A. 554.

⁴¹ *Tennant's, Ltd., v. C. S. Co., Ltd.*, [1917] A. C. 495; *Earl Loreburn*. See also *Engineering Co. v. United States*, Fed. 243.

⁴² In *Standard Silk Dyeing*

§ 1969. Other effects of impossibility.

Thus far the only question much considered under the heading of impossibility has been its effect as an excuse for not per-

Roessler, etc., Chemical Co., 244 Fed. 250, the court held that where a contract for the sale of prussiate of soda, a German product, providing that the sellers should not be liable for causes beyond their control, including war or insurrection, was made after war was declared between Germany and Great Britain, performance was not excused by the British orders in council which in effect placed an embargo on shipments from Germany, because in view of the actual existence of war the parties must have intended relief only in case the United States became involved in the war. The decision was reversed by the Circuit Court of Appeals. *Roessler &c. Chemical Co. v. Standard Silk Dyeing Co.*, 254 Fed. 777, 166 C. C. A. 223; but some of the cases relied on by the lower court, though not strictly in point, may be stated in its words. "In the recent case of *Thaddeus Davids Co. v. Hoffman Co.*, 97 N. Y. Misc. 33, 160 N. Y. S. 973, before Judge Lehman in the state Supreme Court, where the clause was found in the contract, 'Contingencies beyond your control, fire, strikes, accidents to your work or to your stock or change in the tariff will allow you to cancel this contract or any part of the same,' and where it was sought to be relieved of the obligations of the contract by the fact that war broke out in August, 1914, between Germany and Great Britain, the learned court said: 'If the words "contingencies beyond your control" stood alone, there could be little, if any, doubt, that they covered the conditions arising from the state of war beginning on August 1, 1914. It is true that probably these parties did not contemplate the probability or possibility of a world war arising which would interfere with the

importation of the products of foreign nations, but the question in this case is not what contingencies did the parties contemplate might arise, but what meaning did they intend to give the words "contingencies beyond your control"? And if these words stood alone, they would cover all contingencies arising thereafter beyond the defendant's control which became the proximate cause of the inability of the defendant to comply with its contract.' In this case the contract was made before the commencement of the war. The same is true of *Ducas v. Bayer*, 163 N. Y. S. 32.

"Judge Weeks in *Richards v. Wreschner*, 174 N. Y. App. Div. 484, 156 N. Y. S. 1054, said: 'The claim of the defendants that they are excused from performance because of the interference with the source of supply or with the opportunity for shipment by reason of the existence of a state of war between Germany and Belgium, and also because of the subsequent illegality of shipment by reason of the proclamation of the German government prohibiting the exportation of merchandise contracted for, cannot be sustained. It is well settled that impossibility due to a foreign war is no excuse.'

"Judge Wolverton, in *Balfour v. Portland Co.*, 167 Fed. 1010, where a provision of the carrier's contract exempted it from 'loss or damage occasioned by arrest or restraint of princes, rulers or people,' had a somewhat similar question before him, and he used this language: 'It can hardly be disputed that the respondent entered into the contract with full knowledge of the existence of war conditions, and with the intention of carrying the flour notwithstanding

forming an impossible promise, but impossibility may have other consequences.

1. The impossibility of A to perform his promise may excuse B from the performance of his. This subject has been already sufficiently adverted to.⁴³

2. The impossibility of performing a condition may not only preclude recovery upon the promise qualified by the condition,—a topic which also has been dealt with previously—⁴⁴ but may discharge a contract altogether.

3. There is a quasi-contractual obligation to pay the value of any partial performance which has been received; whether by the party whose performance has become impossible, or by the other party.

4. There is a quasi-contractual obligation owing by the party whose performance has become impossible if he has derived any advantage from the non-performance of his impossible promise, to pay the other party the net value of that advantage.

§ 1970. Effect of impossibility of performing a condition precedent or concurrent in discharging contract.

No liability can arise on a promise subject to a condition precedent until the condition is performed, and if by lapse of time or for any other reason the condition cannot be performed no liability can ever arise upon the promise. In other words, it will be discharged. If the condition by its terms was performable by a party to the contract, and he is also under an

these conditions. . . . Now, having entered into such a contract with that intent and purpose in view, what is the significance and intendment of the clause referred to? It can hardly be contended that such intendment and signification should be the same as where the contract was made prior to the time that any such war conditions arose, or not in anticipation thereof. If it can bear such a construction, the contract has made it optional with the respondent to carry or not as it might see fit from motives of its own, re-

gardless of the fact that its purpose and intent was to carry, notwithstanding the dangers incident to the traffic or on account of the war. . . .” That the existence of a foreign war apart from a special provision in the contract would afford no excuse was admitted by the Circuit Court of Appeals in *Roessler & Co. Chemical Co. v. Standard Silk Dyeing Co.*, 254 Fed. 777, 166 C. C. A. 223.

⁴³ See *supra*, §§ 838, 928, 961.

⁴⁴ See *supra*, §§ 808-810.

obligation to perform it, his failure to do so will subject him to liability, unless his failure to perform had some legal excuse, and will also free the other party to the contract. Sometimes, however, there is no legal obligation to perform the condition, the matter being optional with a party to the contract, or dependent upon chance or the will of a third person. Thus in case of an option under seal or for consideration, which by its terms must be accepted by tender of the price or otherwise before a certain date, a failure to comply with this condition prior to the date fixed will discharge the contract altogether.⁴⁵

Concurrent conditions are in legal effect mutual conditions precedent. Therefore, if each party fails to comply with the condition qualifying the other's promise, neither can acquire a right upon it, and if by lapse of the time fixed by the contract, or of an unreasonable time if no time was fixed, the conditions become impossible of performance, the contract is discharged.⁴⁶

⁴⁵ See *supra*, § 853. So in *Bolton v. Riddle*, 35 Mich. 13, where the contract between the parties bound the defendant to deliver goods on board vessels to be furnished by the plaintiff, it was held that furnishing the vessels was a condition precedent to the defendant's undertaking, and that a failure to furnish them within reasonable time discharged the defendant.

⁴⁶ *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K. B. 78. In *Hunt v. Livermore*, 5 Pick. 395, 397, in speaking of a contract for the purchase and sale of land, the court said (indicating the necessity of action within a reasonable time), "If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money

and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement."

In *Mowry v. Kirk*, 19 Ohio St. 375, 383, similarly, the court said: "We agree with the court below in the opinion that the tender actually made by Cheever was too late. The contract was of such a nature, and in respect to such a subject-matter, as to render it evident that the parties in making it contemplated a prompt, and not a dilatory, execution of it on both sides; and a week's delay, by either party, of any attempt to carry it into execution, would authorize the other in presuming and acting on the assumption that the former assented to its rescission and abandonment."

In *Hallet & Davis Piano Co. v. Starr Piano Co.*, 85 Oh. St. 196, 202, 97 N. E. 377, the court said: "This was a commercial transaction which should ordinarily be completed with considerable promptness. When more than four months had elapsed and

This result is sometimes explained on the ground that mutual assent to rescission is presumed,⁴⁷ but the explanation is an undesirable fiction. The conduct of the parties can hardly amount to an agreement of rescission unless silence and non-feasance are sufficient to amount not only to an acceptance but also to an offer.⁴⁸ Moreover, it may be supposed that one party said to the other "I do not propose to make a tender within a reasonable time, nevertheless I do not assent to rescind the bargain." Surely such notice could not enlarge the rights of the party who gave it though clearly negating any assent to rescission.

There are decisions opposed to the view which is here expressed. They require that a defendant in order to free himself from the chance of being made liable by a tender after a reasonable time on the part of the plaintiff, must give notice.⁴⁹ These decisions, however, seem opposed to principle. Mutual promises to buy and sell goods of fluctuating price on March first,

neither party had done anything to complete the transaction. *Blanche English* had the right to treat the contract as rescinded and to enter into the deal with the plaintiff in error. 'Mutual delinquency gives rise to the presumption of mutual assent to a rescission. See *Parsons, Contracts*, 667 *et seq.*, and 16 *Ohio St.* 454.' Per *Brinkerhoff, J.*, in *Mowry v. Kirk*, 19 *Ohio St.* 375, 383; *Lewis v. White*, 16 *Ohio St.* 444, 454."

⁴⁷ See extracts in the preceding note.

⁴⁸ See *supra*, § 91.

⁴⁹ In *Jones v. Gibbons*, 8 *Exch.* 920, to an action against the defendant on a contract to deliver a certain quantity of iron "as required," the defendant pleaded that the plaintiff did not request delivery within a reasonable time. The plaintiff made replication that as soon as the iron was required by him he requested delivery. On demurrer the plea was held bad.

The Court seemed to admit that the plaintiff's right to require the iron was limited to a reasonable time,

but that notice by the defendant was necessary in order to terminate the plaintiff's right. *Alderson, B.*, said: "So soon as a reasonable time elapsed, it was competent for the defendant to say, 'I desire you to ask me to deliver the iron now or never.' *Pollock, C. B.* said: 'The defendant reads the contract as if the condition which the law implies were part of it. No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that every reasonable condition is also implied; and it seems to me reasonable that the party who seeks to put an end to the contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them.'" A similar view was expressed in *McFadden v. Henderson*, 128 *Ala.* 221, 29 *So.* 640; *Cameron v. Wells*, 30 *Vt.* 633.

cannot be performed on May first because the performance at that day is substantially different from performance on March first. Therefore, neither party can succeed in an action supported by tender on a later day; and as each party is equally responsible for the lack of a prior tender or demand, neither can object to the other's failure to make it. Even though the contract fixes no time for performance it may be equally clear that performance at a late day is not the same in substance as performance within a reasonable time. Under a contract for the purchase and sale of election badges, a tender made after the election is not the same thing as a tender made before election. The distinction is only one of degree between this case and any case where under a contract for the sale of goods of fluctuating value a tender is made unreasonably late.

§ 1971. A party cannot be deprived of what he has received under a contract unless put in default.

The case must be distinguished where one party to the contract has already received a benefit under it. In such a case the other party to the contract seeking to rescind and to recover that benefit or its value must take affirmative action. A typical case is where a contract for the purchase and sale of land has been made and the purchaser has been put in possession. Here though the payment of the price, or of the last instalment of the price, may be concurrently conditional with the conveyance of the land, the vendor cannot by mere lapse of time become entitled to take the position that the contract is discharged, and that the purchaser may be ejected from the premises. The vendor must put the purchaser in default not only in order to recover the price if he so desires, but also in order to become entitled to rescind and regain the premises.⁵⁰

⁵⁰ In *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219, it was said: "If the covenants of the vendor to convey and the purchaser to pay purchase money . . . are mutual and dependent, the vendor must at law convey, or tender a proper conveyance before he can put the purchaser in default, and thereby become entitled

to rescind." In *Scott v. Smith*, 58 Or. 591, 115 Pac. 969, it was said: "As a general rule, the party who asks for the rescission of a contract for the sale of real estate must be himself without fault, and when, as in this case, the payment of the purchase money and the making or tender of the deed are to occur simultaneously,

§ 1972. Recovery of value of performance, when counter-performance impossible.

If performance on one side or the other of a contract becomes excusably impossible while the transaction is still wholly executory on both sides, not only is the contract discharged but neither party is subject to further obligation of any kind.⁵¹ But where the party excused by impossibility has partly performed the contract on his side before the impossibility arises, or where the other party has partly or wholly performed without receiving compensation, justice requires the imposition of a quasi-contractual obligation on the party receiving such performance to pay its fair value. No fundamental distinction in principle can be drawn between these two cases. It

they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract without performance or a valid offer to perform on his part; and, so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side, and demanded it on the other." In *M'Cloat v. Floral Park Villa Co.*, 177 N. Y. App. Div. 865, 165 N. Y. S. 55, 57, the court said: "In the absence of any specified day for delivery of the deed the plaintiff could not rescind the contract for non-performance, and demand a return of the consideration paid, until he had given notice to defendant requiring performance within a specified reasonable time, and defendant had failed to convey within that time. *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867, Ann. Cas. 1914 D. 284."

To the same effect are *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; *Spolek v. Hatch*, 21 S. Dak. 386, 113 N. W. 75; *Roberts v. Braffett*, 33 Utah, 51, 92

Pac. 789; *Lewis v. Wellard*, 63 Wash. 590, 114 Pac. 455. See also *supra*, § 791.

Cf. Seibel v. Purchase, 134 Fed. 484, an action to recover a deposit of part of the purchase money, where the court said: "It was the positive undertaking of the defendant that the title should be conveyed to the plaintiff on July 1st, and that it should be free and clear, nothing of which was done or offered. This, under the authorities cited, constituted a clear breach of the contract, of which the plaintiff is entitled to take advantage without more. It is said that he made no tender so as to put the defendant in default, and that, without this, *non constat* that she might not have been prepared to comply with her engagement upon the plaintiff's complying with his. But if she was, she should have shown it. . . . Without regard to this, however, the plaintiff not asking for performance, and the defendant being unquestionably in default for want of an *ad diem* compliance, a tender to complete the default was superfluous and unnecessary."

⁵¹ An exceptional situation where this may not be true is considered *infra*, § 1978.

should make no difference whether the party seeking quasi-contractual relief is the one who has failed, because of impossibility, to fulfil his contract or whether it is the other party who has rendered performance. In both cases performance of the contract has been stopped midway without fault on either side. Also, it should be immaterial at what stage of performance impossibility supervenes. The plaintiff may have performed in full or only in part. If the defendant has not performed at all there is total failure of consideration for what the plaintiff has given. If the defendant has partly performed, but to a less degree than the plaintiff, there is only partial failure, and consequently it may be more difficult to fix the amount which the plaintiff should justly recover, but this difficulty is not serious. Finally, it should be immaterial whether the plaintiff's claim is based on a transfer by him of money, land, goods, labor and materials, or personal services. The basis of his right is in each case the same. After it has thus been pointed out that such distinctions of fact in the cases have no significance in legal principle, the decisions may be considered more specifically.

If property has been transferred and is still in the buyer's possession unused and uninjured when impossibility excuses further performance, he should be allowed to return it if he wishes to do so;⁵² if used or injured he should be liable for its value.⁵³

The performance of one who has merely contracted to pay money will not generally become excusably impossible;⁵⁴ but this may happen when a partly performed contract is forbidden by supervening change of law. Money previously paid in such a case, for which no return has been received, should be recoverable.⁵⁵ Where money is to be paid in consideration of the receipt of personal services, or of property, circumstances

⁵² See *supra*, §§ 703, 802.

⁵³ See *supra*, § 802.

⁵⁴ See *supra*, § 1932.

⁵⁵ In *Manhattan Life Ins. Co. v. Buck*, 93 U. S. 24, 23 L. Ed. 789, the plaintiff was prevented by war from paying premiums on his life insurance policy. It was expressly provided in

the policy that in case of non-payment the company should not be liable and that the policy should "cease and determine." The court held that though there could be no recovery on the policy, so much of the premiums as exceeded the value of the insurance received should be returned.

may readily make impossible performance of a condition on which the money was to be paid.⁵⁶

§ 1972a. Assumption of risk.

There is no doubt that it is possible for one who contracts to perform in whole, or in part, before the other party performs, to agree to assume the risk of all contingencies which may render impossible the complete fulfilment of the contract; and in any attempt by a party to recover on principles of quasi-contract for what he has performed when full performance of the contract has been excused by impossibility, the primary questions must be: "Did the plaintiff take the risk of the impossibility which has occurred? Is the contract to be construed as providing not only that the plaintiff should receive pay for his performance on certain contingencies, but that except on those contingencies he should receive no pay?"

The English court goes far in thus construing contracts,⁵⁷ but even in England where the property in goods has passed to a buyer, and owing to impossibility the time fixed in the contract for payment can never come,⁵⁸ or even though the full amount of the goods which under the contract was to be an entire indivisible performance has not been delivered by the seller,⁵⁹ he is allowed to recover the price or value of what he gives.

In the United States the right of recovery is general, whether the contract is for the sale of goods, or land, or the rendering of services, unless a contrary intention clearly appears.⁶⁰ And though it must be possible for the risk to be so assumed that no recovery can be had if full performance becomes impossible, yet the mere fact that there is stated in the contract a condition on which payment shall be made, and that the condition (whether it is one of full performance, as is frequently the case

⁵⁶ So, too, the obligation of one who had contracted to pay for having his portrait painted would be discharged by his own death.

⁵⁷ See *Cutter v. Powell*, 6 T. R. 320; *Appleby v. Dods*, 8 East, 300; *Appleby v. Meyers*, L. R. 2 C. P. 651; *Whincup v. Hughes*, L. R. 6 C. P. 78; and see

the *Coronation Cases*, *supra*, § 1954.

⁵⁸ See *supra*, § 799.

⁵⁹ *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128.

⁶⁰ *Williams v. Butler*, 58 Ind. App. 47, 56, 105 N. E. 387, 107 N. E. 300; and see decisions in the following sections *passim*.

in contracts of service, or is something more specific), is usually not enough to preclude recovery.⁶¹ The condition, like the remainder of the contract, has become inapplicable if the parties made the contract without reference to the possibility of such an event as has interrupted its performance.

Three circumstances seem to control the construction of the contract in this particular: First, and most important, did the defendant receive the benefit of the performance as it progressed? If not, the assumption will be made, as in the case of goods partly transported and lost before carriage was complete, that no recovery can be had, and no payment retained unless full performance was rendered;⁶² but if the benefit is received as it progresses, as in ordinary contracts of service, or in work performed on the defendant's property, the implication is strong that the provisions of the contract in terms making payment conditional on an event which has become impossible, were not intended to cover the situation which has arisen. A second circumstance having importance, though not equal importance to the preceding, is the equivalence of the performance promised on one side with that promised on the other. If the plaintiff was taking a chance of losing his part performance by impossibility, he would presumably have bargained for corresponding gain. If, however, the provisions of the contract provide that the most he would receive, had the contract been fully performed, was the fair value of his performance, it is a reasonable inference that the parties were not contemplating an aleatory contract but were assuming the contract would be fully performed, and failed to provide for the situation that would arise if performance were stopped midway by impossibility. Finally, in case of doubt, it seems

⁶¹ In *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858, and in *Prater v. Prater*, 94 S. C. 267, 77 S. E. 936, a promise was made to a husband and wife to leave them property by will in consideration of their caring for the promisor during his life. One of the promisees died during the lifetime of the promisor, and the court held that this rendered

the remainder of the contract impossible of performance, but allowed recovery. See also *Harrison v. Harrison*, 124 Iowa, 525, 100 N. W. 344; *Jones v. Judd*, 4 N. Y. 411; *Fenton v. Clark*, 11 Vt. 557. Cf. *More v. Luther*, 153 Mich. 206, 215, 116 N. W. 986, 117 N. W. 932, 18 L. R. A. (N. S.) 149, 126 Am. St. Rep. 479.

⁶² See *supra*, §§ 838, 1101.

that parol evidence should be admissible to show the actual intention of the parties if other circumstances leave the construction of the contract ambiguous. Such parol evidence is not offered to enable the plaintiff to recover on the contract, but to show the inapplicability of the contract to the situation which has arisen. The plaintiff admits the contract itself to be conditional, and that he cannot recover upon it, but he seeks to recover on principles of quasi-contract because the express contract was not made to cover the contingency which has occurred.⁶³

§ 1973. Recovery for services, where full performance impossible.

If an employee fails without wrongful default on the part of the employer to fulfil his entire contract in a material degree, he cannot recover on the contract unless the contract is divisible and he has completely performed one or more divisions of the service, and then only for such divisions. This is as true where the employee's failure is due to excusable impossibility as where it is due to his wrongful breach of contract.⁶⁴ It would be admitted, however, certainly everywhere in the United States, and perhaps in England, that the employee or his representatives may recover the fair value of any services rendered by him for which, because illness or death stopped performance, he could not recover on the contract; unless the contract clearly makes the whole performance a prerequisite to the existence of an obligation to pay for any part of the work.⁶⁵

⁶³ See to this effect, Keener on Quasi Contracts, p. 249.

⁶⁴ No recovery on the contract, therefore, was permitted in *Plymouth v. Throgmorton*, 1 Salk. 65, 2 Salk. 784; *Lowndes v. Stamford*, 18 Q. B. 425; *Natterstrom v. The Hazard*, Bee, 441; *Greene v. Linton*, 7 Porter, 133, 31 Am. Dec. 707; *Givhan v. Dailey*, 4 Ala. 336; *American Publishing House v. Wilson*, 63 Ill. App. 413; *Green v. Gilbert*, 21 Wis. 395. This is in accordance with the principle stated *supra*, § 838.

As to the right of the employee to recover any divisible portion of the agreed compensation for which he has completely performed the agreed services, see *Stubbs v. Holywell R.*, L. R. 2 Ex. 311; *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550; *Pasquotank, etc., Steamboat Co. v. Eastern Carolina Transp. Co.*, 166 N. C. 582, 82 S. E. 956.

⁶⁵ In the following cases recovery on a *quantum meruit* was allowed where full performance was prevented by illness: *Dryer v. Lewis*, 57 Ala.

Where excusable impossibility of other kinds, as the conduct of a third person on whose cooperation the possibility of per-

551; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387; *Fuller v. Brown*, 11 Met. 440; *Stolle v. Stuart*, 21 S. D. 643, 114 N. W. 1007; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Fenton v. Clark*, 11 Vt. 557; *Patrick v. Putnam*, 27 Vt. 759; *Hubbard v. Belden*, 27 Vt. 645; *Green v. Gilbert*, 21 Wis. 395.

In the following cases where full performance was prevented by death recovery was similarly allowed: *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; *Prater v. Prater*, 94 S. Car. 267, 77 S. E. 936; *McClellan v. Harris*, 7 S. D. 447, 64 N. W. 522; *Landa v. Shook*, 87 Tex. 608, 30 S. W. 536. In *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77, and *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865, reasonable fear of illness or injury if the plaintiff continued his work was held to justify him in stopping and to entitle him to compensation for what he had done.

In *Cutter v. Powell*, 6 T. R. 320, a sailor received on engaging for a voyage a written promise to pay him "provided he proceeds, continues and does his duty as second mate from hence to the port of Liverpool." He died when the voyage was about three-quarters finished and was held entitled to recover nothing. It will be observed that complete performance is made an express condition of recovery. Nevertheless the correctness of the case may well be doubted. If the court was of opinion that the condition was not inserted for such a contingency as had happened it

might properly allow recovery for the benefit which the defendant received. In *Fenton v. Clark*, 11 Vt. 557, it was expressly provided that the plaintiff should receive no pay until he had worked the full period of four months. He was prevented by illness and the court allowed recovery. Criticisms of *Cutter v. Powell* are collected in *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858. Certainly, it seems clear that merely fixing the time of payment after full performance or at a time which never arises or becomes fixed, because of death of one of the parties, is not equivalent to an agreement that there shall be no obligation to pay unless the contract is fully completed.

In *More v. Luther*, 153 Mich. 206, 116 N. W. 986, 117 N. W. 932, 18 L. R. A. (N. S.) 149, 126 Am. St. 479, the court assumed *arguendo* the existence of a contract which provided that if a son would work on his parents' farm until their death, he should then have the farm. He died before his parents after having worked more than thirty years on the farm. His representative was denied any recovery for this work, on the ground that no intention was manifested in the contract to compensate him unless he worked during the whole of his parents' lives. Though the decision of the case may be supported, for there seems to have been rather a gratuitous conditional promise than a contract, the reasoning seems unsound. If there were a contract, recovery should be allowed for part performance when full performance was prevented by death unless the parties have made an agreement to the contrary. Quasi-contractual recovery does not depend on agreement,

formance depends,⁶⁶ or a supervening law,⁶⁷ makes complete performance impossible, recovery should likewise be allowed of the fair value of any part performance rendered while performance was still possible.

§ 1974. Recovery of payments made or property transferred, where full performance impossible.

If one party to a contract, at the time when further performance becomes impossible, has paid money or transferred property, to an amount that constitutes a greater proportion of the total performance which he undertook, than the other party has performed, he should recover back the value of his disproportionate performance, unless by express provision of the contract he clearly assumed the risk of the supervening impossibility. Where there is a total failure of consideration this has been generally recognized. One who has paid for goods which he never gets, is entitled to recover the payment, even though the reason why performance is not made by the seller is excusable impossibility.⁶⁸ The rule governing a contract to sell realty is the same, but its application is varied in

though it may be excluded by agreement. Recovery was accordingly held allowable under similar facts in *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; *Prater v. Prater*, 94 S. Car. 267, 77 S. E. 936. See also *Harrison v. Harrison*, 124 Iowa, 525, 100 N. W. 344.

⁶⁶ *Townes v. Cheney*, 114 Md. 362, 79 Atl. 590, seems opposed to the text and wrongly decided. The plaintiff, having a right to the services of a jockey, transferred that right to the defendant subject to the approval of the jockey's father and of the jockey club. While the question of approval was pending the jockey acted for the defendant for two months. The necessary approval was then refused. The plaintiff was not allowed to recover on a *quantum meruit* for the services rendered by his jockey.

⁶⁷ *Whitfield v. Zellnor*, 24 Miss. 663;

Jones v. Judd, 4 N. Y. 411. Cf. *Sauer v. School District*, 243 Pa. 294, 90 Atl. 150. In *American Mercantile Exchange v. Blunt*, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, the court denied recovery owing to a surprising confusion of the case with decisions holding that there can be no recovery where part of the consideration of a contract is illegal. (See *supra*, § 1780.) In the case before the court, the contract was legal in its inception, and performance was stopped as soon as it became illegal. No illegal consideration was ever given.

⁶⁸ *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *Joyce v. Adams*, 8 N. Y. 291; *Williams v. Allen*, 10 Hump. 337, 51 Am. Dec. 709; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488; *Wong Ko v. Hawaiian Government*, 7 Hawaii, 690.

many jurisdictions by the doctrine, previously considered and criticised,⁶⁹ that risk of loss is transferred to the buyer from the moment an absolute contract to sell is made. But a payment made before the risk has been transferred is recoverable if the property is destroyed;⁷⁰ and the same is true of payments made for property of other kinds or for services.⁷¹ Nor is the situation different in principle where property instead of money has been transferred and there has been failure of the agreed consideration.⁷²

⁶⁹ See *supra*, §§ 928-954.

⁷⁰ *Thompson v. Gould*, 20 Pick. 138; *Wilson v. Clark*, 60 N. H. 352.

⁷¹ In *Knowles v. Bovill*, 22 L. T. Rep. 70, a sum paid for the use of a patent which an inventor was about to take out was recovered after the death of the inventor prevented him from applying for the patent. See also *Wright v. Newton*, 2 Crompt. M. & R. 124; *Wilkinson v. Lloyd*, 7 Q. B. 45.

In *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270, recovery was had for services rendered as consideration for a promise to devise property; the promisor having become insane so that his promise could not be performed.

In *Watson v. Donald*, 142 Ill. App. 110, money paid for stock in a corporation thereafter to be formed was recovered when the action of a third person made it impossible to form the proposed corporation.

In *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, money paid on account of a building which was destroyed by fire was recovered subject to the builder's claim (see *supra*, § 1975) for labor and materials.

In *Bibb v. Hunter*, 2 Duvall, 494, money paid to one who had undertaken to serve in the army as a substitute for the promisee was recovered when the promisor was rejected by an examining board.

In *Mascall v. Reitzmeier* (Minn.), 176 N. W. 486, the defendant a farm tenant had contracted to work out the road taxes assessed against the town property. A supervening law required all taxes to be paid in money, and the owner was compelled to pay the taxes. He sued the tenant and should, it seems, have been allowed to recover not for breach of contract, but for the value of the work of which the defendant had been relieved. The court, however, allowed recovery on the contract, holding that the tenant's promise could be substantially performed by paying the taxes in money.

The decisions on the recovery of advance freight after loss of a cargo should also be considered in this connection. See *supra*, §§ 838, 1101.

⁷² In *Board of Education v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868, land had been transferred by the plaintiff for a promise by the defendant, performance of which it asserted had become impossible. The court said: "We are not aware of any principle, and have not been referred to any adjudicated case, that would give absolution from the obligations of a contract to a party who has received from the other full consideration for a promise which the former has become unable to fulfill, and at the same time protect him in the enjoyment of the consideration paid. The act of God may properly

Where, however, performance has been partly rendered of the counter promise for which an indivisible payment or transfer of property or other performance has been made, the courts of England and of a few American States seem to have found insuperable difficulty in allowing a recovery of the balance of value equitably due to the party who has made the payment or transfer.⁷³ Such decisions seem clearly wrong. The difficulty of measuring the relief to which the plaintiff is entitled should not be a reason for giving him none. It is an obvious obligation in justice to return such a fraction of the consideration, or its value, as exceeds the value of the fraction of performance which the defendant has rendered.⁷⁴

lift from his shoulders the burden of performance, but has not yet been extended so as to enable him to keep the other man's property for nothing."

⁷³ In *Whincup v. Hughes*, L. R. 6 C. P. 78, recovery was denied of any portion of a premium paid on behalf of an apprentice when the master died during the period of service. A similar decision was made in *Ferns v. Carr*, 28 Ch. D. 409.

In *Cowley v. Northern Pac. Rd.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, a conveyance of land was made to the defendant railroad in consideration of its promise to grant certain passes over its lines during a term of years. For a number of years this contract was kept by the road, but in 1906, the issue of passes became illegal and was stopped. It was held that plaintiff was not entitled to rescission or damages. See also *Bruce v. Indianapolis Gas Co.*, 46 Ind. App. 193, 92 N. E. 189; *Pinkham v. Libbey*, 93 Me. 575, 45 Atl. 823, 49 L. R. A. 693; *Dorr v. Chesapeake & Ohio R.*, 78 W. Va. 150, 88 S. E. 666, L. R. A. 1916 E. 622. Cf. *Bell v. Kanawha Traction & Electric Co.* (W. Va.) 98 S. E. 885.

⁷⁴ In *Louisville &c. R. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848, the facts of which were similar

to those in *Cowley v. Northern Pacific R.*, stated in the preceding note, the decision was otherwise, the court saying: "These authorities merely hold that it is a general rule of law that where a contract is lawful when made, and a subsequent enactment renders performance of it unlawful, neither party shall be prejudiced, and the contract is at an end. They do not hold that one party can take the property of another under a promise to pay for it, and still hold it, and not pay for it, if by reason of any enactment of law after the contract is made, such party is prohibited from making payment in the article he contracted to pay with. And if those cases did so hold, we would be inclined to disagree with them. The party obtaining the property in this way should be required to restore it, or to pay for it upon equitable terms. The equitable way to adjust the matter is to require appellant to pay to appellee, a reasonable sum, based, not on the probable value of what he would have received thereunder for the remainder of his life, nor upon a breach of the contract; but for the right of way so taken and necessarily retained; taking into consideration, of course, what appellee has already received under the contract." In *McCammon v. Peck*, 9

§ 1975. Incomplete work on property which is destroyed.

One who works upon a building (or other property) under an indivisible contract with the owner, requiring him to complete a certain task or accomplish a certain result cannot perform his full undertaking if the building or property in question is destroyed. He is excused from liability for his failure, because the contract required the continued existence of the building.⁷⁵ Equally clearly he cannot sue the owner for loss of profit. If the destruction of the building was without fault on the part of the latter, he, as well as the workman, is excused from liability on the contract. But most American decisions allow recovery on a *quantum meruit* for the value of the work which has been done prior to the destruction.⁷⁶ The law of England and of a few of the United States, however, denies recovery.⁷⁷

Ohio C. C. 589, a lawyer after being paid in full for certain legal work died when it was but partially completed. His estate was held liable for the excess which he had received over the fair value of what he had done. See also *Jones-Gray Construction Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659; *Callahan v. Shotwell*, 60 Mo. 398; *Thomas v. Hartshorne*, 45 N. J. Eq. 215, 16 Atl. 916, 3 L. R. A. 381; *Bell v. Kanawha Traction & Electric Co.* (W. Va.), 98 S. E. 885.

⁷⁵ See *supra*, § 1948.

⁷⁶ *Keeling v. Schastey*, 18 Cal. App. 764, 124 Pac. 445; *Goldfarb v. Cohen*, 92 Conn. 277, 102 Atl. 649; *Lord v. Wheeler*, 1 Gray, 282; *Cleary v. Sohler*, 120 Mass. 210; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; *Young v. City of Chicopee*, 186 Mass. 518, 72 N. E. 63; *Ganong v. Brown*, 88 Miss. 53, 40 So. 556, 117 Am. St. Rep. 731; *Haynes, etc., Co. v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413 (but see *Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262;

Pike Electric Co. v. Richardson Drug Co., 42 Mo. App. 272); *Darne v. Wood*, 75 N. H. 38, 70 Atl. 1081 (Cf. s. c. 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133); *Niblo v. Binasse*, 1 Keyes, 476; *Dolan v. Rodgers*, 149 N. Y. 489, 494, 44 N. E. 167; *Hayes v. Gross*, 9 N. Y. App. Div. 12, 40 N. Y. S. 1098, *affd.* 162 N. Y. 610, 57 N. E. 1112; *Hollis v. Chapman*, 36 Tex. 1; *Weis v. Devlin*, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38; *Clark v. Franklin*, 7 Leigh (Va.), 1; *Hysell v. Sterling Coal Co.*, 46 W. Va. 158, 33 S. E. 95; *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765; *Halsey v. Waukeesa Springs Sanitarium*, 125 Wis. 311, 104 N. W. 94, 110 Am. St. 838. See also *Rawson v. Clark*, 70 Ill. 656; *Clark v. Busse*, 82 Ill. 515; *American Towing & Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 679, 84 Atl. 182, *Ann. Cas.* 1914 A. 46; *Teakle v. Moore*, 131 Mich. 427, 91 N. W. 636; *Ellis v. Midland R. Co.*, 7 Ont. App. 464.

⁷⁷ *Mentone v. Athawes*, 3 Burr. 1592; *Appleby v. Myers*, L. R. 2 C. P. 651; *The Madras*, [1898] Prob. 90; *Brumby v. Smith*, 3 Ala. 123; *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677; *Siegel v.*

§ 1976. Reasons supporting the American decisions.

The latter decisions have been supported on the ground that the defendant has derived no benefit from the work and labor which the plaintiff has done;⁷⁸ but the right of recovery, generally, where full performance has been prevented by impossibility does not depend, under the American law at least, on whether the defendant has received and still retains a benefit at the time when further performance becomes impossible, nor on whether at any prior time the performance which the defendant received was advantageous to him. It is enough that the defendant has actually received in part performance of the contract something for which when completed he had agreed to pay a price. The case of work on a building which has been destroyed while the work was still incomplete is not peculiar, and the majority of American decisions have decided the question in exact accordance with the analogy of other cases similar in principle. When goods are destroyed after the property in them has passed to the defendant, he must pay for those goods, though the seller's performance is still incomplete and no advantage has accrued to the buyer from the partial performance.⁷⁹ When one who has contracted to receive personal service dies, or becomes incapacitated to use what has been furnished him, it is submitted that he or his estate must nevertheless pay for what he has received before impossibility supervened, though it has proved of no value to him.⁸⁰ If money is paid in part performance of a contract, which later becomes impossible, it is submitted that the de-

Eaton & Prince Co., 165 Ill. 550, 46 N. E. 449; *Huyett Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272; *Krause v. Board of Trustees*, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203; *Taulbee v. McCarty*, 144 Ky. 199, 137 S. W. 1045, 36 L. R. A. (N. S.) 43, Ann. Cas. 1913 A. 456; *King v. Low*, 3 Ont. L. R. 234. And see *Forman v. The Liddesdale*, [1900] A. C. 190, 202. *Louisville Foundry, etc., Co. v. Patterson*, 29 Ky. L. Rep. 349, 93 S. W. 22; *Fildew v. Beasley*, 42 Mich. 100; *Fair-*

banks v. Richardson Drug Co., 42 Mo. App. 262; *Pike Electric Co. v. Richardson Drug Co.*, 42 Mo. App. 272.

⁷⁸ Keener, *Quasi Contracts*, p. 254.

⁷⁹ See *supra*, § 799; and *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128. Cf. *Rochester Oil Co. v. Hughey*, 56 Pa. 322; and see *Williston on Sales*, § 277.

⁸⁰ The cases cited *supra*, n. 65, certainly give no indication that the plaintiff's right depends on the defendant's ability to utilize what he has received.

fendant cannot show as a defence to an action for money had and received, that the money has been stolen from him, and that he has therefore derived no benefit. The situation is different from that which exists where money or property has come into the hands of a defendant under a mistake.⁸¹

In the cases under consideration the defendant has agreed to take and pay for something and he has got part of what he agreed to take. Therefore where the plaintiff's work, labor and materials have been added to a building of which the defendant is the owner, the defendant must pay the value of what he has received.

As a practical reason for the allowance of recovery, it has been suggested that the defendant may, and usually does insure his building, and is thereby indemnified, while the plaintiff cannot insure labor or materials which have become the defendant's property.⁸² It has occasionally been suggested also that the owner is under an implied obligation to maintain the building in existence so that the work could be performed upon it.⁸³ This last reason will not bear examination. If it were sound the employee could recover not simply the value of what he has done but damages for being prevented from performing the whole contract. Even an express promise to sell or lease property is excused by its destruction,⁸⁴ and there surely can be no more comprehensive guaranty of continued existence in a contract of the sort under discussion.⁸⁵

Where a contract with the owner of chattels provides for work to be done thereon, and the property is destroyed when the work is partially completed, the situation is the same as in the case of a building. Several New York decisions allow recovery for the value of the work;⁸⁶ the English law denies it.⁸⁷

⁸¹ See *supra*, § 1595.

⁸² Woodward, Quasi Contracts, §117.

⁸³ Niblo *v.* Binsse, 1 Keyes, 476.
See also Rawson *v.* Clark, 70 Ill. 656;
Haynes *v.* Second Baptist Church, 12
Mo. App. 536, 545, 88 Mo. 285, 57
Am. Rep. 413.

⁸⁴ See *supra*, § 1946.

⁸⁵ The reasoning of Niblo *v.* Binsse
was rejected, though the decision of the

case held correct, by Landon, J., in
Hayes *v.* Gross, 9 N. Y. App. D. 12,
40 N. Y. S. 1098.

⁸⁶ Whelan *v.* Ansonia Clock Co., 97
N. Y. 293; Labowitz *v.* Frankfort, 4
N. Y. Misc. 275, 23 N. Y. S. 1038;
Rhodes *v.* Hinds, 79 N. Y. App. Div.
379, 79 N. Y. S. 437.

⁸⁷ Appleby *v.* Myers, L. R. 2 C. P.
651.

§ 1977. Measure of damages where full performance is prevented by impossibility.

The measure of recovery for part performance of an indivisible contract, or of an indivisible portion of a divisible contract, where full performance is prevented by excusable impossibility, was distinguished in the preceding section from that applicable in certain cases of mistake, and must now be distinguished both from cases where the plaintiff has been in fault,⁸⁷ and from cases where the defendant has been in fault.⁸⁸

In the case now under consideration, the rule in the United States, at least, seems clear that the plaintiff may recover the fair value of the performance which he has rendered. It is sometimes said that the defendant is liable for the benefit which he has received,⁸⁹ but unless the word benefit is given a meaning wider than is natural, the statement is inadequate. In the first place, the word benefit suggests that the matter is to be examined as it exists after the impossibility has supervened; but, as indicated in the preceding section, the American law seems clear that where the defendant has received part performance regarded as valuable under the contract between the parties, the fact that this value has been destroyed by the very circumstances which make full performance of the contract impossible, will not preclude recovery. A second reason for discarding the use of the word benefit, in this connection, is because it suggests that what has been received by the defendant must be of pecuniary advantage to him. This seems unnecessary. Thus, suppose one who has agreed to take a course in shorthand, for which a total price is fixed, becomes paralyzed or loses his hands before the course is completed, this would excuse liability on the contract, but, it would seem that a quasi-contractual obligation remained. So if services to a third person are contracted for, and they cannot be rendered in full because of the third person's death, or refusal to receive them, recovery may be had for the part performance though it is of no pecuniary benefit to the promisor.⁹⁰ Ac-

⁸⁷ See *supra*, §§ 1473-1477.

⁸⁸ See *supra*, §§ 1478-1485.

⁸⁹ *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Bing v. National Supply Co.*

(Tex. Civ. App.), 105 S. W. 543; *Hubbard v. Belden*, 27 Vt. 645.

⁹⁰ In *Moore v. Robinson*, 92 Ill. 491, the defendant contracted for

cordingly, it is well settled that a recovery on a *quantum meruit* or *quantum valebat* should *prima facie* be such a proportion of the price as the work which the plaintiff has done bears to the full amount of the work for which the contract provided.⁹⁰

This *prima facie* basis of recovery is subject to some limitations, most frequently discussed in connection with contracts of employment, though they seem of general application. As the employee has made no wrongful default no damages for non-fulfilment of the remainder of the contract should be deducted though some authorities seem to warrant such deduction.⁹¹ It is said of such deduction that "the justice of the rule is apparent on a moment's reflection."⁹² If so, its injustice is apparent on a little longer reflection. In a contract for a year, under which the compensation is payable monthly, if the employee works exactly one month and then dies, his executor can surely recover the pay due for that month and be under no liability for failing to serve the remainder of the term. Why should his right to sue on a *quantum meruit* for a fraction of a month subject him to such liability?⁹³

the services of an attorney to defend his brother. The brother ran away, and the court held that though the attorney was not entitled to the sum promised by the contract, he was entitled to a fair compensation for such services as he had rendered.

⁹⁰ *Angus v. Scully*, 176 Mass. 357, 358, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; *Dame v. Wood*, 75 N. H. 38, 39, 70 Atl. 1081; *Wolfe v. Howes*, 20 N. Y. 197, 200, 203, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 284, 286, 84 Am. Dec. 189; *Hayes v. Gross*, 9 N. Y. App. Div. 12, 13, 17, 18, 40 N. Y. S. 1098; *Weis v. Devlin*, 67 Tex. 507, 509, 513, 3 S. W. 726, 60 Am. Rep. 38; *Green v. Gilbert*, 21 Wis. 395, 398, 399; *Cook v. McCabe*, 53 Wis. 250, 259, 260, 10 N. W. 507, 40 Am. Rep. 765.

⁹¹ *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Patrick v. Putnam*, 27 Vt. 759; *Walsh v. Fisher*, 102 Wis. 172, 179, 78 N. W. 437, 43 L. R. A. 810, 72

Am. St. Rep. 865. See also *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388. But see *contra* *McClellan v. Harris*, 7 S. Dak. 447, 64 N. W. 522, and the criticisms in Woodward, *Quasi-Contracts*, § 125, and 28 L. R. A. (N. S.) 326 n.

⁹² *Walsh v. Fisher*, 102 Wis. 172, 179, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865. See also *Clark v. Gilbert*, 26 N. Y. 279, 284.

⁹³ The cases which so hold probably derive the idea from cases like *Allen v. McKibbin*, 5 Mich. 449, and *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, where a plaintiff after breaking his contract without excuse was nevertheless allowed to recover; or from early cases like *Fenton v. Clark*, 11 Vt. 557, decided before it was fully established that illness or death excused liability on an obligation voluntarily assumed as fully as on one imposed by law. See *supra*, § 1931. If the employee is liable for breach of

There is, indeed, an injustice to the employer where the contract is divisible and the employee has performed completely one or more divisions of the contract, but has been incapacitated from performing the rest, in allowing him to recover the contract price for the division of his performance which he has completed, if the value of what has been done is materially diminished by the failure to complete the whole performance, as must often be the case.⁹⁴ There may likewise be injustice to the employer where after a period of incapacity the employment under the contract is continued. As the employer has elected to go on with the contract he must perform according to its terms, and, therefore, the employee is entitled to recover the full compensation contracted for,⁹⁵ unless the employee expressly or impliedly agrees to continue performance on other terms. In these situations where there is no such assent the sum recoverable under the contract should justly be diminished on a principle of recoupment (analogous to the *actio quanti minoris* of the Roman law)⁹⁶ to the value of the periods of service actually rendered.⁹⁷

This, it should be noticed, is a different thing from holding the employee liable in damages for non-performance. But where the plaintiff's recovery is altogether based on a *quantum*

contract, the amount of his liability may well be deducted from any quasi-contractual recovery allowed him.

⁹⁴ See *supra*, § 1973, n. 64 *ad. fin.*, as to the employee's right to recover in such a case.

⁹⁵ *Cuckson v. Stones*, 1 El. & El. 248; *Warren v. Whittingham*, 18 T. L. Rep. 508; *Mott v. Baxter*, 13 Col. App. 63, 56 Pac. 192 (rev'd on another point, 29 Col. 418); *Dartmouth Ferry Comm. v. Marks*, 34 Can. Supr. Ct. 366; *Goode v. Downing*, 5 N. W. Ty. 505. See also *K. v. Raschen*, 38 L. T. (N. S.) 38; *Reiter v. Standard Scale Co.*, 237 Ill. 374, 86 N. E. 745; *Nichols v. Coolahan*, 10 Metc. 449; *Dunlap v. Montgomery*, 123 Pa. 27, 16 Atl. 41; *Dickinson v. Norwegian Plow Co.*, 101 Wis. 157, 76 N. W. 1108, and *supra*, § 1942. But see *Hunter v. Waldron*,

7 Ala. 753; *Wilson v. Smith*, 111 Ala. 170, 20 So. 134; *Hughes v. Toledo Scale &c. Co.*, 112 Mo. App. 91, 101, 86 S. W. 895; *McDonald v. Montague*, 30 Vt. 357, 360; *MacFarlane v. Allen Pfeiffer Chemical Corp.*, 59 Wash. 154, 109 Pac. 604, 28 L. R. A. (N. S.) 314, Ann. Cas. 1912 A. 1180. Cases must be distinguished where there is no contract of employment extending during the period of illness. Therefore, on a weekly hiring absence for a week owing to illness deprives the employee of any right to wages for that week though he is again employed after his illness. *Orpin v. Westmacott Gas Furnace Co. (R. I.)*, 74 Atl. 481; *Miller v. Morton*, 8 Manitoba, 1.

⁹⁶ See *supra*, § 920.

⁹⁷ See cases cited at the end of n. 95, *supra*.

meruit since he has not performed the full contract or a specific division of it, no injustice to the employer arises. All that he loses if the employee recovers the fair value of the services actually rendered is the loss of profit due to the non-performance of the executory portion of the contract, and this loss a promisee under a contract which becomes impossible must always suffer. In no event, however, should the recovery exceed a ratable portion of the contract price.⁸⁸ The employer might not have been willing to contract upon less favorable terms than those actually entered into, and should not in effect have them forced upon him.

§ 1978. Benefits received from third persons by party excused from performing.

It sometimes happens that one excused by impossibility from performing his promise, especially when the impossibility is due to act of the law, receives a benefit thereby not directly conferred by the other party to the contract. For a purely negative benefit—that of escaping from a contract the performance of which would have involved greater expense than return, undoubtedly the promisor need not account.⁸⁹ But the benefit may also be the affirmative one of an actual gain received from a third person. An instance of the sort arises where the owner of land has made restrictive covenants with regard to it, and the land is taken by eminent domain and used without restriction. It is clear that the covenantor should not be allowed to receive and retain the whole compensation for the land based on its value as unrestricted land.¹ So far as the

⁸⁸ *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189. See also *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081; *Jones v. Judd*, 4 N. Y. 412.

⁸⁹ See cases cited *supra*, §1938. But see *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 123 N. E. 631.

¹ In *Kingsley v. Butterfield*, 35 Neb. 228, 52 N. W. 1101, the defendants had contracted to open a road and had failed to do so, alleging that they

had been prevented by the building of a railway. The court refused to admit the defence, saying (p. 231) that the defendants "no doubt were compensated for the right of way taken for the railroad," and though it seems that the decision is wrong in holding the defendants liable in damages for breach of their promise—(see *Baily v. DeCrespigny*, L. R. 4 Q. B. 180), they should not be allowed not only to escape liability but to retain a benefit derived by non-per-

covenantee's right is based on partial return of what he has given, because the consideration for it has failed, the case is within a principle previously discussed;² but if he is entitled to such a share of what the covenantor received from a third person as may represent the difference in value to the defendant of the land when he was subject to the covenant, and the price he actually received, a new principle is involved.

The same principle is also involved in several cases where a ship has been seized by the government when under charter, and owing to the enhanced value of shipping at the time, the government pays a greater price for the use of the ship than that stipulated for in the charter. It is clear gain to the owner if he can be relieved from the obligations of the charter and keep the full amount paid by the government. In order to avoid a result so palpably unjust, the English court has held that the charter is not dissolved by the temporary seizure by the government, but continues so that the charterer may regularly pay the ship's hire due under the charter, and may himself receive the government payments.³

formance. See also cases on taking leased premises by eminent domain, *supra*, § 891.

² See *supra*, § 1974.

³ In *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum &c. Co.*, [1916] 2 A. C. 397, Earl Loreburn said: "By a charterparty dated May 18, 1912, on which the question arises, the owner of the tank steamer *F. A. Tamplin* agreed to let the steamer to the respondents as charterers for sixty calendar months. . . . It is, of course, obvious that, although the contract was described as one of lease, there was and could have been no lease properly so called. The real relation was that the owners retained through the officers and crew the possession of the vessel, and that the charterers were entitled to use it for certain purposes and under certain restrictions during a term of five years. . . . Early in December, 1914, the steamer was requisitioned by the

British Government for Admiralty transport service and was engaged in such service until about February 10, 1915. No question has been raised as to this requisition, which appears to have been accepted by both parties as a merely temporary burden upon their rights under the charter party. But about the latter date notice was given by the Admiralty Director of Transports to the charterers that the steamer was again requisitioned and that she would be specially fitted by the Government for the service on which she was to be employed. This was done shortly thereafter, and the Government made structural alterations and used her for the transport of troops. She has since then, according to what was stated at the Bar, been in part, at all events, restored to something resembling her original condition, and has been used for the carriage of oil. But I think it is clear that the Admi-

This decision seems unsatisfactory. In the cases in question the vessels were taken for an indefinite period probably extending for the length of the war. Material changes were made in them to suit government convenience. It can hardly be doubted that the owner was, without his fault, prevented for a time so material as to be essential from performing his contract. If so, it should be discharged.⁴

ality neither regarded their powers as in any way restricted, nor had any intention of limiting the period during which they claimed to use the steamer. Had the charterers done what the Government has done, their action would have constituted such a breach of contract as would have entitled the owners to treat the contract as at an end.

"The owners claimed that what had happened could not be treated as a sub-letting under the contract, but that the basis of the contract was gone, inasmuch as the steamer could no longer be made available under the charterparty, which was therefore either entirely at an end or was indefinitely suspended under the restraint of princes clause. The charterers argued that in reality there had been what was tantamount to a sub-letting to the Admiralty, and that the uses by the latter for purposes outside those prescribed by the charterparty, and the making of the structural alterations, did not amount to breaches of contract by the charterers, inasmuch as they were covered by the restraint of princes clause. If the charterers were right, it would no doubt follow that they would be entitled to retain the largely increased monthly payment which the Government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charterparty. If the owners, on the other hand, were right, the charterers would be able to claim compensation from the Government

for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the steamer to the use of which the charterers would no longer be entitled."

It was held by Lord Buckmaster, L. C., Earl Loreburn, and Lord Parker of Waddington (Viscount Haldane and Lord Atkinson dissenting), that the interruption was not of such a character that the Court ought to imply a condition excusing the parties from further performance of the contract, and that the requisition did not determine or suspend the contract. See also *Modern Transport Co. v. Duneric S. S. Co.*, [1917] 1 K. B. 370. In later English cases, the charterer repudiated, and was sued by the owner in *Countess of Warwick S. S. Co. v. LeNickel Soc. An.*, 34 T. L. R. 27; *Admiral Shipping Co. v. Widner, Hopkins & Co.*, [1917] 1 K. B. 222, and *Lloyd Royal Belge, etc., v. Stathatos*, 33 T. L. R. 390 (as to the counterclaim); while the owner repudiated, and was sued by the charterer, in *Chinese Mining & Eng. Co. v. Sale*, [1917] 2 K. B. 599, and *Heilgers v. Cambrian, etc., Co.*, 33 T. L. R. 348. In all these cases, the only question discussed has been the probable duration of the requisition at the time when it was made, *Tamplin, etc., Co. v. Anglo-Mexican, etc., Co.*, [1916] 2 A. C. 397, being interpreted as leaving open only that issue.

⁴ The remark of L. Hand, J., seems correct: "I should myself incline to

The decision of the English court seems to involve the result that if the government hire had been less than reserved in the charter, the charterer must, nevertheless, pay the owner. Furthermore, the decision affords no suggestion of relief for the charterer if the ships had been taken over permanently by the government. In two American decisions on the subject the courts did not altogether escape the defective reasoning of the English decision.⁵

A better solution of the difficulty than that reached by the English decisions, seems to be to absolve the charterer from his promise, but to hold him liable on principle of contract for any benefit which he may receive from the solution of the contract; that is, for any excess of the government payment over the hire reserved in the charter.

It is to be thought that any requisition ought to be treated *prima facie* to terminate the charter-party. *Earn Line S. S. Co. v. Sutherland S. S. Co.*, 254 Fed. 126, 134.

⁵ In *Earn Line S. S. Co. v. Sutherland S. S. Co.*, 254 Fed. 126, L. Hand, J., held that where requisition by the English government of an English vessel was made, and there appeared no likelihood that the vessel would be released before the expiration of the charter, that the owner was warranted in treating the charter at an end, and in refusing both to receive further hire and to allow the charterer to collect sums paid by the Admiralty. Though the decision seems right in holding the charter at an end, the consequence which the court apparently accepts that the owner secures the profit of the increased compensation by the government is unjust.

In *The Isle of Mull*, 257 Fed. 798, Rose, J., held that though the British Admiralty actually retained control of the vessel until after the expiration of the charter party, the requisition could not be regarded as a frustration of the contract, and the charterer was entitled to the difference between the rate fixed in the charter party and the hire paid by the Admiralty. The

decision achieves a just result by the argument of the court to the effect that though the vessel was taken over for the entire term of the charter, it was not the object of the contract to make money by the use of the vessel, and the use of it by the government would involve a profit, not extraordinary. See *supra*, § 1977. If this could be accepted, the result would be that the owner would be liable to the charterer, not for the going value of the ship, but for the market value of the ship, which was greater than the less also a party to a contract to select to continue it in spite of the probable partial non-performance by the other party; but the charterer on this theory entitle him to more than the owner can give for performance originally promised here the owner can give nothing.

⁶ In *Chinese Mining and Smelting Co., Ltd., v. Sale & Co.*, 11 B. 599, the court held that the currency of a charter party could not be a charter party for a definite period, the requisitioned by the Admiralty in circumstances that the charter was not terminated by reason of

The German Civil Code contains a provision effecting this result.⁷

§ 1979. Impossibility in the Civil law.

The Civil law starts from a principle opposite to that of the Common law. While the Common law regards a promise as binding according to its terms, even though it proves impossible of performance, unless the promisor can show that it falls within an excepted clause or that there is an "implied condition," the Civil law regards impossibility as an excuse unless it can be shown that the promisor assumed the risk of possibility. Though the fundamental principle is thus stated in diametrically opposite ways in the two systems of law, it is probable that the decisions on actual cases do not greatly vary.⁸ The German law prior to the enactment of the Civil Code has been stated substantially as follows:⁹

Impossibility of performance is divided into original and supervening impossibility.

if the employment of the ship by the Admiralty is of a more extensive character and more onerous to the owner than that authorized by the charter party, the hire paid by the Admiralty for the use of the ship, whether it be more or less than the charter party hire, is divisible between the owner and the charterer in proportion to their respective interests in the ship.

⁷ Civ. Code, Sec. 281, provides: "If the debtor in consequence of the circumstance, which makes performance impossible, obtains a compensation or a right to compensation for the thing to which he is entitled, the creditor may require delivery of the compensation or assignment of the right to compensation." See also Sec. 323, *supra*, § 910.

⁸ The provisions of the French Civil Code stating the general principle and some particular applications of it are contained in Arts. 1148, 1302, 1647, 1733, 1929, 1964. These provisions have

been largely copied in the codes of other countries: Italy, Arts. 1226, 1298, 1504, 1589, 1845, 1868; Spain, Arts. 1105, 1182 *et seq.*, 1487, 1488, 1563, 1766, 1784; Portugal, Arts. 705, 717, 1608, 1422, 1436; Holland, Arts. 1282, 1490, 1546, 1601, 1745, 1748; Chili, Arts. 1556, 1670-1680, 1862, 1947, 2242, 2230; Mexico, Arts. 1463-1465, 1442 *et seq.*, 2878, 2975, 2976. See also La. Rev. C. C. Art. 1933; Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; Romero v. Newman, 50 La. Ann. 80, 23 So. 493. The provisions of the German Civil Code, and of the Swiss Code of Obligations are different in form, but are based on the same general principle that impossibility is *prima facie* an excuse. See German Civil Code, Secs. 265, 275, 280 *et seq.*, 285, 287, 291, 323, 425, 815. Swiss Code of Obligations, Arts. 97, 119, 163, 378, 379, 392.

⁹ The statement is a paraphrase of §§ 264, 315, of Windscheid's *Lehrbuch des Pandektenrechts*.

1. Original impossibility is divided into
 - a. Objective, which is a defence, though the obligor knew of the impossibility.
 - b. Subjective, in which case the obligor is bound to pay a money equivalent though he did not know of the impossibility when he entered into the contract.

In case of objective impossibility, however, the obligor is bound to make good to the obligee, if the latter died before the occurrence of the impossibility when the contract was made, and the obligor knew of the impossibility which the latter has incurred by acting on the assurance that the contract was valid; and in such a case if the obligor knew of the impossibility he is bound to make good the performance. Subsequent termination of the impossibility does not render the contract valid only if such termination was fourfold in the nature of the impossibility—not if it was accidental.

2. Supervening impossibility.

It is not important whether it is subjective or objective, but only whether it has happened because of any fault of the obligor. If not, he is free, and need only perform whatever may still be possible, or give up instead of the object due what is still possible. If the event causing the impossibility may have given him a gain, and if the impossibility was due to the obligor's fault, he is bound to pay a money equivalent, less any gain the obligee has made by the impossibility. It is further to be observed:

- a. The obligor may by express contract or by statute be held liable for impossibility, *i. e.*, take the risk.
- b. If performance is possible only at a disproportionate sacrifice, the obligor is bound only for the value of the performance.

If the question is whether the supervening impossibility is due to the fault of the obligor, the main rules are:

1. If the impossibility is due to the obligor's fraud, he is always chargeable.
2. If due to his gross negligence, he is also chargeable.
3. If due to ordinary negligence, he is chargeable, unless he is accustomed to use greater care in his own affairs.
4. Aside from the cases included under (3) it is to be observed that the obligor is chargeable if the impossibility is due to his fault.

due to ordinary negligence, but this rule is subject to exception.

The Indian Contract Act adopts the broad general principles of the Civil law.¹⁰

¹⁰ Sec. 56 of the Act provides: "An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

"Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

CHAPTER LIV

BANKRUPTCY

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§ 1980. Bankruptcy.

Bankruptcy can here be considered only so far as it is a discharge of a contractual obligation. It may be considered in two ways. Bankruptcy may preclude the bankrupt from enforcing a right and may also free him from liability for obligations previously been seen ¹ that insolvency or bankruptcy may operate as an excuse for giving credit to the insolvent bankrupt. But insolvency or bankruptcy does not necessarily involve the loss of the bankrupt's contractual rights; if the contract is personal "it may be finally and fully performed by others who may be acting, for instance, as trustees, successors or purchasers of the bankrupt's property and not involved therein or affected thereby." ²

¹ See *supra*, § 880.

184 Fed. 109, citing *Care*

² *In re Morgantown Tin Plate Co.*, 184 Fed. Cas. No. 2,403; *Leahy*

If the bankrupt's contractual right is personal, as an ordinary contract of service, or a contract to marry, it is possible that he may still be capable of performing it, or it may be of such a character that the loss of credit by the bankrupt precludes any further right on his part to require further continuance of the contract. Such for instance is the nature of the right of a publisher,³ unless his contract with the author permits assignment by the publisher, and the same principle is applicable to all contracts too personal for voluntary assignment,⁴ or survival to an executor, or administrator.⁵

The effect of bankruptcy in discharging contractual obligations of the bankrupt is due to the statutory discharge freeing a bankrupt from liability upon claims provable against his estate. A discharge was first granted to a bankrupt in the reign of Queen Anne,⁶ and since then the granting of a discharge has been an important feature of English and American Bankruptcy statutes. Until recently, unless at least the debtor's estate paid a certain percentage of his debts, the consent of a majority or of a larger fraction of his creditors was requisite in order to entitle him to a discharge. The present statute in the United States makes no such requirement; and, unlike any previous bankruptcy statute, permits a discharge not only of a natural person, but of a corporation.⁷

§ 1981. State and Federal jurisdiction.

The Constitution of the United States gives Congress power to "establish . . . uniform laws on the subject of bankruptcies throughout the United States."⁸ Under this power four bankruptcy acts have been enacted by the United States, the Act of April 4, 1800,⁹ repealed December 19, 1803;¹⁰ the Act of August 19, 1841,¹¹ repealed March 3, 1843;¹² the Act of

³ Allen, 569; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 444, 55 N. E. 941, 48 L. R. A. 685. See *supra*, § 1327, for criticism of the statement that bankruptcy amounts to an anticipatory breach.

⁴ Griffith v. Tower Publishing Co., [1897] 1 Ch. 21; *In re McBride*, 132 Fed. 285. See also Pulte v. Derby, 5 McLean, 328.

⁵ See *supra*, § 413.

⁶ See *supra*, § 1945.

⁷ 4 and 5 Anne, c. 17.

⁸ *In re Marshall Paper Co.*, 102 Fed. 872, 43 C. C. A. 38.

⁹ Art. 1, Sec. 8.

¹⁰ 2 Stat. 19.

¹¹ 2 Stat. 248.

¹² 5 Stat. 440.

¹³ 5 Stat. 614.

March 2, 1867,¹³ amended in some details by especially by Act of June 22, 1874,¹⁴ repealed June 22, 1874, and replaced by the Act of July 1, 1898.¹⁵ The last Act has been amended in 1903 and in 1910.¹⁷

In the absence of legislation by Congress the power to pass bankruptcy laws,¹⁸ and this power exercised by a minority of States. A discharge granted by a State law, however, could not affect debts created by a Federal law, since this would impair the obligation of contracts;¹⁹ nor could it affect creditors who were not domiciled in the State in question both at the time when the debt was created,²⁰ and at the time the bankruptcy or insolvency proceedings were instituted.²¹ On the passage of a Federal bankruptcy law, State laws are automatically suspended to the extent of the existence of the Federal law.²²

§ 1982. What debts are discharged.

It is a fundamental principle of bankruptcy law that only provable debts are discharged,²³ but not all debts provable are discharged, since the statute expresses a policy for the survival of certain obligations irrespective of discharge in bankruptcy.²⁴ These obligations are those: "(1) Are due as a tax levied by the United States or any county, district, or municipality in which he resides; (2) For liabilities for obtaining property by false pretences or representations, for wilful and malicious injuries to person or property of another, or for alimony due or to be paid."

¹³ 14 Stat. 517.

¹⁴ 18 Stat. 178, and consolidated with the amendments in Rev. Stat., §§ 4972-5132.

¹⁵ 20 Stat. 99.

¹⁶ 30 Stat. 544.

¹⁷ 32 Stat. 797, 36 Stat. 838; minor amendments were also passed in 1906 and in 1917.

¹⁸ *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531.

¹⁹ See cases in the preceding note.

²⁰ *Denny v. Bennett*, 9 S. Ct. 134, 32 L. Ed. 113; *Cunningham*, 133 U. S. 143, 269, 33 L. Ed. 538; *Bank v. Batcheller*, 151 U. S. 175, 13 N. E. 917, 8 L. R. A. 644.

²¹ *Pullen v. Hillman*, 24 Atl. 795, 30 Am. St. R. 100.

²² The effect of a National law is considered in *L. Rev.* 547.

²³ The present United States Bankruptcy Act so provides in Sec. 17.

²⁴ Sec. 17.

or for maintenance or support of wife or child, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

§ 1983. What are provable debts.

In order to determine then what contracts may be discharged in bankruptcy it is necessary to determine what obligations or debts of the bankrupt are provable, and the statute enumerates the following as debts which may be proved: ²⁵

"a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

²⁵ Sec. 63.

§ 1984. Requirements of a provable claim.

In order to be provable, a claim must exist at the filing of the petition in bankruptcy. Claims subsequently thereto are neither provable nor dischargeable. It is not essential that the claim shall have matured,²⁹ nor shall be liquidated.³⁰ If a claim would have been free from fraud against creditors, had bankruptcy not intervened, it is immaterial that the debtor received no consid-

§ 1985. Claims for rent.

Rent which has accrued and become due under a provable claim, but it is held that unless made so by covenant in a lease, future rent is so far contingent that it has not accrued at the time of filing the petition and is not provable.³⁰ Nor are damages of the lessor for the rental value of the leased property.^{30a} Logically this might seem the same as that arising where a party to a contract becomes bankrupt, and as the claim of that party is now held provable though the bankruptcy occurred in default prior to bankruptcy,³¹ it might be thought that a landlord should have a similar right; but the independent promises in leases,³² and the fact that rent is con-

²⁹ *Zavelo v. Reeves*, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676.

³⁰ *In re Simon*, 197 Fed. 102, 105; *In re Percy Ford Co.*, 199 Fed. 334.

^{30a} *Hutchinson v. Otis*, 190 U. S. 552, 555, 23 S. Ct. 778, 47 L. Ed. 1179; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 53 L. Ed. 591, 29 S. Ct. 332. Unliquidated claims sounding in tort (and indeed all tort claims not reduced to judgment) are not provable. *Schall v. Camors*, 40 S. Ct. 135.

³¹ Thus a voluntary bond made by a person at the time solvent may be proved in his subsequent bankruptcy. *Barnett v. King*, [1891] 1 Ch. 4. And guaranties furnish a frequent illustration of obligations where the obligor receives no benefit.

³² *In re Hinckel Brewing Co.*, 123

Fed. 942; *Watson v. Mer*, 359, 69 C. C. A. 185; *In re*, 131; *In re Roth*, 174 Fed. 667, 104 C. C. A. 667; *Co. v. Withoft*, 195 F. C. C. A. 222. Even where the bankruptcy statute expressly provides for contingent claims this is so. *Ex parte Houghton*, 1 Deane v. Caldwell, 127 M.

^{30a} *Ex parte Houghton*, 1 Deane v. Caldwell, 127 M. But see *In re Mullings*, 238 Fed. 58, 151 C. C. A. 1918 A. 539, 252 Fed. 667; *Re Shaeffer*, 151 Fed. 967; *Re Shaeffer*, 151 Fed. 967; *In re Roth*, 181 Fed. 667, 649.

³¹ See *infra*, § 1987.

³² See *supra*, § 890.

issuing from the land distinguish the case. Even where notes are given for future rent, they are not provable for a period beyond the beginning of the bankruptcy proceedings,³³ unless they have been negotiated to a holder in due course.

The trustee in bankruptcy is entitled to assume the lease as part of the bankrupt estate, and if he does so he unquestionably makes himself liable for rent during the current instalment of the term of the lease.³⁴ It seems also that if the lease or local law allows reentry by the landlord for non-payment of rent, the trustee must pay any instalments of overdue back rent to avoid the exercise by the landlord of this right. It seems further that the trustee if he assumes the lease must assume it for the full remainder of the term, for the trustee's only right is to take such property as the bankrupt had. Undoubtedly it is sometimes assumed that the trustee may take the leased property for such period as he sees fit, paying only the fair value for that period, but there seems no warrant for such an assumption, though the trustee may doubtless retain the property for a brief period in order to determine whether it is desirable to accept or reject it, without thereby becoming liable for more than the value of the property for the time during which he occupies it.

The situation of the parties after the tenant's bankruptcy is somewhat unfortunate under the existing American statute. There should have been a special provision such as is found in the English Bankruptcy Law,³⁵ and in the United States Bankruptcy Act of 1867.³⁶ Under these statutes, it is provided that a bankrupt tenant may free himself from liability where the assignee in bankruptcy declines the lease, by surrendering it to the landlord, who is allowed a provable claim for the injury suffered by the termination of the lease. Under the existing Federal Statute it seems that unless the landlord evicts him or accepts a surrender of the premises, a bankrupt tenant remains liable for the accruing rent, as in the case of

³³ *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185; *In re Wisconsin Engine Co.*, 234 Fed. 281, 284, 148 C. C. A. 183.

³⁴ *Ex parte Faxon*, 1 Lowell, 404.

³⁵ 46 and 47 Vict. c. 52, sched. 2, paragraph 19.

³⁶ Sec. 19. See also provision in the Massachusetts Insolvency Law. Mass. Pub. Stat., c. 157, § 26.

other non-provable claims.³⁷ It seems also the bankruptcy of the tenant will not justify a reentry of the landlord unless and until there is an actual payment of rent, or the performance of some other in the absence of a provision in the lease allowing bankruptcy. On account of these hardships a few under the present Federal Statute have held that altogether terminates a lease;³⁸ but there seems no in principle for such a conclusion. If logically follow deprive the trustee in bankruptcy of any right to the lease; and the view will doubtless be generally accepted in bankruptcy of the tenant does not of itself sever the

§ 1986. Quasi-contractual obligations.

Quasi-contractual obligations even if based on tort are provable;⁴⁰ though tort claims unless reduced to money are not provable.⁴¹ Whenever at common law a creditor has an election whether to base his claim on a tort, or on a contract, he may base his claim on a quasi-contractual obligation not only may he by making the latter election entitle himself to prove in bankruptcy, but he is virtually compelled to make the election, since a discharge of the tort-feasor in bankruptcy will bar the claim in both aspects,⁴² unless it is within

³⁷ *In re Roth*, 181 Fed. 667, 104 C. C. A. 649; *Coleman v. Withoft*, 195 Fed. 250, 115 C. C. A. 222; *In re Mullings Clothing Co.*, 252 Fed. 667, 669. Such was the rule in England before the statutory change referred to in the text. *Copeland v. Stephens*, 1 B. & Ald. 593. And in the United States in the absence of statutory change. *In re Ellis*, 98 Fed. 967; *Boaler v. Kuhn*, 8 Watts & S. 183.

³⁸ *In re Jefferson*, 93 Fed. 948; *Bray v. Cobb*, 100 Fed. 270 (rev'd in *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369); *In re Hinckel Brewing Co.*, 123 Fed. 942.

³⁹ *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185; *In re Pettingill*, 137 Fed. 143; *In re Roth*, 174 Fed. 64, 181

Fed. 667, 670, 104 C. C. A. 649; *In re Curtis*, 109 La. 171, 10 Am. Bkcy. Rep. 286; *Wormann v. Hermann*, 91 N. Y. App. Div. 2, 10 N. Y. S. 315.

⁴⁰ *Crawford v. Burke*, 25 S. Ct. 9, 49 L. Ed. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁴¹ *Schall v. Camors*, 4 N. Y. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁴² *Crawford v. Burke*, 25 S. Ct. 9, 49 L. Ed. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510

of claims excepted by the statute from the effect of a discharge. This result is not wholly free from difficulty since the creditor's alternative rights frequently involve different measures of damages, and it is hard to justify logically the conclusion that he must perforce elect to treat his claim as contractual and therefore provable, rather than as a pure tort and therefore not provable and not affected by the debtor's discharge.⁴³

§ 1987. Bilateral contracts.

Where default has been made in a bilateral contract prior to the filing of the petition, there is no doubt that the injured party has a provable claim for the amount of damage which would be recoverable had there been no bankruptcy. It may be supposed, however, that at the time of filing the petition the bankrupt is not yet in default, either because the time for performance of his obligation has not yet arrived, or because that part of the performance which has become due has been performed. Here there is a contingency as to his future liability. It may be that before the time for performance or for completing performance occurs, the other party to the contract will himself have made default. Even though the future performance of the bankrupt is due before the performance by the other party, a contingency exists. It can hardly be supposed that the solvent party will perform unless the prior obligation of the bankrupt has been completely performed; the bankruptcy makes it improbable that it will be completely performed, and since this is the case no proof would be justifiable for the full amount of the bankrupt's obligation. On principle, the solution of the question depends upon the provability and proper valuation of contingent claims. And the same uncertainty of decision in the lower Federal Courts which prevailed concerning the proof of other contingent claims, also prevailed concerning the right of the solvent party to such a bilateral contract to prove against his bankrupt co-con-

445, 448, 29 S. Ct. 332, 53 L. Ed. 591. Cf. *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. Ed. 205, 37 S. Ct. 38; *Schall v. Camors*, 40 S. Ct. 135.

⁴³ In *Parker v. Norton*, 6 T. R. 695, the court held that a right of action

in trover was not barred by the defendant's discharge in bankruptcy though the plaintiff had an alternative right to sue in contract and had he elected that remedy the discharge would have been a bar.

tractor.⁴⁴ The question has finally been settled by of the Supreme Court of the United States allowing The result reached is unquestionably desirable but on which the court put the decision, namely, that is an anticipatory breach, seems open to criticism. The difficulty originated in the unfortunate omission Bankruptcy Statute of a provision expressly allowing contingent claims.

§ 1988. Contingent debts under early English statute

Most of the difficult questions in regard to what provable under the present Federal statute relate to contingent claims and it is, therefore, desirable to understand the history of such claims in bankruptcy law. Under English bankruptcy statutes, contingent debts were not provable. The first provision for them was made by the Act of 1825.⁴⁵ This statute was construed somewhat narrowly and it was held that "there must not only be a debt or claim, but also that the contingency on which the debt was payable should be one reducible to a certain calculation; so as to allow a value to be put on the debt for the purpose of proof."⁴⁶ The Act of 1849⁴⁷ reenacted the provision of the previous act, and added a further provision requiring valuation and proof of "a liability to pay money."

⁴⁴ Some of the cases are cited and discussed in *Re Imperial Brewing Co.*, 143 Fed. 579, which denied the right to prove. In the following cases also an unmatured obligation on a bilateral contract was held not provable. *Re Inman*, 171 Fed. 185, 175 Fed. 312; *Re Morgantown Tin Plate Co.*, 184 Fed. 109; *Re American Vacuum Cleaner Co.*, 192 Fed. 939.

Proof was allowed in *Re Adams*, 130 Fed. 788; *Re Neff*, 157 Fed. 57, 84 C. C. A. 561; *Re Dunlap Carpet Co.*, 163 Fed. 541; *Re Duquesne Incandescent Light Co.*, 176 Fed. 785; *Re D. C. Clark Shoe Co.*, 211 Fed. 341.

⁴⁵ *Central Trust Co. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 38 S. Ct. Rep. 412, 60 L. Ed. 811.

⁴⁶ See *supra*, § 1327.

⁴⁷ 6 Geo. IV. c. 16, sec.

⁴⁸ Robson on Bankruptcy, 272; and see *Atwood v. Bing*, 209; *Boorman v. N. C.*, 145; *Ex parte Tinda Mac*, 415; *Yallop v. Ebert*, 698; *Ex parte Marshall*, 118; *Thompson v. Bing*, N. C. 168; *Green v. A. & E.*, 701; *Field v. Toy*, 386; *Ex parte Whitmore*, 565; *Hinton v. Acraman*, *Woolley v. Smith*, 3 C.B. & Swinburne, 1 Ex. 203; *Ex 3 De G. & S.*, 561; *South Ry. Co. v. Burnside*, 5 Ex. 178.

contingency which shall not have happened." This was obviously intended to cover the cases which had been held not included under the words contingent debts, but the courts construed the word "liability" narrowly, holding that the "liability must be pay a sum of money of certain amount, or at all events a sum the amount of which could be ascertained by some settled data; and that the contingency on which the liability depended must not be too remote, but that there must be a single contingency reducible to a matter of calculation, and capable of valuation."⁵⁰

The next statute (in 1861)⁵¹ made no further direct provision for proof of contingent liabilities than the preceding acts, but it contained a provision for the assessment of damages in claims for unliquidated damages growing out of contracts. This was held to include such liabilities only as arose from breach of an express contract before bankruptcy.⁵²

§ 1989. Contingent debts under recent English statutes.

In 1869, however, an adequate statutory provision was made,⁵³ which so far as affects contingent liabilities has been repeated in the Act of 1883, now in force. Under this provision the only ground for refusing proof of a contingent liability is, that it is impossible fairly to estimate the value of the claim. Under this section it has been held that there may be proof of damages caused by the failure of a trustee in bankruptcy to take a lease as the bankrupt had agreed to do;⁵⁴ for breach of an agreement to furnish steam power, though the agreement was determinable on a certain contingency;⁵⁵ for failure to pay

⁵⁰ Robson on Bankruptcy (7th ed.), 275; and see *Amott v. Holden*, 18 Q. B. 593; *Warburg v. Tucker*, 5 E. & B. 384; *Young v. Winter*, 16 C. B. 401; *Maples v. Pepper*, 18 C. B. 177; *Ex parte Todd*, 6 D. M. & G. 744; *Hoare v. White*, 3 Jur. (N. S.) 445; *White v. Corbett*, 1 E. & E. 692; *Boyd v. Robins*, 5 C. B. (N. S.) 597; *Adkins v. Farrington*, 5 H. & N. 586; *Parker v. Ince*, 4 H. & N. 53; *Mudge v. Rowan*, L. R. 3 Ex. 85; *Betteley v. Stainsby*, L. R. 2 C. P. 568; *Martin's Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Hastie's*

Case, L. R. 7 Eq. 3, 4 Ch. App. 274; *Ex parte Wiseman*, L. R. 7 Ch. App. 35; *Kent v. Thomas*, L. R. 6 Ex. 312.

⁵¹ 24 & 25 Vict. c. 134, sec. 153.

⁵² *Ex parte Mendel*, 1 De G. J. & S. 330; *Sharland v. Spence*, L. R. 2 C. P. 456; *Cary v. Dawson*, L. R. 4 Q. B. 568; *Johnson v. Skafte*, L. R. 4 Q. B. 700.

⁵³ 32 & 33 Vict. c. 71, sec. 31.

⁵⁴ *Ex parte Llynvi Coal Co.*, L. R. 1 Ch. App. 28.

⁵⁵ *Ex parte Waters*, L. R. 8 Ch. App. 562.

an annuity;⁵⁶ for a surety's right to indemnity or a claim though contingent on future events;⁵⁷ and for the liability of a stockholder for future calls.⁵⁸

Some rights, however, cannot fairly be valued, are not provable; as a covenant not to revoke a will, the liability of having to pay costs to assert a legal right, or liability for alimony.⁶¹ But all claims must be proved in the bankruptcy court, for unless an order is made by the court, no claim is binding, and no claim being binding that the value of a claim cannot fairly be estimated, the claim is held to be barred.⁶²

§ 1990. Contingent debts under early bankruptcy acts of the United States.

Under the Federal Bankruptcy Acts of 1841 and 1867 no express provision was made for the proof of contingent debts. Under these provisions a contingent liability was held to be provable if its value could fairly be calculated but otherwise not provable. The possible liability of a surety on a bond not defaulted by the principal was not provable under the act of 1841.⁶⁴ Under the act of 1867 the courts went farther. It was held that a claim against the surety on a bond was provable though the liability of the principal had not been fixed.⁶⁵ A claim against the debtor on a replevin or attachment bond was also held to be provable though it had not been determined at the time of the bankruptcy whether there would be any liability on the bond.

⁵⁶ *Ex parte Jackson*, 20 W. R. 1023.

⁵⁷ *Ex parte Delmar*, 38 W. R. 752; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *In re Paine*, [1897] 1 Q. B. 122.

⁵⁸ *Re Mercantile Marine Ins. Assn.*, 25 Ch. D. 415; *Re McMahon*, [1900] 1 Ch. 173.

⁵⁹ *Robinson v. Ommanney*, 21 Ch. D. 780, 23 Ch. D. 285.

⁶⁰ *Vint v. Hudspith*, 30 Ch. D. 24.

⁶¹ *Linton v. Linton*, 15 Q. B. D. 239.

⁶² *Hardy v. Fothergill*, 13 App. Cas. 351.

⁶³ *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232; *United States v. Throckmorton*, 8 Bnk. Reg. 309.

⁶⁴ *Turner v. Esselman*, 15 Ala. 690;

Woodard v. Herbert, 2 Me. 3; *Ellis v. Ham*, 28 Me. 3; *Kendall*, 1 Gray, 305; *Stark*, 15 N. H. 218; *Dyland*, 18 Vt. 241.

⁶⁵ *United States v. T*, 8 B. R. 309; *Jones v. Knox*, 7 Am. Rep. 583; *Fisher v. Mass.* 313 (see also *McDevitt*, 177 Mass. 224); *Fisher v. I.* 56. But see *contra*, *1 v. Rob Roy*, 13 B. R. 2; *Graves*, 68 Ala. 21 (overruled); *Knox*, 46 Ala. 53, 7 Ala.

⁶⁶ *Wolf v. Stix*, 99 U. S. 309; *Hill v. Harding*, 130 L. Ed. 1083, 9 S. Ct. 725.

an annuity was held provable.⁶⁷ At the present time the premiums charged by guaranty and title insurance companies would doubtless furnish a means of valuing some contingent claims which could formerly not readily have been valued.

§ 1991. Contingent claims against sureties under the Federal Bankruptcy Act of 1898.

In the Bankruptcy Act of 1898 no direct provision is made for the proof of contingent debts or liabilities. If the same strict construction were put upon this Bankruptcy Statute that was put on the early English Acts, contingent claims would not be provable. But the obvious desirability of having such debts provable and therefore discharged has led to a more liberal construction. The commonest contingent claims are those for which sureties are liable or to which they are entitled. When a principal debtor is not yet in default at the time of the bankruptcy the claim against his surety is contingent on the principal's subsequent default; and whenever a surety has not paid before bankruptcy a debt for which he is bound, his claim against his principal or against co-sureties is contingent on his own subsequent payment. In accordance with the liberal tendency alluded to the claim of a creditor against a bankrupt guarantor or indorser has been held provable though the principal debtor had made no default at the time of the filing of the petition.⁶⁸

§ 1992. Contingent claims by sureties.

If a surety who has not paid the creditor at the time when a petition in bankruptcy is filed against the principal debtor has no provable claim, his right against the principal will not be discharged in bankruptcy, and if the surety is forced subsequently to pay the creditor, he may thereupon recover from

⁶⁷ *Heywood v. Shreve*, 44 N. J. L. 94.

⁶⁸ *Re Gerson*, 105 Fed. 891; *Moch v. Market Street Nat. Bank*, 107 Fed. 897, 47 C. C. A. 49; *Re O'Donnell*, 131 Fed. 150; *Re Philip Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551; *Re Rothenberg*, 140 Fed. 798; *Re Smith*, 146 Fed. 923; *Cohen v. Pecharsky*, 121

N. Y. S. 602, 67 Misc. 72. See also *Re Lyons Beet Sugar Co.*, 192 Fed. 445. But see *contra*, *Re Schaefer*, 104 Fed. 973. See also *Rice v. Murphy*, 109 Me. 101, 82 Atl. 842; *Morgan v. Wordell*, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33; *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222.

the bankrupt principal though the latter has re-charge.⁶⁹ A peculiar feature of the situation is that it is allowed the right of proof, it is of no value to him that it insures him what he ought to have in any event that a dividend shall be paid on the debt to the surety's ultimate loss be only for the balance though the principal debtor expressly promised to indemnify him, so that there are two valid contracts, the principal, one with the creditor and one with the surety, and though both claims are provable, the estate pays only one dividend⁷¹ because of the bankruptcy rule of double proof—prohibiting that is, more than one proof on one debt, no matter by how many contracts. It is not that how many persons the bankrupt may have bound to pay it.⁷²

In spite of the lack of express statutory provision of the surety against the bankrupt principal has been provable and therefore discharged by the Supreme Court of the United States although at the time of filing the claim the surety has not yet been compelled to pay the

⁶⁹ *Page v. Russell*, 2 M. & Sel. 551; *Welsh v. Welsh*, 4 M. & Sel. 333; *Hewes v. Mott*, 6 Taunt. 329; *M'Dougal v. Paton*, 8 Taunt. 584; *Taylor v. Young*, 3 B. & Al. 521; *Newington v. Keeys*, 4 B. & Al. 493; *Watkins v. Flanagan*, 1 Gl. & J. 199; *Watkins v. Flanagan*, 1 Bing. 413 (affirming s. c. 3 B. & Ald. 186); *Freeman v. Burgess*, 6 L. J. C. P. 34; *Thayer v. Daniels*, 110 Mass. 345; *Smith v. McQuillin*, 193 Mass. 289, 79 N. E. 401.

⁷⁰ Section 57 of the Bankruptcy Act of 1898, authorizes the surety to prove the debt for which he is surety on behalf of whom it may concern, and the dividends will then be paid to the creditor unless the surety has previously paid, in which event the surety will receive dividends. The provision not only permits a surety to compel proof against a bankrupt principal's estate, but allows one who is, as between himself and the bank-

rupt, a co-surety similar proof against the bankrupt estate. *Moore v. Sims*, 540, 168 C. C. A. 524.

The statute states that he pays the debt in part, he is subrogated to the creditor to that extent. Such partial discharge of the debt is a violation of the fundamental principle of suretyship. See *supra*.

⁷¹ *In re Oriental Commercial Bank*, L. R. 7 Ch. 99. The rule is the same in Germany. *Petersen v. Konkursordnung*, 2

⁷² See *First Nat. Bank v. Federal*, 204, 79 C. C. A. 162.

⁷³ *Williams v. United States Fidelity, etc., Co.*, 236 U. S. 571, 35 Sup. Ct. 289. The decision in *Smith v. McQuillin*, 193 Mass. 289, 79 N. E. 401, is regarded as overruled.

§ 1993. Other contingent claims under the Act of 1898.

It also has been finally determined by the United States Supreme Court that the claim of a party to an executory bilateral contract is provable against his bankrupt co-contractor although at the time of filing the petition the latter's obligation was conditional on future performance by the solvent contractor.⁷⁴ These decisions of the ultimate tribunal make it evident that such previous decisions of lower Federal Courts and State Courts as were based on the assumption that contingent debts as such are not probable must be regarded as overruled. On the other hand, however, if a conditional obligation cannot fairly be valued it is not provable.⁷⁵

§ 1994. Creditor's right against several bankrupt principals and sureties.

Where any obligor of the creditor remains solvent, the creditor is assured of payment in full; but where all parties to the obligation become insolvent the creditor will suffer loss, unless the aggregate dividends obtainable from the estates of all the debtors amounts to one hundred cents on the dollar. The most favorable course for the creditor if he is allowed to pursue it, is to prove against the insolvent estates of the various obligors for the full amount of his claim, and if the aggregate of dividends on such proofs exceeds one hundred cents on the dollar, rebate the excess or hold it in trust for the sureties on the obligation. If the creditor observes care in the order of proof, this result may be achieved. Payment by a principal debtor operates as a cancellation of the debt, and no action can afterwards be brought against others who may have been bound for the debt,⁷⁶ and part payment by a principal consequently discharges the debt *pro tanto*.⁷⁷ On the other hand, payment by a surety has no such effect. The creditor may sue the

⁷⁴ *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581, 36 Sup. Ct. Rep. 412, 60 L. Ed. 811, L. R. A. 1917 B. 580.

⁷⁵ *Dunbar v. Dunbar*, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623, 190 U. S. 340, 47 L. Ed. 1084, 23 Sup. Ct. 757 (an obligation to pay a

divorced wife an annuity as long as she remained unmarried). *In re 35% Automobile Supply Co.*, 247 Fed. 377.

⁷⁶ *Uniform Neg. Inst. Law*, Sec. 119, *supra*, § 1189.

⁷⁷ *Cook v. Lister*, 13 C. B. (N. S.) 543; and see cases cited, *infra*, n. 80.

principle at law for the full amount,⁷⁸ or prove it therefor, holding any excess as trustee for the st

§ 1995. Application of principles to parties to instruments.

These principles find most frequent application to various parties to a negotiable instrument become parties by payment by a prior party or principal debtor to a creditor, or by a dividend declared on the bankrupt estate. Payment by a party on proof by the creditor before proof against subsequent parties or sureties, must be credited on the part of the latter;⁸⁰ but payment by a subsequent party cannot reduce the proof. The creditor may subsequently sue against the prior party or principal debtor for the balance of his claim, and if more than a hundred cents on the dollar have been realized, hold the balance as trustee for the subsequent

⁷⁸ *Jones v. Broadhurst*, 9 C. B. 173; *Randall v. Moon*, 12 C. B. 281; *Williams v. James*, 19 L. J. Q. B. 445; *Agra &c. Bank v. Leighton*, L. R. 2 Ex. 56; *Woodward v. Pell*, L. R. 4 Q. B. 55; *Thornton v. Maynard*, L. R. 10 C. P. 695; *Andrews v. Toronto Bank*, 15 Ont. Rep. 648; *Bird v. Louisiana Bank*, 93 U. S. 96 (St. of La. not a bar); *Davis v. McConnell*, 3 McL. 391; *Granite Bank v. Fitch*, 145 Mass. 567, 14 N. E. 650, 1 Am. St. Rep. 484; *Beals v. Mayher*, 174 Mass. 470, 473, 54 N. E. 857, 75 Am. St. Rep. 367; *Mechanics' Bank v. Hazard*, 13 Johns. 353; *Madison Bank v. Pierce*, 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. 751; *Beran v. Tradesmen's Nat. Bank*, 137 N. Y. 450, 33 N. E. 593; *Concord Granite Co. v. French*, 65 How. Pr. 317; *Logan v. Cassell*, 88 Pa. 288, 32 Am. Rep. 453; *Bank of America v. Senior*, 11 R. I. 376. See also *Negotiable Instr. Law*, Sec. 120, *supra*, § 1191.

⁷⁹ *Johnson v. Kennion*, 2 Wils. 262; *Walwyn v. St. Quintin*, 1 B. & P. 652; *Reid v. Furnival*, 1 Cr. & M. 538; *North Bank v. Hamlin*, 125 Mass. 506;

Madison Bank v. Pierce, 33 N. E. 557, 33 Am. St. 751; *Ward v. Tyler*, 52 Pa. 361.

⁸⁰ *Ex parte Ryswick*, 2 Ex. 56; *Ex parte Wyldman*, 2 Ex. 56; *Ex parte Rose*, 197; *Re Blake*, 173; *Re Weeks*, 13 N. B. R. 28; *Hicks*, 19 N. B. R. 28; *Hask*, 89; *Re Hamilton*, 800; *Re Pulsifer*, 9 Biss. Fed. 247; *Sohier v. Lorin*, 174 Mass. 470, 54 N. E. 857, 75 Am. St. 367; *Bank v. Porter*, 122 Mass. 470, 54 N. E. 857, 75 Am. St. 367; *ander*, 85 N. C. 352, 39

⁸¹ *Ex parte De Taste*, 5 N. B. R. 28; *In re Ellerhorst*, 5 N. B. R. 28; *Ex parte Talcott*, 2 Low. 568; *Harris*, 2 Low. 568; *N. B. R.* 497; *Re Pu*, 487, 490, s. c. 14 F. Swarts v. Fourth Nat. 1, 54 C. C. A. 387; *Re*, 127 Fed. 286, 62 C. C. A. 387; *Mayher*, 174 Mass. 470, 54 N. E. 857, 75 Am. St. 367; *55Mo. App.* 422. But

Nor will payment by the prior party after proof has once been made in full against the subsequent party be ground for diminishing the latter proof.⁸²

§ 1996. Personal contracts.

A contract right is none the less provable because it is personal in character. Thus a judgment for breach of promise of marriage is provable.⁸³ And it seems that even though not

Pepys, 1 Atk. 106; *Ex parte Leers*, 6 Ves. 644; *Ex parte Worrall*, 1 Cox, 309; *Ex parte Tayler*, 1 DeG. & J. 302; *In re Oriental Bank*, L. R. 6 Eq. 582; *Re Blackburne*, 9 Morrell, 249, 252.

In *Re Swift*, 106 Fed. Rep. 65, 70, Lowell, J., said: "The proving creditor seeks to review the decision of the referee in deducting from the amount proved against the separate estate the amount of the dividend declared on the joint estate. That a creditor may prove for the full amount of a note against both its maker and indorser, and may collect from both estates dividends on such proof until his whole debt is satisfied, is settled law. Where, however, proof against the estate of the indorser is made after part payment by the maker, the proof must be limited to the balance due on the note after deducting the part payment. And it appears to be settled that a dividend from the estate of the maker, declared in favor of the creditor, and payable before proof is made against the estate of the indorser, is the equivalent of actual part payment. In this case, proof against the estate of the maker was made after the declaration of the first dividend. By section 65 c, the creditor making proof after the declaration of the first dividend is entitled to be paid 'dividends equal in amount to those already received by the other creditors, if the estate equal so much, before such other creditors' are paid any further dividends.' This right of the creditor to a preference in future dividends does

not seem to me equivalent to a declaration of a dividend in his favor, or to actual part payment of the note. *In re Hicks*, Fed. Cas. No. 6,456; *In re Hamilton* (D. C.), 1 Fed. 800; *In re Meyer*, 78 Wis. 615, 626, 48 N. W. 55, 11 L. R. A. 841, 23 Am. St. Rep. 435; *Ex parte Todd*, 2 Rose, 202, note. The estate might not be large enough to pay to this creditor the rate declared in favor of the other creditors. Considering the situation as shown in the finding of the referee and in the subsequent stipulation, I think the creditor was entitled to prove for the whole amount of the note against the estate of the indorser."

⁸² *Ex parte Wyldman*, 2 Ves. Sr. 113, s. c. 1 Atk. 109; *In re Weeks*, 13 N. B. R. 263; *Re Hicks*, 19 N. B. R. 299; *Williams v. Importers Bank*, 44 Ill. App. 295; *Citizens' Bank v. Patterson*, 78 Ky. 291; *Southern Bank v. Byles*, 67 Mich. 296, 34 N. W. 702; *Third Bank v. Haug*, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; *Brown v. Merchants' Bank*, 79 N. C. 244; *Miller's Estate*, 82 Pa. 113, 22 Am. Rep. 754; *Ragsdale v. Bank*, 45 S. C. 575, 23 S. E. 947; *Citizens' Bank v. Kendrick*, 92 Tenn. 437, 21 S. W. 1070, 36 Am. St. Rep. 96; *First Bank v. Williamson*, (Tenn.) 35 S. W. 573; *Re Meyer*, 78 Wis. 615, 48 N. W. 55, 11 L. R. A. 841, 23 Am. St. Rep. 435. But see *contra*—*Ex parte Lefebvre*, 2 P. Wm. 407; *In re Howard*, 4 N. B. R. 571; Lowell v. French's Est., 5 Vt. 193.

⁸³ *In re Fife*, 109 Fed. 880; *In re*

reduced to judgment before the filing of the petition would still be provable.⁸⁴ A right to alimony, neither provable nor dischargeable.⁸⁵ Nor is a judgment fine or statutory penalty.⁸⁶

§ 1997. Claims barred by the Statute of Limitations

As the Statute of Limitations is a local statute, it happens that a claim may be barred in one State and not in another.⁸⁷ The Bankruptcy Statute, however, throughout the United States, and a discharge granted by the bankruptcy court in one district discharges the debt everywhere. If, therefore, a claim is barred by limitation in one State it is barred in all. A creditor who is barred by limitation in one State is held provable in the bankruptcy proceedings anywhere in the United States. The debtor will acquire a right to share in the estate of the bankrupt with the other creditors whose claims were not barred, although it is a very practical matter had the debtor not become bankrupt that the creditor's claim was still enforceable in some States. States would never have enabled him to secure a discharge upon it, since the debtor resided elsewhere. On the other hand, if the claim is not provable the debtor's discharge in bankruptcy will be no defence to it. The solution reached is that a claim is provable if the debt is provable in character and is discharged if the dividend is allowable upon it or not, and that no claim is allowable if the bankruptcy proceedings are in a Federal district where the debt has already become barred by li-

Komar, 234 Fed. 378; *Bond v. Milliken*, 134 Ia. 447, 109 N. W. 774, 120 Am. St. Rep. 440.

⁸⁴ By an express exception in the Bankruptcy Act the liability would not be discharged, see *supra*, § 1982.

⁸⁵ *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 21 Sup. Ct. 735; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390, 25 Sup. Ct. 172.

⁸⁶ *In re Moore*, 111 Fed. 145. See also *Bancroft v. Mitchell*, L. R. 2 Q. B. 549; *Ex parte Graves*, 3 Ch. App. 642.

Sec. 57 j of the Federal statute provides that debts owing to the United States, a State, county, district, or municipality, as a penalty

or forfeiture, shall not be discharged except for the amount of the primary loss sustained by the creditor out of which the penalty arose, with reasonable costs, and such interest accrued thereon.

⁸⁷ See *infra*, § 2002.

⁸⁸ *Re Kingsley*, 1 Low. 10; *Re Cornwall*, 9 Blatch, 114; 1 B. R. 395; *Re Reed*, 1 B. R. 395; *Re Capelle v. Trinity Church*, 536; *Re Nossen*, 12 B. R. 16; 16 B. R. 202; *Re Lipman*, 1 B. R. 203; *Re Ray*, 1 B. R. 439. See also *N. B. Ray*, 18 B. R. 469.

If the statute has not run at the time as of which the bankrupt's estate is assigned, proof will not be barred because of the added time which elapses between that date and the offer of proof.⁹⁰ The statute continues to run, however, against any proceedings to collect a debt otherwise than through the bankruptcy court.⁹⁰ Under the Bankruptcy Act of 1867 it was held that if a creditor proved his claim, the time between proof in bankruptcy and the determination of the debtor's right to a discharge was not counted against a creditor who had proved his claim and who thereafter sought to enforce his rights in another tribunal, since during this interval the statute prohibited suit.⁹¹ There is, however, no such prohibition in the Act of 1898; and bankruptcy proceedings against a debtor do not extend the time for enforcing claims against him in any other way than by proof in such proceedings.⁹²

§ 1998. Set-off.

Where both parties to a controversy are solvent, the right of set-off has merely procedural importance. With or without the right, the ultimate condition of the parties will be the same. But if one of them is insolvent, it is a substantial disadvantage to the solvent party if he is compelled to discharge in full the debt which he owes and recover only a fraction of the debt which is owing to him. The hardship is especially great if the insolvent party is also bankrupt, for not only is it impossible then to recover from the insolvent immediate payment of the full debt owing by him, but the remainder of the debt will be

⁹⁰ *Ex parte* Ross, 2 Glyn & J. 46, 330; *Re* Eldridge, 12 B. R. 540; *Re* Graves, 9 Fed. Rep. 816; *Re* McKinney, 15 Fed. 912; *Minot v. Thacher*, 7 Met. 348, 41 Am. Dec. 444; *Willard v. Clarke*, 7 Met. 435; *Colleston v. Hailey*, 6 Gray, 517; *Parker v. Sanborn*, 7 Gray, 191.

⁹⁰ *Hawes v. Fette*, 42 Ark. 374; *Richardson v. Thomas*, 13 Gray, 381; *Doe v. Erwin*, 134 Mass. 90; *Cleveland v. Johnson*, 5 N. Y. Misc. 484, 28 N. Y. S. 734.

⁹¹ *Hawes v. Fette*, 42 Ark. 374; *Hoff*

v. Funkenstein, 54 Cal. 233; *Wofford v. Unger*, 53 Tex. 634. But see *Harwell v. Steel*, 17 Ala. 372; *Sacia v. De Graaf*, 1 Cow. 356; *Milne's Appeal*, 99 Pa. 483; *Hill v. Phillips*, 14 R. I. 93.

⁹² *Nonotuck Silk Co. v. Pritaker*, 143 Ill. App. 644; *American Woolen Co. v. Samuelsohn*, 226 N. Y. 61, 123 N. E. 154; *Simpson v. Tootle & Co.*, 42 Okl. 275, 141 Pac. 448, L. R. A. 1915 B. 1221. *Cf. Union Collection Co. v. Soule*, 141 Calif. 99, 74 Pac. 549 (under California Insolvency statute).

discharged. The Bankruptcy Statute⁹³ according in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor that "the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." To take advantage of this provision it is essential that each debt shall be due and that the debts shall both be owing in the same capacity. If the solvent party is obligated under an express trust, he cannot set off this obligation against a debt which he owes personally to the bankrupt.⁹⁵ A distinction has sometimes been attempted to be made between "mutual debts" and "mutual credits,"⁹⁶ but it seems that one phrase is the correlative of the other.

The possibility of a set-off makes it advantageous for a solvent person who is indebted to one about to go into bankruptcy to buy a claim against the bankrupt if it can be secured by a cash account. On the other hand, if a solvent person is a creditor of the bankrupt, it is for his interest, if he can receive consideration for so doing, to become a debtor of the bankrupt by assuming payment of a debt due to the latter, provided the case that the right of set-off is allowed. The statute does not give a right of a bankrupt's debtor to gain an advantage in this sort by denying a set-off in favor of any claim which he has purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankruptcy was pending, or had committed an act of bankruptcy.⁹⁷ The first method of gaining an advantage is not so obviously expressly prohibited. It is necessary in order to make the second method available that the creditor who has a claim against the bankrupt shall become a direct debtor to the bankrupt by novation; for otherwise, there would be no mutual debts. If the creditor does not assent, it would amount to a preference and therefore be void. If he assents, it would amount to a preference and therefore be void for the debtor to assent to such a novation without the assent of the other party.

⁹³ Sec. 68 a.

⁹⁴ Sec. 68 b; *In re Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551; *In re Harper*, 175 Fed. 412.

⁹⁵ *Libby v. Hopkins*, 104 U. S. 303,

26 L. Ed. 769; *Howard v. Book Co.*, 131 N. Y. S. 9 App. Div. 335.

⁹⁶ *Ex parte Whiting*, 2

⁹⁷ Sec. 68 b (2).

months of his bankruptcy seems the only question which can be raised.²⁸

§ 1999. Debts not affected by discharge.

The words of the statute previously quoted²⁹ enumerating the debts which are not affected by a discharge are sufficiently self-explanatory with a few exceptions. In regard to debts which have not been scheduled in time for proof and allowance, there has been some question made as to what is a sufficiently explicit listing of a creditor's name and address;¹ and how long before the close of the proceedings it is necessary that an unlisted creditor should have had notice of the proceedings in order to be bound by them. As to the last question it is said: "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."²

The provision of the statute depriving the debtor of the benefit of a discharge as to debts created by fraud, etc., while the debtor was acting in a fiduciary capacity have been given somewhat restricted application by a series of decisions originating under earlier bankruptcy statutes which contained a similar provision. It has been held that debts arising from the violation of an implied or constructive trust are not included in this exception,³ and the same construction was followed in the Act of 1898;⁴ but in a case arising after that Act

²⁸ In *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 25 S. Ct. 339, this seems to have been the essential nature of the transaction, and the creditor's right to a set-off was denied upon somewhat unsatisfactory reasoning.

²⁹ See *supra*, § 1982.

¹ The cases are examined in *Kreitlein v. Ferger*, 238 U. S. 21, 59 L. Ed. 1184, 35 Sup. Ct. 685. The residence and not merely the business address should be stated. *McKee v. Preble*,

154 N. Y. App. Div. 156, 138 N. Y. S. 915.

² *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231, 25 S. Ct. 38. See also *Lynch v. McKee* (Tex. Civ. App.), 214 S. W. 484.

³ *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565, 4 Sup. Ct. 576.

⁴ *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, 25 Sup. Ct. 9. In this case, and in the two decisions cited

had been amended in 1903, the Supreme Court violation of an implied or constructive trust may "wilful and malicious injury" to the property of

§ 2000. Composition with creditors.

Apart from bankruptcy legislation though a debtor makes a composition with his creditors and though he is doing by an artificial rule which finds a fictitious debt for the promise of one creditor to surrender a part of his debt in the promise of other creditors to do likewise, such a composition is binding only upon such creditors as may assent to it. In bankruptcy, however, a bankrupt may offer to make a composition to his creditors at any time after he has been adjudged bankrupt in open court or at a meeting of his creditors, and the court may confirm the schedule of his property and list of his creditors required to be filed by bankrupts.⁷ The terms of the composition must be accepted in writing by a majority in number of all creditors whose claims have been allowed and the composition must include a majority in amount of such claims. Consideration to be paid by the bankrupt including cash and property necessary for payment in full of all debts which he owes must be deposited by him.⁸ If these requisites are complied with, the composition will be confirmed by the court. The court concludes that the composition is for the best interest of the creditors,⁹ that the bankrupt has not been guilty of any fraud or omission which would be a bar to his discharge,¹⁰ that the offer and its acceptance are in good faith and have

in the preceding note, the facts presented the case of a broker or factor who had wrongfully disposed of property held for a principal or customer.

⁵ In *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. Ed. 205, 37 S. Ct. 38, the facts were similar to those stated in the preceding note. The court held that the debtor's discharge was no bar to the claim, saying "To exclude from discharge the liability arising from such transactions as those involved in *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, 25 S. Ct. 9, and

here presented, not impeded the special purpose of the amendment to Sec. 17 (2) of 1903.

the meaning of "Wilful and malicious injury" in *Ex parte Cote* (Vt.), 100 U. S. 1, *Wellman v. Mead* (Vt.), 100 U. S. 1, *Mason v. Sault* (Vt.), 100 U. S. 1.

⁶ See *supra*, § 126.

⁷ Sec. 12 a of the Bankruptcy Act.

⁸ *Ibid.*, Sec. 12 b.

⁹ *Ibid.*, Sec. 12 d (1). *Hoxie*, 180 Fed. 508.

¹⁰ *Ibid.*, Sec. 12 b (2). *Godwin*, 122 Fed. 111.

made or procured in any forbidden way.¹¹ On confirmation of a composition the debtor is discharged from his debts except to the extent that they are agreed to be paid by the composition, and except those debts which are not affected by a discharge in bankruptcy.¹²

¹¹ *Ibid.*, Sec. 12 d (3).

¹² *Ibid.*, Sec. 14.

CHAPTER LV

STATUTES OF LIMITATIONS

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§ 2001. Statutes of Limitations.

The common law set no term to a plaintiff's right to bring suit upon a claim,¹ but all jurisdictions now have statutes limiting the period within which an action can be begun. Not infrequently different periods are prescribed for different kinds of contracts. Wherever sealed instruments retain their original force a longer period than that allowed for simple contracts is usually permitted for enforcing them. Where seals have been abolished contracts in writing are often favored in an analogous way. Negotiable paper and attested contracts are also sometimes given a longer period of limitation than other contracts. On the other hand, the obligations of sureties are sometimes barred earlier than ordinary contracts. The period of limitation for ordinary simple contracts under the early English statutes was six years, and this has been copied in many of the United States, but in many it has been shortened. The detailed statutes must be sought in the revisions of the several States. Rights of action against the representatives of deceased persons on obligations of the latter are generally by statute made subject to a special short period of limitation.

§ 2002. The remedy is barred but the right is not lost.

Following the construction placed upon the English Statute,² most American courts have held that the Statute of Limitations merely bars the remedy of the creditor but does not totally discharge the right.³ It follows that a right of action

¹ The earliest statute limiting contractual rights was passed in England in 1623 (21 Jac. I. c. 16). This provided with reference to "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for

arrearages of rent;" that they should be commenced within three years after the then present session of Parliament, or within six years next after the cause of such actions.

By statute of 3 and 4 Wm. IV, c. 42, all specialties were barred in twenty years.

² *Curwen v. Milburn*, 42 Ch. D. 424.

³ *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209; *Booth v.*

may be barred in one jurisdiction but not in another, in a charge in bankruptcy given by a court having jurisdiction over the contract and over the bankrupt is recognized as a part of the debt in other jurisdictions,⁴ but a Statute of a State which bars recovery on a contract in a State where the debtor resides or even where both parties reside, will not bar a suit from suit in another jurisdiction,⁵ unless it is proved that the second jurisdiction (as is now often the case) that the suit is brought in a jurisdiction where the cause of action arose where the debtor resided, or where both the debtor and the creditor resided, shall be barred also in the second State.⁶ If the remedy is barred by the law of the forum no recovery can be had though neither under the law of the debtor nor of the parties nor that of the place where the contract was made there any bar.⁷

Another consequence of the doctrine that the remedy is barred rather than the obligation discharged is that the creditor is not entitled after the statute has run to use any other

Hoskins, 75 Cal. 271, 17 Pac. 225; *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783; *Johnson v. Railroad Co.*, 54 N. Y. 416, 13 Am. Rep. 607; *Campbell v. Maple's Adm.*, 105 Pa. 304; *Jordan v. Jordan*, 85 Tenn. 561, 3 S. W. 896; *Criss v. Criss*, 28 W. Va. 388, 396.

In Wisconsin the statute extinguishes the right. *Carpenter v. State*. 41 Wis. 36; *Pierce v. Seymour*, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737. See also *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344, 349, 1 S. W. 585.

⁴ See *Gibbs v. Société Industrielle*, 55 Q. B. D. 399; *May v. Breed*, 7 Cush. 15, 54 Am. Dec. 700.

⁵ *Jones v. Jones*, 18 Ala. 248; *Bulger v. Roche*, 11 Pick. 36, 22 Am. Dec. 359; *Currier v. Studley*, 159 Mass. 17, 22, 25, 33 N. E. 709; *Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510; *Miller v. Brenham*, 68 N. Y. 83; *Grubb v. Clayton*, 2 Hayw. 378. Otherwise if the foreign statute destroys the right.

Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510; *Baker v. Mo.* 338, 349; *Berkle v. Mo.* 584, 595, 63 S. W. 587.

⁶ In cases where it is shown that in the forum under such Statute of Limitation of the State, the foreign statute is adopted as a whole, and can be deducted in the same time in accordance with the law. *Isenberg v. Rainier*, App. D. 256, 130 N. Y. 1.

⁷ *Le Roy v. Crowninshield*, 151; *La Rue v. C. G. K. Co.*, 177 Ala. 441, 445; *McArthur v. Goddin*, 1 Nash v. Tupper, 1 Caine Dec. 197; *Staples v. W.* 516, 76 Atl. 353, 30 L. R. also *Dalrymple v. Schwan*, App. D. 650, 164 N. Y. 8; *v. Holbrook*, 107 N. Y. 8; *N. Y. S.* 562; *Sisson v.* 449, 24 Atl. 992.

collecting his debt than a direct right of action. Therefore, any security by way of lien or mortgage may be utilized to collect the claim.⁸ Thus a vendor's lien for the price of land may be enforced,^{8a} or a mortgage may be foreclosed,⁹ or a

⁸ *Higgins v. Scott*, 2 B. & Ad. 413; *Seager v. Aston*, 26 L. J. Ch. 809; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

In *House v. Carr*, 185 N. Y. 453, 458, 78 N. E. 171, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, the court said: "The Statute of Limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the legislature to repeal the Statute of Limitations and revive claims, the enforcement of which has been barred by the statute for generations. *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209. Therefore, though the statute may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation applies, a creditor may enforce his claim through that remedy." See also *infra*, § 2031.

^{8a} *Hardin v. Boyd*, 113 U. S. 756, 765, 28 L. Ed. 1141, 5 S. Ct. 771; *Clay v. Freeman*, 118 U. S. 97, 30 L. Ed. 104, 6 S. Ct. 964; *Buckner v. Street*, 15 Fed. 365; *Gage v. Riverside Trust Co.*, 86 Fed. 984; *Ware v. Curry*, 67 Ala. 274; *Hood v. Hammond*, 128 Ala. 569, 30 So. 540, 86 Am. St. Rep. 159; *Coldcleugh v. Johnson*, 34 Ark. 312; *Magruder v. Peter*, 11 G. & J. 217; *Railroad Co. v. Trimble*, 51 Md. 99, 109-112; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639. And see *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145. But see the contrary decisions of *Hett v. Collins*, 103 Ill. 74; *Vandiver v. Hodge*, 4 Bush, 538; *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181; *Littlejohn v. Gordon*, 32 Miss. 235; *Madison County v. Powell*, 71 Miss. 618, 15 So. 109; *Borst v. Corey*, 15 N.

Y. 505; *Fuller v. Morian*, 85 N. Y. Misc. 529, 147 N. Y. S. 650.

In *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59, the court distinguished a vendor's lien from a mortgage because the vendor's lien arises by operation of law from the same transaction that gave rise to the debt. *Cf. People v. Michigan Central R.*, 145 Mich. 140, 108 N. W. 772.

⁹ *Cheney v. Stone*, 29 Fed. 885; *Bailey v. Butler*, 138 Ala. 153, 35 So. 111; *Birnie v. Main*, 29 Ark. 591 (but see *Sturdivant v. Reece*, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. (N. S.) 825); *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Jordan v. Sayre*, 24 Fla. 1, 3 So. 329; *Elkins v. Edwards*, 8 Ga. 325; *Harding v. Durand*, 138 Ill. 515, 28 N. E. 948; *Kittredge v. Nicholes*, 162 Ill. 410, 44 N. E. 742; *Jenks v. Shaw*, 99 Ia. 604, 68 N. W. 900, 61 Am. St. Rep. 256; *Joy v. Adams*, 26 Me. 330; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Eyermann v. Piron*, 151 Mo. 107, 52 S. W. 229; *Omaha Bank v. Simeral*, 61 Neb. 741, 743, 86 N. W. 470; *Shoecraft v. Beard*, 20 Nev. 182, 19 Pac. 246; *Lembeck & Co. Brewing Co. v. Krause* (N. J.), 109 Atl. 293; *Borst v. Corey*, 15 N. Y. 505; *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359; *Kerr v. Lydecker*, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842; *Campbell v. Maple*, 105 Pa. 304, 307; *Ballou v. Taylor*, 14 R. I. 277; *Richmond v. Aiken*, 25 Vt. 324; *Coles v. Withers*, 33 Gratt. 186; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95.

In a few States, however, because of statutes or for other reasons a contrary result is reached. *Sturdivant v.*

policy of insurance on the creditor's life,⁹² or a pledge of stock¹⁰ enforced, though the debt is barred.¹¹ So the bar of a statute against a principal debtor will not release a surety.¹² And a payment made generally may be appropriated to the payment of a barred debt.¹³ An executor may retain from a legacy the amount of a barred debt owing by a legatee to the testator;¹⁴ and generally where the law has not been changed by the construction put upon local statutes, the executor may retain from the estate a barred debt owed to him by the testator, and may pay other barred debts of the testator.¹⁵ The

Reece, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. (N. S.) 825; *Jackson v. Longwell*, 63 Kans. 93, 64 Pac. 991; *First Bank v. Thomas* (Ky.), 3 S. W. 12; *Hembree v. Johnson* (Miss.), 80 So. 554; *Hubbard v. Dahlke* (Mo.), 210 S. W. 652. See 11 L. R. A. (N. S.) 825, concerning cases where property is conveyed by deed absolute in form though intended merely as security.

⁹² *Curtiss v. Aetna L. Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; *Conway v. Caswell*, 121 Ga. 254, 48 S. E. 956, 2 Ann. Cas. 269; *Pollock's Adm. v. Smith*, 107 Ky. 509, 54 S. W. 740; *Townsend v. Tyndale*, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513; *Bush v. Kansas City L. Ins. Co. (Mo.)*, 214 S. W. 175; *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Insurance Co. v. Dunscomb*, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

¹⁰ *Hartman's Est.*, 153 Pa. 530, 26 Atl. 104, 34 Am. St. Rep. 717.

¹¹ In New Hampshire the statute provides that action on a note secured by mortgage of real estate is not barred until the mortgage is barred. Otherwise in regard to chattel mortgages. See *Hall v. Hall*, 64 N. H. 295, 9 Atl. 219.

¹² See *supra*, §§ 1213, 1286.

¹³ See *supra*, § 1796.

¹⁴ *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249; *Re Akerman*, [1891] 3 Ch. 212; *Holmes*

v. McPheeters, 149 Ind. 587, 49 N. E. 452; *Garrett v. Pierson*, 29 Ia. 304; *Re Bogart*, 28 Hun, 466; *Tinkham v. Smith*, 56 Vt. 187. But unless this was clearly intended by the testator other courts hold the retainer is not permissible. *Wilson v. Smith*, 117 Fed. 707 (applying Pennsylvania law); *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Allen v. Edwards*, 136 Mass. 138; *Light's Est.*, 136 Pa. 211, 20 Atl. 536.

¹⁵ *Norton v. Frecker*, 1 Atk. 524; *Hill v. Walker*, 4 K. & J. 166; *Stahlschmidt v. Lett*, 1 Sm. & Giff. 415; *Re Huger*, 100 Fed. 805; *Knight v. Godboldt*, 7 Ala. 304; *Glenn v. Glenn*, 41 Ala. 571; *Trimble v. Marshall*, 66 Ia. 233, 23 N. W. 645; *Payne v. Pusey*, 8 Bush, 564; *Stiles v. Smith*, 55 Mo. 363, 366; *Preston v. Cutter*, 64 N. H. 461, 13 Atl. 874; *Person v. Montgomery*, 120 N. C. 111, 26 S. E. 645. But in many States the right is limited or denied. *Fairfax v. Fairfax's Exr.*, 2 Cranch C. C. 25; *Pollard v. Sears*, 28 Ala. 484, 65 Am. Dec. 364; *Richmond, Admr., Petitioner*, 2 Pick. 567; *Hodgdon v. White*, 11 N. H. 208, 213; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Claghorn's Est.*, 181 Pa. 600, 608, 37 Atl. 918, 921, 59 Am. St. Rep. 680; *Seig v. Acord's Exr.*, 21 Gratt. 365, 371, 8 Am. Rep. 605; *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707. See also *Woods v. Elliott*, 49 Miss. 168; *Oates v. Lilly*, 84 N. C. 643.

fact that the remedy only is barred, is also thought to be involved in the well-recognized principles concerning the revival of barred debts by subsequent promises.¹⁶

It is also true as is later shown ^{16c} that statutes in the early English form do not necessarily bar all remedies by action when a contract is broken if the statute in terms bars an action in one form. Where the law allows an election of remedies one remedy only may be barred.

§ 2003. Against whom and by whom advantage of the statute can be taken.

It was a fundamental principle of the English law that no lapse of time operated to bar a right of the Crown,¹⁷ and it is equally well recognized that an American State¹⁸ and the Federal government¹⁹ are similarly exempt from the operation of the statute unless it contains an express contrary provision.²⁰ This exemption operates in favor of one who has acquired by subrogation a right of the government,²¹ but the principle is

In Tennessee the executor may pay the barred debt of another but may not exercise a right of retainer for such a debt due himself. *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707; *Shields v. Alsup*, 5 Lea, 508, 517; *Bates v. Elrod*, 13 Lea, 156, 158; *Williams v. Williams*, 15 Lea, 438, 439.

¹⁶ See *supra*, §§ 160 *et seq.*

^{16c} *Infra*, § 2031.

¹⁷ *In re J.*, [1909] 1 Ch. 574.

¹⁸ *Ware v. Greene*, 37 Ala. 494; *Assessor v. Kaanaana*, 18 Hawaii, 252; *Realty Co. v. Realty Co.*, 134 La. 1030, 64 So. 897; *County v. Bennett*, 185 Mich. 544, 153 N. W. 814; *Joselyn v. Stone*, 28 Miss. 753; *State v. Fleming*, 19 Mo. 607; *Duckworth v. Springfield*, 194 Mo. App. 51, 184 S. W. 476; *White v. State*, 50 Okl. 97, 104, 150 Pac. 716, 718; *Brink v. Dann*, 33 S. Dak. 81, 144 N. W. 734; *Levasser v. Washburn*, 11 Gratt. 572;

Virginia Hot Springs Co. v. Lowman (Va.), 101 S. E. 326.

¹⁹ *Grand Trunk Western Ry. Co. v. United States* (U. S.), 40 S. Ct. 309; *United States v. Jones*, 218 Fed. 973; *United States v. Norris*, 222 Fed. 14, 137 C. C. A. 552; *Bistline v. United States*, 229 Fed. 546, 144 C. C. A. 6; *United States v. Minor*, 235 Fed. 101, 148 C. C. A. 595.

²⁰ *Keola v. Parker*, 21 Hawaii, 597; *People v. Journal Co.*, 158 N. Y. App. Div. 326, 143 N. Y. S. 389; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 182; *State v. Milwaukee*, 152 Wis. 228, 138 N. W. 1006. A state statute, however, cannot bar a remedy of the national government. *United States v. Norris*, 222 Fed. 14, 137 C. C. A. 552; *Chesapeake & D. Canal Co. v. United States*, 223 Fed. 926, 139 C. C. A. 406, L. R. A. 1916 B. 734.

²¹ *United States Fidelity, etc., Co. v. Union Bank, etc., Co.*, 228 Fed. 448, 143 C. C. A. 30.

not applicable where an individual brings suit in private right in the name of the government.²²

Municipal corporations, and other governmental entities of the State, have the same privilege as the individual when seeking to enforce public rights,²³ but in the enforcement of merely private rights, such corporations are subject to the statute, even though not expressly included in its terms, as they sometimes are.²⁴ Thus the statute renders void an action on behalf of a county to collect from a debtor the amount received by a sheriff,²⁵ or to enforce other liabilities of a debtor.²⁶ Public corporations supported by the State are subject to the statute when acting on a work appropriate to the government on its behalf, although subject to the same rule, though differences of decision may be found. The right of a public hospital to recover charges from those whom it has served has been held free from the bar of the statute.²⁷

Third persons cannot generally avail themselves of the statute that a debt is barred by the Statute of Limitations.

²² *Curtner v. United States*, 149 U. S. 662, 13 Sup. Ct. 985, 37 L. Ed. 890; *United States v. Des Moines Valley R. Co.*, 70 Fed. 435, *affd.* in 84 Fed. 40, 28 C. C. A. 267; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *State v. Halter*, 149 Ind. 292, 47 N. E. 665.

²³ *Louisville Sinking Fund v. Buckner*, 48 Fed. 533; *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161; *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088; *County v. Bennett*, 185 Mich. 544, 153 N. W. 814; *Caruthersville v. Huffman*, 262 Mo. 367, 171 S. W. 323; *Magee v. Commonwealth*, 46 Pa. St. 358; *Gustaveson v. Dwyer*, 83 Wash. 303, 145 Pac. 458.

²⁴ *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231, 10 Sup. Ct. 19; *County v. Montgomery*, 195 Ala. 197, 70 So. 642; *School Dist. No. 5 v. School Dist. No. 1*, 105 Ill. 653; *Burlington v. Burlington R. Co.*, 41 Iowa, 134; *Mellinger v. Houston*, 68 Tex. 36, 3 S. W. 249.

²⁵ *People v. Putnam*, 122 Pac. 796, Ann. Cas. 1916; *People v. Davis*, 157 Ill. 1; *People v. Rebstock*, 157 Ill. 1.

²⁶ *Polk County v. Row*, 145 N. W. 868; *Clark v. I*, 138 Ky. 676, 128 S. W. 1; *County v. Johnson*, 259 Ill. 1; *W. 1039*; *County Commis*, 49 Okl. 254, 152 Pac. 1916 E. 92. But see *County v. Herbert*, 173 Ill. 1; *State v. Smith (Okl.)*, 173 Ill. 1.

²⁷ *State v. Moore*, 90 Ill. 1; *Pac. 233*; *Central Hosp*, 134 Tenn. 429, 183 S. W. 1916 E. 94; *Eastern Sta*, 105 Va. 151, 52 L. R. A. (N. S.) 746.

School District, 22 Neb. 377, 3 Amer. St. Rep. 26.

²⁸ *Allen v. Smith*, 129 Ill. 1; *L. Ed. 732*, 9 Sup. Ct. 3; *v. Railroad Co.*, 96 Fed. 1; *chett v. Blair*, 100 Fed. 1; *A. 76*; *Wright v. Wright*, 100 Fed. 1.

fore, payment by an insolvent debtor of a debt barred by the Statute of Limitations is not a fraudulent conveyance;²⁹ but barred claims are not provable in bankruptcy,³⁰ and where an estate is distributed by a court of equity, any creditor can oppose the claim of other creditors if the statute has run against them.³¹

§ 2004. Statute runs from breach of contract.

The general rule governing the commencement of the running of the statute is that the statutory period is computed from the time when the right of action which the plaintiff seeks to enforce first accrued; that is, ordinarily in an action based on a contract, as soon as there is a breach of contract. In determining the time when a right of action accrues on a contract it is, therefore, necessary to have in mind the question previously considered,³² what constitutes a breach of contract. The only necessary qualification of this principle is that where the plaintiff's right of action depends upon a preliminary act to be performed by himself he cannot suspend indefinitely the running of the statute by delaying performance of this act.³³

The statute runs from the time of the breach though no damage occurs until later;³⁴ and it is no exception that on an obligation to indemnify against loss there must be damage

Vansickle v. Wells, Fargo & Co., 105 Fed. 16; *Brookville Bank v. Kimble*, 76 Ind. 195; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. 35; *Ullman v. Thomas*, 126 Mich. 61, 85 N. W. 245; *Frost v. Steele*, 46 Minn. 1, 48 N. W. 413; *Quirk v. Metropolitan St. Ry. Co.* (Mo. App.), 210 S. W. 106; *Dayton Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *McConnell v. Barber*, 68 Hun, 360, 33 N. Y. S. 480; *McAfee v. McAfee*, 28 S. Car. 188, 5 S. E. 480.

²⁹ *French v. Motley*, 63 Me. 326.

³⁰ See *supra*, § 1997.

³¹ *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Re Lafferty*, 122 Fed. 558;

Grattan v. Wiggins, 23 Cal. 16; *Sawyer v. Sawyer*, 74 Me. 579; *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172; *McCartney v. Tyrer*, 94 Va. 198, 202, 26 S. E. 419; *Callaway's Admr. v. Saunders*, 99 Va. 350, 38 S. E. 182; *Werdenbaugh v. Reid*, 20 W. Va. 588.

³² See *supra*, §§ 1288 *et seq.*

³³ See *infra*, § 2041.

³⁴ *Battley v. Faulkner*, 3 B. & Ald. 288; *Howell v. Young*, 5 B. & C. 250, 265; *In re Herbert*, 262 Fed. 682 (C. C. A.); *Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *O'Connor v. Aetna L. Ins. Co.*, 67 Neb. 122, 93 N. W. 137, 99 N. W. 845; *Woodland Oil Co. v. Byers*, 223 Pa. 241, 72 Atl. 518, 132 Am. St. 737.

before the statutory period begins, for by the n a contract, there is no breach until there is dama other hand, if the promise is to pay a debt or c debtor from liability, a right of action is comp statute begins to run as soon as the debt is due a

Conversely, a cause of action may not accrue un damage has been caused or services rendered or i if the law or the contract interposes a condition the right to bring suit and the condition has no fied.³⁵

§ 2005. There must be in existence parties and enforcement.

No right of action accrues within the meaning of of Limitations until there is not only a theoretic duty but also a legal possibility that some one exi enforce the right and another against whom it can b

³⁵ *Collinge v. Heywood*, 6 Ad. & E. 633; *Tunstall v. Bartlett*, 14 L. T. R. 400; *Gilbert v. Selleck* (Conn.), 106 Atl. 430; *Parker v. Dickson*, 88 N. J. L. 443, 97 Atl. 46.

In *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 286, 93 N. W. 226, the court said: "A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in performance, whether the obligee has suffered damage or not. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, not from the date of the act which causes damage, but from the time when pecuniary loss ensues thereon. *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *American Building, etc., Assoc. v. Waleen*, 52 Minn. 23, 53 N. W. 867; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *Hicks v. Hoos*, 44 Mo. App. 571, 579; *Terre Haute & I. R.*

Co. v. Peoria, etc., R. C. 455."

³⁶ *In re Herbert*, 1 (C. C. A.).

³⁷ A statute in Mass a creditor the right to the proceeds of the polic of premiums, paid by while insolvent, on a policy, subject to th Limitations. It was h statutory period on su did not begin to run u of the insured, since un were no proceeds. *York* 210 Mass. 35, 96 N. E. *Lehman v. Gunn*, 124 So. 475, 51 L. R. A. 111 Rep. 159; *Tonkin v. Ba* 414, 7 Atl. 185.

³⁸ *Murray v. East Ind & Ald.* 204; *San Francisco v. Irwin*, 28 Fed. 708; *C* sling, 160 Fed. 604, 87 C *Hopper v. Steele*, 18 A *croix v. Malone*, 157 Ala 725; *Hoskins v. Lindsay*,

Therefore, where a cause of action has not accrued until after the death of the person whose representative becomes entitled as such to the right of action, the statute will not begin to run until after grant of administration,³⁸ and where a cause of action has not accrued until after the debtor's death, the statute does not begin to run until administration of the decedent's estate has been granted.³⁹ So while the debtor, an ambassador, is exempt from suit when the debt arises, the statute will not begin to run.⁴⁰

R. (Pa.) 249; *Hilderbrand v. Kinney*, 172 Ind. 447, 83 N. E. 832.

"There must be some one in existence by whom, and a different person against whom, the claim may be enforced. The statute implies that such persons are in being, and, if they are not, there is no room for its operation. It is the general rule that where one person represents both sides of conflicting claims the statute does not run." *Bremer v. Williams*, 210 Mass. 256, 258, 96 N. E. 687, citing *Burrell v. Egremont*, 7 Beav. 205, 235; *Topham v. Booth*, 35 Ch. D. 607, 611. *In re Hawes*, 62 L. J. Ch. 463; *Lister v. Pickford*, 34 L. J. Ch. (N. S.) 582; *Mills v. Borthwick*, 35 L. J. Ch. (N. S.) 31; *Gray v. Quick-silver Min. Co.*, 68 Fed. 677. See *East Stonehouse, etc., Council v. Willoughby Bros.*, [1902] 2 K. B. 318, 333-335; *Grant v. Hughes*, 94 N. C. 231. To these cases may be added *Binns v. Nichols*, L. R. 2 Eq. 256; *In re Pardoe*, [1906] 1 Ch. 265. This principle is not accepted in California. Nothing will prevent or delay the running of the statute, not expressly provided therein, after there has been a breach of legal duty. *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

³⁸ *Murray v. East India Co.*, 5 B. & Ald. 204; *Fergusson v. Fyffe*, 8 Cl. & F. 121; *Word v. West*, 38 Ark. 243; *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Coe v. Finlayson*, 41 Fla. 169, 26 So. 704; *Sherman v. West-*

ern Stage Co., 24 Iowa, 515; *Carney v. Havens*, 23 Kan. 82; *Pendleton v. Pendleton*, 6 Bush, 469; *Carpenter v. Hadley (Me.)*, 108 Atl. 679; *Rockwell v. Young*, 60 Md. 563; *Kingsbury v. Gastrell's Est.*, 110 Miss. 96, 69 So. 661; *Clark v. Amoskeag Mfg. Co.*, 62 N. H. 612; *Riner v. Riner*, 166 Pa. St. 617, 31 Atl. 347, 45 Am. St. Rep. 693. But see *contra*, *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *Sanford v. Bergin*, 156 Cal. 43, 103 Pac. 333; *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

The postponement of the statutory period has been allowed even though there has been long delay in taking out administration. *Carpenter v. Hadley (Me.)*, 108 Atl. 679. In *Riner v. Riner*, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693, the court expressed great regret that the cases did not justify a decision extending the statutory period only for the time reasonably necessary to take out administration. *Cf. Sanford v. Sanford*, 62 N. Y. 553; *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433, 61 Am. St. 627.

³⁹ *Jolliffe v. Pitt*, 2 Vern. 694; *Tuohy v. Trail*, 19 A. C. Dist. Col. 79; *Kingsbury v. Gastrell's Est.*, 110 Miss. 96, 69 So. 661, But see *contra*, *Hibernia Savings, etc., Soc. v. Conlin*, 67 Cal. 178, 7 Pac. 477.

⁴⁰ *Musurus Bey v. Gadban*, [1894] 1 Q. B. 352.

§ 2006. Statutory disabilities of the plaintiff.

The early English Statute of James the First,⁴¹ provided that the period of the statute should not begin to run if, when the cause of action accrued, the party entitled to sue was an infant, a married woman, insane, in prison, or beyond the seas; and that such person might bring his action within the time fixed by the statute computed from the termination of his disability. This provision has been copied in substance in most of the existing American statutes, though often with variations. The law governing infancy, insane persons, and those in prison, has not generally been much changed. With the increased legal capacity of married women in most States, the exception in their favor has been often omitted. The term "beyond the seas" when copied in American statutes has led to a difference of construction. A number of jurisdictions have given the phrase the meaning of "outside of the jurisdiction."⁴² Elsewhere, however, the words have been given the meaning of "outside of the United States."⁴³ In many States the English words have been so far varied as to make clear whether the legislative intent is "without the State," or "without the United States." The exception in favor of creditors "beyond the sea" is not confined to those who are or ever have been citizens of the State where suit is brought.⁴⁴ Where two or more persons are jointly entitled, the absence from the jurisdiction of one of them will not extend the period of the statute,⁴⁵

⁴¹ 21 Jac. I. c. 16.

⁴² *Bank of Alexandria v. Dyer*, 14 Pet. 141, 10 L. Ed. 391; *Thomason v. Odum*, 23 Ala. 480; *Wakefield v. Smart*, 8 Ark. 488; *Keech v. Enriquez*, 28 Fla. 597, 10 So. 91; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Stephenson v. Doe*, 8 Blackf. 508, 46 Am. Dec. 489; *Mason v. Union Mills, etc., Co.*, 81 Md. 446, 32 Atl. 311, 29 L. R. A. 273, 48 Am. St. Rep. 524; *Hulburt v. Merriam*, 3 Mich. 144; *Galusha v. Cobleigh*, 13 N. H. 79; *West v. Pickesimer*, 7 Ohio, 235; *Alexander v. Burnet*, 5 Rich. 189.

⁴³ *Mason v. Johnson*, 24 Ill. 159, 76 Am. Dec. 740; *Keeton's Heirs v.*

Keeton's Adm., 20 Mo. 530; *State v. Harris*, 71 N. C. 174; *Gonder v. Estabrook*, 33 Pa. St. 374. The Federal courts follow the construction given by state courts to the local statutes. *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086.

⁴⁴ *Strithorst v. Graeme*, 2 W. Bl. 723; *Keech v. Enriquez*, 28 Fla. 597; *Bulgex v. Roche*, 11 Pick. 36, 22 Am. Dec. 359; *Goetz v. Voelinger*, 99 Mass. 504; *Wolf v. District Grand Lodge*, 102 Mich. 23, 60 N. W. 445.

⁴⁵ *Perry v. Jackson*, 4 T. R. 516; *Dickey v. Armstrong*, 1 A. K. Marsh. 39. *Cf. Jones v. Coal Creek &c. Co.*, 133 Tenn. 159, 169, 180 S. W. 179.

since those resident in the jurisdiction may sue in the name of all those entitled.⁴⁶

When the plaintiff has once come within the jurisdiction the disability of absence cannot be restored by subsequent absence.⁴⁷

§ 2007. Defendant's absence from the jurisdiction.

The disabilities referred to in the preceding section are all disabilities of the plaintiff. Corresponding disabilities of the defendant are not generally provided for by statute, except the defendant's absence from the jurisdiction. For this, provision was first made in England by statute in the reign of Queen Anne;⁴⁸ and in the United States it is now generally provided in effect that if the person against whom a right accrues resides outside the State, the action may be begun within the period of the statute computed from the time when he comes within the State,⁴⁹ and that if during the period when the statute is running he resides outside the State, the period of this residence shall not be computed as part of the statutory time.⁴⁹

Under some statutes the extension of the statutory period because of the defendant's absence from the jurisdiction is only applicable to those who were residents of the State at the time when the right of action first accrued,⁵⁰ but generally a

⁴⁶ "It was competent to the plaintiffs who resided in England, to bring the action as well as to release it." *Perry v. Jackson*, 4 T. R. 516, 519.

⁴⁷ *Sturt v. Mellish*, 2 Atk. 610; *Faw v. Roberdeau's Ex.* 3 Cranch, 174, 2 L. Ed. 402; *May v. Slaughter*, 3 A. K. Marsh. 505; *Powell v. Koehler*, 52 Ohio St. 103, 39 N. E. 195, 26 L. R. A. 480, 49 Am. St. Rep. 705; *Jones v. Coal Creek &c. Co.*, 133 Tenn. 159, 180 S. W. 179.

⁴⁸ See *Jolliffe v. Pitt*, 2 Vern. 694.

⁴⁹ In Oregon if a cause of action arises in another State between non-residents of Oregon, the Oregon Statute is not suspended. *Fargo v. Dickover*, 87 Oreg. 215, 170 Pac. 280;

In re Wemple's Estate (Oreg.), 179 Pac. 674.

⁵⁰ Aside from the latter provision, if the debtor comes within the jurisdiction, though for a short time and without the plaintiff's knowledge, the statute begins and continues to run. *Gregory v. Hurrill*, 5 B. & C. 341. See also *St. Paul Title & Trust Co. v. Stensgaard*, 162 Cal. 178, 21 Pac. 731, 39 L. R. A. (N. S.) 741.

⁵¹ *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613; *Drake v. Bigelow*, 93 Minn. 112, 100 N. W. 664; *Lindauer Mercantile Co. v. Boyd*, 11 N. Mex. 464, 70 Pac. 568; *Van Santvoord v. Roethler*, 35 Oreg. 250, 57 Pac. 628, 76 Am. St. Rep. 472;

wider construction is given and the exception is held applicable to all persons.⁵¹

§ 2008. Details of law governing absence.

It is commonly held that an absence in order to be deducted must be at least of such a character as to preclude service of process,⁵² and in many statutes the express provision requires residence without the State in order to come within the exception.⁵³ In a few States, however, any temporary absence may be deducted.⁵⁴ Attention has previously been called⁵⁵ to a

Wilson v. Daggett, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766. See also *Howard v. Blair* (W. Va.), 98 S. E. 435.

⁵¹ *Lafond v. Ruddock*, 13 C. B. 813; *Holley v. Coffee*, 123 Ala. 406, 26 So. 239; *Waterman v. Sprague Mfg. Co.*, 55 Conn. 554, 12 Atl. 240; *McCann v. Randall*, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; *Belden v. Blackman*, 118 Mich. 448, 76 N. W. 979; *Bower v. Henshaw*, 56 Miss. 619; *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 54 N. W. 973; *Howard v. Fletcher*, 59 N. H. 151; *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Williams v. Iron Belt Bldg., etc., Assoc.*, 131 N. C. 267, 42 S. E. 607; *Cuthbertson v. People's Bank*, 170 N. C. 531, 533; *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574; *Reeves v. Block*, 31 S. Dak. 60, 68, 139 N. W. 780; *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126; *Davis v. Marshall*, 37 Vt. 69; *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934. Cf. *Trask v. Karrick* (Vt.), 108 Atl. 846.

⁵² *Vanlandingham v. Huston*, 9 Ill. 125; *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128; *Penley v. Waterhouse*, 1 Iowa, 498; *Blodgett v. Utley*, 4 Neb. 25.

⁵³ *Barney v. Celrichs*, 138 U. S. 529 (N. Y. statute), 34 L. Ed. 1037, 11 Sup. Ct. 414; *Pells v. Snell*, 130 Ill.

379, 23 N. E. 117; *Jones v. Foster*, 175 Ill. 459, 470, 51 N. E. 862; *Platt v. Carter* (Iowa), 174 N. W. 786; *Ware v. Gowen*, 111 Mass. 526; *Campbell v. White*, 22 Mich. 178; *McKenzie v. Boylan*, 40 Mich. 329; *Kerwin v. Sabin*, 50 Minn. 320, 52 N. W. 642, 17 L. R. A. 225, 36 Am. St. Rep. 645; *Johnson v. Smith*, 43 Mo. 499; *Bell v. Lamprey*, 52 N. H. 41.

⁵⁴ In *Bauserman v. Blunt*, 147 U. S. 647, 656, 37 L. Ed. 316, 13 Sup. Ct. 466, the court said, speaking of the Kansas statute: "Upon the question relating to the debtor's personal absence from the State in his lifetime, it is to be observed that the saving clause of the statute speaks only of where the debtor is, and does not (like the statute of New York which governed *Penfield v. Chesapeake, etc., R. Co.*, 134 U. S. 351, 33 L. Ed. 940, 10 Sup. Ct. 566; and *Barney v. Celrichs*, 138 U. S. 529, 34 L. Ed. 1037, 11 Sup. Ct. 414) use the word 'reside' or 'residence.' The words of the Kansas statute are 'if he be out of the State,' 'until he comes into the State,' 'if he depart from the State,' and 'the time of his absence.' When this case was before the Circuit Court, it was clearly settled by a uniform series of decisions of the Supreme Court of Kansas, extending over a period of twenty years, that the words of the

⁵⁵ *Supra*, § 2002.

not unusual enactment, qualifying the statutory provision concerning non-residence, namely, that a right of action which has become completely barred in another jurisdiction in which the cause of action arose, or where the debtor or where both parties resided, is barred in the jurisdiction where the enactment is passed.

A foreign corporation which is lawfully doing business within the jurisdiction of the forum is not a non-resident or absent from the State within the meaning of the Statute of Limitations.⁵⁶

§ 2009. Secret return; successive absences.

Where the defendant's absence from the jurisdiction has been such as to prevent the running of the statute, its operation will not be started by a secret entrance into the jurisdic-

statute were to have their natural meaning, and that personal absence of the debtor, even if he retained a residence within the State at which process against him might be served, was sufficient to take the case out of the statute. *Lane v. National Bank*, 6 Kans. 74; *Hoggett v. Emerson*, 8 Kans. 262; *Morrell v. Ingle*, 23 Kans. 32; *Conlon v. Lanphear*, 37 Kans. 431, 15 Pac. 600. The later decisions of that court recognize the same rule. *Chicago, etc., Ry. v. Cook*, 43 Kans. 83, 22 Pac. 988; *Bauserman v. Charlott*, 46 Kans. 480, 482, 26 Pac. 1051; [*Roth v. Holman (Kans.)*, 182 Pac. 416].

"The Supreme Court of the adjoining State of Nebraska, indeed, as the plaintiff in error has pointed out, has held a precisely similar provision of its own statute of limitations not to include the case of a debtor temporarily absent from the State, and having a usual place of residence therein at which a summons to him might be served. *Nebraska Code of Civil Procedure* § 20; *Blodgett v. Utley*, 4 Neb. 25; *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411."

The statute of Oklahoma is given

the same construction as the Kansas statute. *Quinette v. Pullman Co.*, 233 Fed. 980, 147 V. C. A. 654.

* *United States Express Co. v. Ware*, 87 U. S. 543, 22 L. Ed. 422; *Taylor v. Union Pac. R. Co.*, 123 Fed. 155; *Southern R. Co. v. Mayes*, 113 Fed. 84, 51 C. C. A. 70; *Childs v. Missouri &c. R.*, 221 Fed. 219, 136 C. C. A. 629; *Baltimore &c. R. v. Reed*, 223 Fed. 689, 139 C. C. A. 192; *Huss v. Central R., etc., Co.*, 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *Wall v. Chicago, etc., R. Co.*, 69 Iowa, 498, 29 N. W. 427; *St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. 17; *Louisville, etc., R. Co. v. Pool*, 72 Miss. 487, 16 So. 753; *Sidway v. Missouri Land, etc., Co.*, 187 Mo. 649, 86 S. W. 150; *Ball Engine Co. v. Bennett*, 98 Neb. 290, 152 N. W. 550; *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832; *Colonial, etc., Mortgage Co. v. Northwest Thresher Co.*, 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814; *Hale v. St. Louis &c. R.*, 39 Okl. 192, 134 Pac. 949, L. R. A. 1915 C. 544; *Turcott v. Yasoo, etc., R. Co.*, 101 Tenn. 102, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661.

tion, but the defendant must either come into the jurisdiction with the purpose of making it a permanent residence (in which case the creditor's knowledge is immaterial),⁵⁷ or, under such circumstances as afford the plaintiff knowledge or means of knowledge of his presence.⁵⁸

Under statutes which allow the defendant's absence from the State to be deducted from the statutory period after the right of action has once accrued, the total time of various absences may be deducted in computing the statutory period.⁵⁹

§ 2010. Absence of one joint debtor.

The absence of one of several joint debtors under these statutes is ordinarily held to prevent the statute from running in his favor, but not to prevent its running in favor of those within the jurisdiction.⁶⁰ But unless the rule of the common law that judgment for or against one joint debtor discharges the other⁶¹ has been abrogated by statute, this rule is unjust, for though the plaintiff may recover against one joint debtor when the other is without the jurisdiction,⁶² he will thereby lose forever his right against the other who may be the only solvent one. Under the English Statute of Anne, therefore, the absence of one joint debtor prevented the statute from beginning to run as to any.⁶³

§ 2011. Disabilities not covered by statute.

Unless the difficulty of bringing an action in a particular

⁵⁷ *Home Life Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Davis v. Field*, 56 Vt. 426.

⁵⁸ *Gregory v. Hurrill*, 1 Bing. 324; *Dorr v. Swartwout*, 7 Fed. Cas. No. 4,010; *Stewart v. Stewart*, 152 Cal. 162, 92 Pac. 87; *Bennett v. Devlin*, 17 B. Mon. 353; *Little v. Blunt*, 16 Pick. 359; *Campbell v. White*, 22 Mich. 178; *Cottrell v. Kenney*, 25 R. I. 99, 54 Atl. 1010; *Davis v. Field*, 56 Vt. 426; *Boulton v. Langmuir*, 24 Ont. App. 618.

⁵⁹ *Bohannon v. Chapman*, 13 Ala. 641; *Rogers v. Hatch*, 44 Cal. 280; *Fielding v. Iler* (Cal. App.), 179 Pac.

519; *Bell v. Lamprey*, 52 N. H. 41; *Brady v. Potts* (N. J.), 11 Atl. 345; *Cutler v. Wright*, 22 N. Y. 472, 477; *Fisher v. Phelps*, 21 Tex. 551. Cf. *Cottrell v. Kenney*, 25 R. I. 99, 54 Atl. 1010.

⁶⁰ *Town v. Washburn*, 14 Minn. 268, 100 Am. Dec. 219; *Cutler v. Wright*, 22 N. Y. 472, 477; *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150; *Caswell v. Engelmann*, 31 Wis. 93.

⁶¹ See *supra*, § 330.

⁶² See *supra*, § 329, n. 15.

⁶³ *Fannin v. Anderson*, 7 Q. B. 811. See also *Reybold v. Parker*, 7 Houst. 526.

case can be brought within the general principle that the statute will not begin to run where no legal possibility of maintaining an action exists even though a theoretical right of action has accrued, or within one of the disabilities expressly enumerated by the Statute, the general rule is clear that the Statute will begin to run, and its operation will not be suspended by other disabilities.⁶⁴ Exceptional cases of fraud and fiduciary relations are considered in subsequent sections.

§ 2012. Disabilities arising after accrual of action.

It is generally true that when the statute has once started, it is not suspended (except by war or by the defendant's absence from the jurisdiction) by subsequent disability or impossibility of bringing suit, even of a kind which would have prevented the statute from beginning to run, had it existed when the cause of action accrued.⁶⁵ Thus, apart from a special

⁶⁴ *Beckford v. Wade*, 17 Ves. 88; *The Sam Slick*, 2 Curt. (U. S.) 480; *Moliver v. Ragan*, 2 Wheat. 25, 29, 4 L. Ed. 175; *Bank of Alabama v. Dalton*, 9 How. 522, 13 L. Ed. 242; *Kendall v. United States*, 107 U. S. 123, 2 S. Ct. 277, 27 L. Ed. 437; *Bank v. Kissanne*, 32 Fed. 429; *Howell v. Hair*, 15 Ala. 194; *Pryor v. Ryburn*, 16 Ark. 671; *St. Paul Title & Trust Co. v. Stensgaard*, 162 Cal. 178, 121 Pac. 731, 39 L. R. A. (N. S.) 741; *Campbell v. Long*, 20 Iowa, 382; *Shorick v. Bruce*, 21 Iowa, 305; *Relf v. Eberly*, 23 Iowa, 467, 469; *Gebhard v. Sattler*, 40 Iowa, 152; *Miller v. Lesser*, 71 Iowa, 147, 32 N. W. 250; *Roelefson v. Pella*, 121 Ia. 153, 96 N. W. 738; *Lougee v. Reed*, 133 Ia. 48, 110 N. W. 165; *Hells v. Child*, 12 Allen, 333; *Dosier v. Ellis*, 28 Miss. 730; *Wyatt v. Wyatt*, 28 Miss. 219, 32 So. 317; *Somerset Co. v. White*, 44 N. J. L. 509; *Church of the Communion v. Paterson*, etc., 43 N. J. L. 470, 43 Atl. 696; *Graaf*, 1 Cow. 352; *Demar-koop*, 3 Johns. Ch. 129; *With*, 20 Johns. 33; *Engel*, 1 N. Y. 400, 7 N. E. 300,

55 Am. Rep. 818; *Baines v. Williams*, 3 Ired. L. 481; *Fee v. Fee*, 10 Ohio, 470; *Favorite v. Booher*, 17 Ohio St. 548; *Simpson v. Tootle & Co.*, 42 Okla. 275, 141 Pac. 448, L. R. A. 1915 B. 1221; *Warfield v. Fox*, 53 Pa. 382; *Bledsoe v. Stokes*, 1 Baxt. 312; *Johnson v. Merritt (Va.)*, 99 S. E. 785; *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279; *McGraw v. Rohrbough*, 74 W. Va. 285, 82 S. E. 217; *Woodbury v. Shackelford*, 19 Wis. 55; *Tallman v. Mutual F. Ins. Co.*, 27 U. C. Q. B. 100.

⁶⁵ *Freake v. Craneheldt*, 3 Mg. & Cr. 499; *Penny v. Brice*, 18 C. B. (N. S.) 393; *Walden v. Gratz*, 1 Wheat. 292, 4 L. Ed. 94; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38; *Harris v. McGovern*, 99 U. S. 161, 25 L. Ed. 317; *McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 L. Ed. 269; *Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316; *De Arnaud v. United States*, 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244; *Larue v. C. G. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155; *Doyle v. Wade*, 23 Fla. 90, 1 So. 516, 11 Am. St. 334; *McCutchen v.*

statutory provision, where a cause of action has once arisen, neither the death of the creditor⁶⁶ nor of the debtor⁶⁷ will

Currier, 94 Me. 362, 47 Atl. 923; Paul v. New York Fidelity &c. Co., 186 Mass. 413, 71 N. E. 801, 104 Am. St. Rep. 594; Piper v. Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. 785; White v. Scott (N. C.), 101 S. E. 369.

In *Roelefsen v. City of Pella*, 121 Iowa, 153, 154, 96 N. W. 738, the court said: "If there be any relief for plaintiff, it must be found in some statute. *Shorick v. Bruce*, 21 Iowa, 305. When the statute has commenced to run against a cause of action it will not be suspended on account of the death of the party in whose favor the cause of action has existed, or of the minority of the persons to whom his rights have passed. *Bishop v. Knowles*, 53 Iowa, 268, 5 N. W. 139. Indeed, it is fundamental that when the statute once commences to run it will not be tolled by the subsequent disability of him in whose favor the cause of action existed. *Black v. Ross*, 110 Iowa, 112, 81 N. W. 229; *Mereness v. Bank*, 112 Iowa, 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. Rep. 318."

But in *Cobb v. Houston*, 117 Mo. App. 645, 653, 94 S. W. 299, the court said: "Independent of the statute suspending the running of the Statute of Limitations during the absence of the defendant from the State, the plaintiff's inability to successfully prosecute a suit on his judgment during the period of the defendant's absence, by necessity stopped the running of the Statute of Limitations at common law. (19 Am. & Eng. Ency. of Law, p. 215).

"In *United States v. Wiley*, 78 U. S. 508, 20 L. Ed. 211, there being no statute to fit the case, the court held that during the continuation of the rebellion (1861-5) its effect was to stop the running of the Statutes of Limitations in regard to claims against

citizens residing in the rebellious States. Judge Strong, writing the opinion, at page 513, said: 'It is the loss of the ability to sue rather than the loss of the right that stops the running of the statute.' The same learned judge in *Braun v. Sauerwein*, 77 U. S. 218, 223, 19 L. Ed. 895, after reviewing many of the authorities, said: 'It seems, therefore, to be established, that the running of a statute of limitations may be suspended by causes not mentioned in the statute itself.' In *Amy v. Watertown*, 130 U. S. 320, 323-4, 9 S. Ct. 537, 32 L. Ed. 953, this latter remark of Judge Strong is quoted and pronounced 'undoubtedly correct.'"

⁶⁶ *McNeill v. McNeill*, 35 Ala. 30; *Brown v. Merrick*, 16 Ark. 612; *Sherman v. Western Stage Co.*, 24 Iowa, 515; *Ackerman v. Hilpert*, 108 Ia. 247, 79 N. W. 90; *Hull v. Deatly*, 7 Bush, 687; *Doty v. Jameson*, 29 Ky. L. Rep. 507, 93 S. W. 638; *Metcalf v. Grover*, 55 Miss. 145; *Hall v. Gibbs*, 87 N. C. 4; *Light's Estate*, 136 Pa. St. 211, 20 Atl. 536, 537; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. 796; *Boyd v. Monroe*, 32 S. C. 249, 10 S. E. 963. The rule was held unaltered where the debtor fraudulently concealed the cause of action (which had been known by the decedent) from the creditor's representative. *Mereness v. First Nat. Bank*, 112 Ia. 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. 318.

⁶⁷ *Rhodes v. Smethurst*, 4 M. & W. 42; *Whipple v. Johnson*, 66 Ark. 204, 49 S. W. 827; *Quivey v. Hall*, 19 Cal. 97; *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Carpenter v. Hadley* (Me.), 108 Atl. 679; *Davis v. Davis' Estate* (Mont.), 185 Pac. 559; *Sanford v. Sanford*, 62 N. Y. 553;

suspend the running of the statute during the delay necessary for the grant of administration.

The effect of the debtor's death on the general Statutes of Limitations has been qualified by special statutes. On the one hand the period during which an action may be brought against personal representatives of a debtor has been in effect shortened by special statutes requiring claims to be made within one or two years after the grant of administration; and on the other hand the harsh rule of the common law that in no case is the statute suspended by the death of the debtor after a right of action has once accrued, has been modified by statutes allowing a certain period, as a year, after grant of administration on the debtor's estate, although this extends the period during which suit may be brought beyond the time allowed by the general Statute of Limitations.

After a cause of action has once accrued even an injunction against the prosecution of the action will not suspend the running of the statute.⁶⁸ But equity may enjoin the defendant from pleading the Statute of Limitations under such circumstances if exclusion of the period during which the prohibition of suing was operative will bring the plaintiff's suit within the statutory period.⁶⁹ If the plaintiff has been guilty of laches he can get no equitable relief.⁷⁰ In some States by statute the

Copeland v. Collins, 122 N. C. 619, 30 S. E. 315; *Micheltree v. Veach*, 31 Pa. St. 455; *Harshberger v. Alger*, 31 Gratt. 521; *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. 796.

In Kansas the statute is held to be suspended by the debtor's death, for not exceeding fifty days thereafter, in order to allow time for taking out letters of administration. *Bauserman v. Charlott*, 46 Kan. 490, 26 Pac. 1051; *Robertson v. Tarry*, 83 Kan. 716, 112 Pac. 603. See also *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

⁶⁸ *Yale v. Randle*, 23 L. Ann. 579; *Paul v. New York Fidelity, etc., Co.*, 186 Mass. 413, 71 N. E. 801, 104 Am.

St. Rep. 594; *Park Assoc. v. Pere Marquette R.*, 172 Mich. 179, 137 N. W. 799; *Robertson v. Alford*, 13 Sm. & M. 509; *Wilkinson v. First Nat. F. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166.

⁶⁹ *Anonymous*, 1 Vern. Ch. 73; *Steamboat Co. v. Chaffin*, 204 Fed. 412, 122 C. C. A. 598; *Kelly v. Donlin*, 70 Ill. 378; *Stanbrough v. M'Call*, 4 La. Ann. 322; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Brown County v. Martin*, 50 Ohio St. 197, 33 N. E. 1112; *Converse v. Davis*, 90 Tex. 462, 39 S. W. 277; *Yzaquierre v. Garcia* (Tex. Civ. App.), 172 S. W. 139; *Union Mutual Life Ins. Co. v. Dice*, 14 Fed. 523.

⁷⁰ *Sugg v. Thrasher*, 30 Miss. 135.

time during which prosecution of an action is excluded from computation.⁷¹

§ 2013. War and other exceptional disabilities v the statute.

An exception to the rule that supervening disaster suspend the running of the statute is made in case foreign war prevents suit between citizens of two countries,⁷² and on this account it is held that the war must be excluded from the computation of a subsequent suit by a citizen of the country with the country of the forum.⁷³ This doctrine extended in the United States to the Civil War. It is held by the Supreme Court that the effect of the war suspend the running of Statutes of Limitations during its continuance both in regard to claims of the government against its citizens who were residents in the seceding State and to claims of citizens of one set of States against citizens of the other, and it has been said by the same court in view of this "It seems, therefore, to be established that the Statute of Limitation may be suspended by cause mentioned in the statute itself."⁷⁵ But of this statement it is said in a later decision,⁷⁶ "The observation is correct; but the cases in which it applies are very few in number, and of peculiar character, and are to be admitted with great caution. It is wise the court would make the law instead of a departure from it. The general rule is that the language of the statute is to be taken at its face, and no reasons based on apparent inconvenience can justify a departure from it."

Exceptions certainly are rare.⁷⁷ If, however, af

⁷¹ See *Pensacola Bank v. Thornberry*, 226 Fed. 611, 141 C. C. A. 367.

⁷² See *supra*, §§ 1748, 1957, n; 1958.

⁷³ *Hopkirk v. Bell*, 3 Cranch, 454, 2 L. Ed. 497; *Robson v. Wall*, 2 Nott. & M. 498, 10 Am. Dec. 623.

⁷⁴ *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *The Protector*, 9 Wall. 687, 19 L. Ed. 812; *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211;

Braun v. Sauerwein, 10 L. Ed. 895. See also *Hartford Ins. Co.*, 13 L. Ed. 490.

⁷⁵ Mr. Justice Strong, *Sauerwein*, 10 Wall. 2 L. Ed. 895.

⁷⁶ *Amy v. Watertown*, 324, 32 L. Ed. 953, 9 S.

⁷⁷ See as to the effect of *supra*, § 1997.

ute has begun to run, the right to sue and the liability of being sued are joined in the same person the running of the statute is suspended while the rights are thus united,⁷⁸ and where a municipal corporation was dissolved by the legislature and a successor (which the court held in substance a continuation of the earlier corporation and liable for its debts) was not created for twelve years, it was held that the statute was suspended during this period.⁷⁹

§ 2014. Tacking disabilities.

Statutory disabilities unless otherwise stated, apply only to the situation at the time when the cause of action accrued. Accordingly if at that time several disabilities existed, the statute will not begin to run until all the disabilities are removed;⁸⁰ whereas if one disability only exists when the cause of action accrues but a subsequent disability arises before the first one is removed, the two cannot be tacked, and the statute begins to run from the time when the first disability ceases.⁸¹ But where the defendant's absence from the jurisdiction suspends the running of the statute, his subsequent absence may be tacked to a disability existing when the cause of action accrued.⁸²

§ 2015. Fraud—English decisions.

The English court of equity in cases brought before it declined to regard the Statutes of Limitations as applicable, or to

⁷⁸ *Seagram v. Knight*, 36 L. J. Ch. (N. S.) 918.

⁷⁹ *Broadfoot v. Fayetteville*, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610.

⁸⁰ *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Butler v. Howe*, 13 Me. 397; *North v. James*, 61 Miss. 761; *Keeton v. Keeton*, 20 Mo. 530; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Patton v. Dixon*, 105 Tenn. 97, 58 S. W. 299.

⁸¹ *Murray v. East India Co.*, 5 B. & Ald. 204; *Cottrell v. Dutton*, 4 Taunt. 826; *Millington v. Hill*, 47 Ark. 301, 1

S. W. 547; *Verdery v. Savannah, etc., R. Co.*, 82 Ga. 675, 9 S. E. 1133; *Royce v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485; *Manion v. Titsworth*, 18 B. Mon. 582; *Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017; *Allis v. Moore*, 2 Allen, 306; *Watts v. Gunn*, 53 Miss. 502; *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; *Bradstreet v. Clarke*, 12 Wend. 602, 675; *Jones v. Coal Creek &c. Co.*, 133 Tenn. 159, 180 S. W. 179; *Parish v. Alston*, 65 Tex. 194; *Blackwell v. Bragg*, 78 Va. 529.

⁸² *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

apply a doctrine of laches analogous thereto, either cause of action was based on fraud or where the action, whatever its basis, was fraudulently concealed from the plaintiff discovered, or by reasonable diligence not discovered the fraud.⁸³ But whether equity under the circumstances would enjoin the pleading of the statute at law, or whether a court of law itself would apply a principle similar to that established in equity, was not so clear. In several cases at the end of the eighteenth century and the beginning of the nineteenth century, it was decided, that fraudulent concealment was a good replication of the statute.⁸⁴

These decisions perhaps prevented the question from being decided by a court of equity, whether an injunction should be granted under the circumstances in question to prevent the defendant from pleading the statute to an action at law. In later decisions, however, it was first intimated that the statute could not be supported as a legal replication,⁸⁵ and that equitable pleas and replications were allowed at law, if the facts did not furnish sufficient foundation for the statute replication.⁸⁶ The correctness of the two decisions was questioned by Brett, L. J.,⁸⁷ but the case did not involve a decision of the matter; and the prevailing view of the English law seems to be that while fraudulent concealment will prevent the statute from running where prior to the Judicature Acts a court of equity had either exclusive or concurrent jurisdiction of the cause, the statute will run in any case where a court of law alone had exclusive jurisdiction; and that, for its purpose, fraudulent concealment of a breach of contract of which equity has taken jurisdiction will not prevent the statute running.⁸⁸ This seems not only a technical restriction

⁸³ *Whalley v. Whalley*, 3 Bligh, 1; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143. And see cases *infra*, n. 88.

⁸⁴ *Bree v. Holbech*, 2 Doug. 654; *Clark v. Hougham*, 2 B. & C. 153; *Granger v. George*, 5 B. & C. 149, 152; *Ex parte Bolton*, 1 Mont. & Ayr. 60.

⁸⁵ *Imperial Gaslight, etc., Co. v.*

London Gaslight Co.,

⁸⁶ *Hunt v. Gibbons*, 1

⁸⁷ *Gibbs v. Guild*, 9 Q

⁸⁸ *Gibbs v. Guild*, 9

Bulli Coal Mining Co. v. Bulli Coal Mining Co. [1899] A. C. 351; *Oelkers v. Oelkers*, 2 K. B. 139.

⁸⁹ *Armstrong v. Milbu*

principles, but one where even the technical ground is unsound. It has been thought that this is in effect creating a new exception to the statute not authorized by it. To this criticism the answer of Brett, L. J., seems adequate:⁹⁰

"I do not agree that Courts of Equity have engrafted an exception upon the Statute of Limitations. It all depends, no doubt, upon what is meant by those words. If by engrafting an exception upon the statute is meant that a Court of Equity prevents a particular person from taking advantage of the statute, then no doubt that is true, but if it is meant to say that a Court of Equity by what it has done has altered the terms of the statute, then, with great respect, I demur to it. What I wish to convey is, that I understand the Courts of Equity to deal with the Statute of Limitations as they deal with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying, on principles well understood in those Courts, that in some particular cases it is unjust that the party should be allowed to exercise those rights."

§ 2016. American decisions generally allow fraudulent concealment as a reply to a plea of the statute.

The early English decisions holding that a court of law could on replication give effect to the plaintiff's excuse for his late suit because of the defendant's fraud were widely followed in the United States and the result often incorporated in statutes. Either by virtue of such statutes or without their aid, the rule supported by the great weight of authority unquestionably is that fraudulent concealment by the defendant of a cause of action not discovered until within the statutory period prior to the bringing of the action, is a good reply to a plea of the Statute of Limitations,⁹¹ and this exception is frequently em-

247, 723; *Osgood v. Sunderland*, 30 T. L. Rep. 530.

⁹⁰ *Gibbs v. Guild*, 9 Q. B. D. 59, 65.

⁹¹ *Sherwood v. Sutton*, 5 Mason, 143; *Porter v. Smith*, 65 Ala. 169; *Conditt v. Holden*, 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206; *Kane v. Cook*, 8 Cal. 449; *Eising v. Andrews*, 66 Conn.

58, 33 Atl. 585, 50 Am. St. Rep. 75; *State v. Northrop* (Conn.), 106 Atl. 504; *Lewis v. Denison*, 2 App. Cas. D. C. 387; *Hoyle v. Jones*, 35 Ga. 40, 89, 89 Am. Dec. 273; *Downs v. Harris*, 75 Ga. 834; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *Fortune v. Eng-*

bodied in modern Statutes of Limitations. On sim the defendant may be estopped to set up the stat has induced by misrepresentation the plaintiff t pected performance until after the statutory elapsed.⁹²

**§ 2017. Divergent views as to the effect of fra
cealment.**

In other jurisdictions a narrower view has obta

lish, 226 Ill. 262, 80 N. E. 781, 12 12; *Morgan v. Tene*
L. R. A. (N. S.) 1005, 117 Am. St. Rep. *Hughes v. First Nat.*
253; *Lancaster v. Springer*, 239 Ill. 428, 1 Atl. 417; *Reyno*
472, 88 N. E. 272; *Terry v. Davenport*, 17 R. I. 169, 20 Atl. 3
185 Ind. 561, 112 N. E. 998; *Caldwell* *Harrell v. Kelly*, 2 N
v. Ulah, 184 Ind. 725, 112 N. E. 518; *Vance v. Mottler*, 92
Fidelity & Casualty Co. v. Jasper S. W. 593; *Boro v. Hi*
Furniture Co., 186 Ind. 566, 117 N. E. 80, 120 S. W. 961, 13
258; *Boomer v. French*, 40 Iowa, 601; 857; *Munson v. Hall*
Cook v. Chicago, etc., R. Co., 81 Iowa, 475, 84 Am. Dec. 582;
551, 46 N. W. 1080, 9 L. R. A. 764, 25 *Co. v. Gay*, 86 Tex. 571
Am. St. Rep. 512; *Cress v. Ivens*, 155 25 L. R. A. 52, 88 Tex
Iowa, 17, 134 N. W. 869; *Mullen v.* 543; *Bonner v. McCre*
Callanan, 167 Ia. 367, 379, 149 N. W. App.), 35 S. W. 197; *Le*
516, 521; *Ogg v. Robb*, 181 Ia. 145, 162 T. Co., 23 Utah, 449,
N. W. 217; *Birks v. McNeill* (Iowa), *Ragland v. Owen*, 84 V
170 N. W. 485; *Atchison &c. R. v.* 91; *Reynolds v. Gawthr*
Atchison Grain Co., 68 Kans. 585, 75 3, 16 S. E. 364.
Pac. 1051 (reversed on rehearing, 70 In *Curtis v. Metcalf*,
Pac. 933); *Deake's Appeal*, 80 Me. 50, 963, *Brown, J.*, said: "V
12 Atl. 790; *Wear v. Skinner*, 46 Md. that 'committing a frau
257, 24 Am. Rep. 517; *First Massa* that it concealed itself'
achusetts Turnp. Corp. v. Field, 3 Mass. defence of limitations
201, 3 Am. Dec. 124; *Manufacturers'* *Co. v. United States*, 2
Nat. Bank v. Perry, 144 Mass. 313, 11 447, 38 S. Ct. 571, 573, 6
N. E. 81; *Dean v. Ross*, 178 Mass. 397, yet it is also the rule th
60 N. E. 119; *Tompkins v. Hollister*, 60 be a reasonable diligence
Mich. 470, 27 N. W. 651; *Mast v.* means of knowledge a
Easton, 33 Minn. 161, 22 N. W. 253; thing in effect as kno
Clarke v. Goodrum, 61 Miss. 731; (Wood v. Carpenter, 10
Shelby County v. Bragg, 135 Mo. 291, 143, 25 L. Ed. 807, cited
36 S. W. 600; *State v. Yates*, 231 Mo. Scharff, 231 U. S. 517, 3
276, 132 S. W. 672; *Douglas v. Elkins*, 58 L. Ed. 343; *United f*
28 N. H. 26; *Quimby v. Blackey*, 63 N. mond Coal & C. Co., 254
H. 77; *Waugh v. Guthrie Gas, etc., Co.* C. C. A. 554; *Strout v.*
37 Okla. 239, 131 Pac. 174, L. R. A. *Machinery Co.*, 206 Fe
1917 B. 1253; *Spalding v. Enid Cem-* *Id.*, 224 Fed. 1016, on ap
etery Assoc. (Okla.), 184 Pac. 579; 1022, 140 C. C. A. 609)."
Harrisburg Bank v. Forster, 8 Watts,

⁹² See *supra*, § 139, n. 3C

times the equitable doctrine has not been held available in actions at law, though the application of that doctrine to cases originally of equitable cognizance is not necessarily denied.⁹³ In other States the terms of local statutes have been such as to prevent a liberal recognition of the equitable doctrine. Thus under a few statutes the courts have held that in order to justify extension of the period for fraud, the fraud must be the basis of the action; fraudulent concealment of a cause of action not being of itself sufficient.⁹⁴ If this fraudulent concealment involves misrepresentation, however, it may give rise to a new cause of action on which the statute will begin to run only from the time of the misrepresentation.⁹⁵

In a few States the statutory provision confines the extension of the statutory period to cases which were formerly "solely cognizable" in chancery.⁹⁶ It is of course possible for the leg-

⁹³ *Andreas v. Redfield*, 98 U. S. 225, 25 L. Ed. 158 (New York statute); *Murray v. Chicago & W. R. Co.*, 92 Fed. 868, 35 C. C. A. 62 (Iowa statute); *Birkhead v. De Forest*, 120 Fed. 645, 649, 57 C. C. A. 107 (New York statute); *Pyle v. Beckwith*, 1 J. J. Marsh. 445; *Somerset County v. Veghte*, 44 N. J. L. 509; *Troup v. Smith*, 20 Johns. 33; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Wend. 202; *Hamilton v. Shepperd*, 3 Murph. 115; *Blount v. Parker*, 78 N. C. 128; *Fee v. Fee*, 10 Oh. 469, 36 Am. Dec. 103; *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413; *Peak v. Buck*, 3 Bart. 71; *Smith v. Bishop*, 9 Vt. 116, 31 Am. Dec. 607; *Callis v. Waddy*, 2 Munf. 511; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320.

In *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68, the court held that though a court of law could not give relief, equity would enjoin a plea of the statute to an action for breach of contract where the breach had been fraudulently concealed.

⁹⁴ *Frishmuth v. Farmers' L. & T. Co.*, 107 Fed. 169, 46 C. C. A. 222; *Kenney v. Parks*, 137 Cal. 527, 70

Pac. 556; *Murto v. Lemon*, 19 Col. App. 314, 75 Pac. 160; *Ogg v. Robb*, 181 Ia. 145, 162 N. W. 217; *Atchison, etc., R. Co. v. Atchison Grain Co.*, 68 Kans. 585, 75 Pac. 1051, 70 Pac. 933; *Brown v. Cloud County Bank*, 2 Kans. App. 352, 42 Pac. 593; *Penobscot R. Co. v. Mayo*, 65 Me. 566; *Price v. Mulford*, 107 N. Y. 303, 14 N. E. 298; *Rouss v. Ditmore*, 122 N. C. 775, 30 S. E. 335; *Mosher v. Butler*, 31 Ohio St. 188; *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279; *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762, 44 L. R. A. (N. S.) 524, Ann. Cas. 1914 C. 636.

⁹⁵ *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762, 44 L. R. A. (N. S.) 279, Ann. Cas. 1914 C. 636.

⁹⁶ *Daugherty v. Daugherty*, 116 Ia. 245, 90 N. W. 65; *Birks v. McNeill*, 170 N. W. 485; *Jaffray v. Bear*, 103 N. C. 165, 9 S. E. 382; *Lenhardt v. French*, 57 S. Car. 493, 35 S. E. 761; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320. This provision formerly existed in New York but the restriction was later made to cases cognizable in chancery, instead of solely cognizable. *Bosley v. Nat. Machine Co.*,

islature to codify all reasons, equitable as well as extension of the statutory period, and in a jury trial this has been done a failure of the statute to prevent concealment necessarily involves the result that such concealment the statute runs.⁹⁷ Fraudulent action from a deceased creditor's personal representative of action which had been known to the creditor is no ground for suspending the running of the statute which recognizes the equitable principles of the doctrine of fraudulent concealment can but should have no difficulty in denying a debtor in bad conduct in question a right to plead the statute.

Devices of the debtor to avoid the service of process to prevent the statute from running. Though such devices are dishonest, so, it may be said, is non-payment beyond the day when it is due. In neither case, however, is the deception on which the equitable right to relief

123 N. Y. 550, 25 N. E. 990; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837. In *Kirby v. Lake Shore, etc., R.*, 120 U. S. 130, 30 L. Ed. 569, 7 S. Ct. 430, the court, refusing to enforce in an equity proceeding in the Federal court the rule then prevailing in New York, held it to be an established rule of equity as administered by Federal courts "that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until with reasonable diligence, it might have been discovered." Cf. the many decisions of the Supreme Court cited in *Quinette v. Pullman Co.*, 229 Fed. 333, 143 C. C. A. 453, holding that the Federal courts will adopt the construction of a Statute of Limitations given to it by the highest court of the State.

⁹⁷ *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279. See also *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

In *Ott v. Hood*, 152 Wis. 97, 98,

139 N. W. 762, 44 I. 524, Ann. Cas. 1914 (1) 115, the plaintiff delivered to defendant at law, practicing his profession in Crosse, Wisconsin, a note for collection. July 2, 1910, the defendant collected thereon repeatedly, thereafter, the plaintiff had not been able to collect on the note, and plaintiff brought suit to the contrary until 1910. She then demanded judgment of the defendant, who denied the contract. The court said: "A contract, whether oral or otherwise, commences at the time of the breach of the contract. The facts are known to the plaintiff the right or not, and whether through ignorance or mistake of such party his adversary. There is no fraud."⁹⁸ *Mereness v. First Nat. Bank*, 111 Ia. 11, 83 N. W. 711, 51 Am. St. 318.

⁹⁸ See *supra*, § 2015, ad

¹ *Amy v. Watertown*, 320, 32 L. Ed. 953, 9 Sup.

§ 2018. What amounts to concealment.

A mere failure by the defendant to disclose the facts on which a cause of action is based is not ordinarily sufficient to preclude him from setting up the statute. There must be some artifice or positive action to prevent the plaintiff's acquiring knowledge.² Where, however, the basis of the action is itself fraud, subsequent silence is often regarded as a continuance of the original fraud so as to preclude the defendant from asserting the statute.³ Thus, one who steals or secretly converts property is regarded as fraudulently concealing continuously his liability until it is discovered by the owner, and the statute will not run against him until he discovers the facts.⁴ And in a number of statutes it is broadly provided that in actions for relief on the ground of fraud, the statute shall not begin to run until discovery of the fraud.⁵

Where the defendant had exclusive or peculiar knowledge of the facts on which his liability was based, and sustained a relation of trust or confidence to the plaintiff making it his duty to disclose the facts in question, silence will amount to a fraudulent concealment,⁶ even though there is no such tech-

² *Wood v. Carpenter*, 101 U. S. 135, 143, 25 L. Ed. 807; *Bates v. Preble*, 151 U. S. 149, 38 L. Ed. 106, 14 Sup. Ct. 277; *American Nat. Bank v. Fidelity & Deposit Co.*, 131 Ga. 854, 63 S. E. 622, 21 L. R. A. (N. S.) 962; *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *Terry v. Davenport*, 185 Ind. 561, 112 N. E. 998; *Graham v. Walters*, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244; *McBride v. Burlington*, etc., R. Co., 97 Iowa, 91, 66 N. W. 73, 59 Am. St. Rep. 395; *Perry v. Wade*, 31 Kans. 428, 2 Pac. 787; *State v. Yates*, 231 Mo. 276, 132 S. W. 672; *Smith v. Blachley*, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849; *Culpeper Nat. Bank v. Tidewater Imp. Co.*, 119 Va. 73, 89 S. E. 118; *Boyd v. Beebe*, 64 W. Va. 216, 61 S. E. 304, 17 L. R. A. (N. S.) 660. A refusal to allow the

plaintiff to examine the defendant's books is insufficient. *Fidelity & Casualty Co. v. Jasper Furniture Co.*, 186 Ind. 566, 117 N. E. 258.

³ *American Nat. Bank v. Fidelity & Deposit Co.*, 131 Ga. 854, 63 S. E. 622, 21 L. R. A. (N. S.) 962. But see *Smith v. Blachley*, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849; *Boyd v. Beebe*, 64 W. Va. 216, 61 S. E. 304, 17 L. R. A. (N. S.) 660.

⁴ *Bull Coal Min. Co. v. Osborne*, [1899] A. C. 351; *Conditt v. Holden*, 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206; *Quimby v. Blackey*, 63 N. H. 77; *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817. Cf. *Blount v. Parker*, 78 N. C. 128; *Hawk v. Minnick*, 19 Oh. St. 462, 2 Am. Rep. 413.

⁵ See *Perry v. Wade*, 31 Kans. 428, 2 Pac. 787.

⁶ *American Nat. Bank v. Fidelity*

nical trust as to make applicable the rule govern trustees.⁷

§ 2019. Discovery of fraud.

One who with reasonable diligence might have discovered fraud or fraudulent concealment is chargeable with the fraud from the time when it should reasonably have been discovered. This is so provided by statute in England as to real estate, at least,⁸ and in the absence of statute, a similar rule has been applied in the United States.⁹ On discovery of the fraud by him to sue, a plaintiff is entitled generally not to the full or reasonable additional time for bringing action, but to the full statutory period computed from the discovery;¹⁰ in some jurisdictions the statutes prescribe either an absolute period beyond which the action cannot be delayed even if the fraud is discovered, or fix a period after the discovery of the fraud, within which action must be brought.¹¹

Bank of America & Deposit Co., 131 Ga. 854, 63 S. E. 622, 21 L. R. A. (N. S.) 962; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *Wilder v. Secor*, 72 Ia. 161, 33 N. W. 448, 2 Am. St. 236; *Blackeney v. Wyland*, 115 Ia. 607, 89 N. W. 16; *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58; *McCoon v. Galbraith*, 29 Pa. 293; *Cobb v. First Nat. Bank*, 91 Texas, 226, 42 S. W. 770. But see *Birkhead v. DeForest*, 120 Fed. 645, 57 C. C. A. 107. Failure to notify the other party of a mistake by him in making an over-payment, will not extend the period of the statute. *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; *Evert v. Tower*, 51 Wash. 514, 99 Pac. 580, 21 L. R. A. (N. S.) 950. See also *Sankey v. McElevey*, 104 Pa. 265, 49 Am. Rep. 575.

⁷ See *infra*, § 2033.

⁸ 3 and 4 William IV. c. 27, § 26. See *Lawrence v. Norreys*, 15 A. C. 210; *Willis v. Howe*, [1893] 2 Ch. 545.

⁹ *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Swift v. Smith*, 79 Fed. 709, 25 C. C. A. 154; *Sedalia School*

Dist. v. DeWeese, 100 F. v. Kansas L. & T. Co. 41 C. C. A. 106; *Simmons v. McDonald*, 135 Cal. 599, 67 Pac. 135; *Arnaud*, 144 Ga. 26, 88 S. E. 100; *McDonald v. Bayard*, 123 Iowa, 413, 98 N. W. 100; *v. Black*, 64 Kans. 688; *Donaldson v. Jacobitz*, 61 Pac. 846; *Shakopee First Nat. Bank v. Strait*, 71 Minn. 69, 70 N. W. 107; *Hudson v. Kimbrough*, 20 So. 885; *Callan v. Callan*, 346, 74 S. W. 965; *Cole v. Cole*, 146, 93 N. W. 1003; *Beck v. Co. v. Willow Springs* (Neb.), 176 N. W. 80; *Crouse*, 147 N. Y. 411, 10 N. E. 6; *Smith v. Blachley*, 190, 47 Atl. 985, 53 L. R. A. 100; *James*, 83 Tex. 110, 18 S. W. 2d 100; *Irwin v. Holbrook*, 32 Vt. 360.

¹⁰ *Oelkers v. Ellis*, [1893] 139, 150. And see case preceding sections, *passim*.

¹¹ *Porter v. Smith*, 6

§ 2020. Ignorance of facts.

Ignorance of the plaintiff of his rights or of the facts on which his rights are based, when such ignorance is not due to fraudulent concealment by the defendant, is not generally held to prevent the running of the statute.¹² In a few statutes, however, ignorance in special cases is made a ground for not computing the statutory period until the injured party knew, or should have known, the facts. A few decisions, also, without statutory authority, have applied the same principle to ignorance that has been applied to fraudulent concealment. The Pennsylvania Supreme Court has held that where a defendant had trespassed on the plaintiff's land by mining coal under it, of which the plaintiff was ignorant, the statute ran only from the discovery of the facts, or from the time when the discovery might have been made,¹³ saying: "Mere ignorance will not prevent the running of the statute in equity any more than at law; but there is no reason, resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer."¹⁴

Heflin v. Ashford, 85 Ala. 125, 3 So. 760; *Nave v. Price*, 108 Ky. 105, 55 S. W. 882; *Ruff v. Milner*, 92 Mo. App. 620.

¹² *Granger v. George*, 5 B. & C. 149; *Howell v. Hair*, 15 Ala. 194; *Campbell v. Long*, 20 Ia. 382; *Lougee v. Reed*, 133 Ia. 48, 110 N. W. 165. To these cases may be added *a fortiori* the minority decisions which hold that even though a defendant has fraudulently concealed the cause of action, the period of the statute is not thereby extended, see *supra*, § 2017, and those which hold that though fraudulent concealment may prevent the statute from running, mere silence does not amount to fraudulent concealment. See *supra*, § 2018.

¹³ *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684.

¹⁴ The court added: "In the English

courts this question has arisen quite frequently. The old rule applied in the courts of law was that the statute might be successfully pleaded as running from the date of the trespass. In the courts of equity where an account for the coal that has been taken was asked for, it was applied only from the discovery of the trespass: *McSwinnny on Mines*, 543; see also *Hovenden v. Lord Annesley*, 2 Sch. & L. 607, 634. If after discovery, or the happening of any circumstances calculated to put the owner on notice, he slept on his right till the statutory period had expired he was held bound by the statute in equity precisely as he would have been at law. If he knew, or if by the exercise of reasonable care he might have known of the trespass, the statute ran from the discovery, or the time when discovery could have been made. *Bainbridge on Mines*,

In a decision in the District of Columbia ment was applied to a breach of warranty.¹⁵

515, 516. It was against good conscience to permit one who had taken the property of another without the owner's knowledge, and who had failed to disclose or to account for what he had taken, to avail himself of the statute while the owner remained in ignorance of his loss. When compensation was sought by means of a bill for an account it was held that the statute began to run at the time of discovery regardless of the time of taking. The same question was also encountered in actions to recover for injuries done on the surface by subsidence due to the withdrawal of support. When the action was trespass, it was generally held that the statute ran from the date of the removal of the support which was the trespass to which the injury was due; but when the action was case the subsidence was treated as the consequence of the wrongful removal of the coal or other underlying stratum, and the damages suffered as consequential. The happening of the injury was upon this ground held to give a cause of action against which the statute would run only from its date. The removal of the supports might not be known to, or be discoverable by, the owner of the surface until the subsidence revealed it; and unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied altogether. 34 L. J. Q. B. 181; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Smith v. Thackerah*, 15 Am. Law Reg. (N. S., vol. 5), 761, and note. The reason for the distinction exists in the nature of things. The owner of land may be present by himself or his servants on the surface of his possession no matter how extensive they may be. He is for this

reason held to present wherever he cannot be present in earth. No amount enable him to detect a trespasser who may pass through the coal way through the coal adjoining lands. . . to hold therefore that against an injury on lower stratum from discovery, or the time was reasonably possible enough for the purpose to hold that inasmuch administered in this common-law form of tort need not be turned of law in order to be equity side of the may not be entitled damages but he is entitled satisfaction in the same would have been on account. For this purpose rule that the statute from discovery, or a recovery might have been be applied by courts.

¹⁵ In *P. H. Sheehy (ern I. & Mfg. Co., 44 110, L. R. A. 1916 F said: "The contention judgment below is that is sold with a warranty the cause of action for warranty occurs immediately sale and delivery of the Statute of Limitations from that time.*

"The following authority upon in support of it 25 Cyc. 1091, 1092; *Barnes*, 3 Barn. & Ald. 2 Rep. 390; *Brackett v. I App. 249, 87 Pac. 410; & Co. v. Smith (Tex. C*

§ 2021. Laches of creditor in removing disability to sue.

"The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."¹⁶ Thus, though the Supreme Court of Kansas has always held that the death of the debtor suspends the operation of the Statute of Limitations,¹⁷ it has also held that the operation of the statute is suspended after the death of the debtor for the fifty days only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the fifty days;^{17a} and this decision was not only accepted by the Supreme Court of the United States as establishing the law of Kansas, but was stated to be "in accord with well-settled principles."¹⁸

W. 705; *Allen v. Todd*, 6 Lans. 222; *Baucum v. Streater*, 50 N. C. (5 Jones L.) 70. Of the cases cited above only one, *Allen v. Todd*, directly supports the proposition.

"It cannot be said that a person should assert a right before he has knowledge of, or is chargeable with knowledge of, the same. He must ordinarily have had such opportunity to ascertain his position as would be sufficient in the case of a man of ordinary intelligence and prudence under the circumstances of the case. . . . If, then, it was not practicable for plaintiff to discover the true condition of the sardines, it ought to be allowed a reasonable time within which to make that discovery, and the statute of limitations would not begin to run until such time. *Shearer v. Park Nursery Co.*, 103 Cal. 415-419, 42 Am. St. Rep. 125, 37 Pac. 412; *Felt v. Reynolds Rotary Fruit, etc., Co.*, 52 Mich. 602, 604, 18 N. W. 378; *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. 536, 543, 28 L. R. A. 283, 45 Am. St. Rep. 684, 31 Atl. 261; *Beach v. Branch*, 57 Ga. 362-366."

So in *Texas & P. Ry. Co. v. R. W.*

Williamson & Co., 106 Tex. 294, 187 S. W. 354, it was held that "where cotton was shipped on a through bill of lading from Texas *via* New Orleans to Liverpool, England, and a portion of it destroyed by fire while in defendant's possession, the consignor not being under duty to keep track of the shipment while in transit, the Statute of Limitations did not begin to run till plaintiffs, not being negligent, actually learned of the non-delivery."

¹⁶ *Bauserman v. Blunt*, 147 U. S. 647, 656, 37 L. Ed. 316, 13 S. Ct. 466, citing *Richards v. Maryland Ins. Co.*, 8 Cranch, 84, 3 L. Ed. 496; *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895; *United States v. Wiley*, 11 Wall. 508, 513, 514, 20 L. Ed. 211; *Kirby v. Lake Shore & M. S. Railroad*, 120 U. S. 130, 140, 30 L. Ed. 569, 7 S. Ct. 430; *Amy v. Watertown*, 130 U. S. 320, 325, 32 L. Ed. 953, 9 S. Ct. 537.

¹⁷ *Toby v. Allen*, 3 Kana. 399; *Hanson v. Towle*, 19 Kana. 273; *Nelson v. Herkel*, 30 Kana. 456.

^{17a} *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051.

¹⁸ *Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316.

§ 2022. Exceptions to the rule that the statute begins to run upon a contract as soon as a cause of action arises upon it.

Aside from any question of disabilities or of fraud, there are at least six exceptions to the general rule that the statute begins to run upon a contract as soon as a cause of action arises upon it.

1. Where the breach of either a bilateral or unilateral contract is insufficient to support an action for a total breach of contract. This may occur (a) where the breach is not sufficiently material, (b) where the breach is the non-performance of a part of a debt, the whole of which is not due, or (c) where the contract is an independent obligation for continuing performance.

2. Where the plaintiff though entitled to maintain an action for an entire breach of contract, may elect to have the statute begin to run upon a part of the contract, and does so elect.

3. Where the plaintiff has undertaken a continuing performance though consisting of several items, and though he has expressly or impliedly promised to do so at any particular time.

4. Mutual accounts.

5. Where there is a fiduciary relation between the parties.

In these five cases the statute does not begin to run until a cause of action accrues. In a sixth exception the statute begins to run before the cause of action has accrued, where the plaintiff has the power at any moment to make a demand to give himself a right of action.

§ 2023. Immaterial breach.

Since a breach of contract may be so slight as to give rise to a recovery by the injured party of entire damages, and in case of a bilateral contract may not give rise to an action on his part in refusing to continue performance on his own part, a cause of action for breach of the entire contract begins to run, and though by delay for the statutory period, he loses his right to recover damages for the slight breach which has already occurred, as a separate injury, yet if later the breach becomes material, or another and a material breach occurs, a new cause of action arises.

¹⁹ See *supra*, § 842.

mitted, the statutory period in an action for the entire breach of the contract should be calculated from the time when the plaintiff was first able to sue for an entire breach of the contract.²⁰

§ 2024. Instalment debts.

When an obligation, whether unilateral or bilateral, for any performance except the payment of money is substantially broken, the law transmutes the contractual obligation into a right of action for money damages. How far this principle may be varied by the election of the injured party to continue the contract will be presently considered.²¹ It is, however, inapplicable to unilateral or independent obligations for the payment of money. Where money is promised as one of two dependent promises a substantial breach of contract involves a right to unliquidated damages,²² and where a unilateral obligation for any performance other than the payment of money is substantially broken the same is true. This is doubtless because the law cannot give the injured person exactly what he was promised; but an obligation to pay money, originally unilateral, or becoming so by performance on the part of the creditor, remains after breach an obligation to pay that sum of money, and if by its terms the money is payable in instalments, no breach, however serious, as to earlier instalments can resolve the creditor's right into a single claim for damages on the entire contract. A separate cause of action arises on each instalment and the statute runs separately against each.²³

²⁰ In *Douglass v. Railroad Co.*, 51 W. Va. 523, 532, 41 S. E. 911, the court said: "I do not see that omission to make fences or cattle guards alone calls for any damage, certainly not for compensatory damages. If there could be an action for nominal damages simply for such omission, as I suppose there can be, I do not see how it would be barred under a covenant to build and maintain them; but when actual loss occurs from that omission as the proximate cause, limitation runs from the date of the loss, as to compensatory damages, and the date of the con-

struction of the road, or when the fences or guards should have been made is immaterial."

²¹ *Infra*, § 2027.

²² Where the seller of personalty is allowed to recover the contract price on breach of an executory contract to sell, there is no real exception because the property passes to the buyer though it may be against his will (see *supra*, §§ 1365 *et seq.*), and thereupon the debt for the price is a unilateral obligation.

²³ This was otherwise in the early law. See *supra*, §§ 1290, 1292, n.

Thus where instalments of compensation for been earned,²⁴ or where any unilateral money payable in instalments,²⁵ the statute runs on ea as it becomes due.

Where interest is due on a debt if no time wa contract for the payment of interest, the statute on the obligation to pay interest until the prin And even though by the terms of the contract ir able at a particular time, it has been held that int run on this obligation until the principal or some is payable.²⁷ But as there is no doubt that an action will lie before maturity of the principal contracted to be paid at stated times,²⁸ the con

²⁴ In *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 173, 46 N. E. 439, the court said: "Where an attorney is conducting a single suit, it has been held that the Statute of Limitations cannot commence running until the services contracted for have been performed by the ending of the suit, or by the termination of the retainer in some other mode. (*Walker v. Goodrich*, 16 Ill. 341.) But where attorneys are regularly employed at a salary given for advice and legal superintendence and other services rendered from day to day, there is no reason why they should not stand upon the same footing as other salaried employees so far as the Statute of Limitations is concerned. . . ." (Citing *Phillips v. Bradley*, 11 Jur. 264; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mosgrove v. Golden*, 101 Pa. St. 605; *Hale's Exrs. v. Ard's Exrs.*, 48 Pa. St. 22.) "In other words, where wages are due at fixed times, the statute runs from the date when due." (Citing *Mims v. Sturtevant*, 18 Ala. 359; *Beach v. Mullin*, 34 N. J. L. 343; *In re Gardner*, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768; *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694; *Rider v. Union India Rubber Co.*, 5 Bosw. 85; *Turner v. Martin*, 4 Rob.

661; *Butler v. Kirby*, N. W. 373.) To the added *St. Louis, I. M. Love*, 74 Ark. 528, 86 *way v. Missouri Land* 649, 86 S. W. 150; *Ca* 202 N. Y. 483, 487, *L. R. A. (N. S.) 922*; *B* 19 *Oreg.* 482, 24 *Pac.* *Silver Brook Coal Co.*,

²⁵ *Davis v. Herring* 13 S. W. 215; *De Up* 23 *Cal.* 352; *Gaston* *Cal.* 542, 46 *Pac.* 609, 86; *Washington L. & T* 21 *D. C. App. Cas.* *Barnes*, 21 *Ia.* 305, 30 *Adams*, 28 *Ia.* An. 59 *Brown*, 23 *Me.* 400; *S* *v. Gooding*, 175 *Mo.* *S. W.* 333; *Berry v. Do* *L.* 399; *Robertson v.* *N. C.* 302; *Pelton v. I* *St.* 51, 4 *N. E.* 714; *B* 71 *Pa. St.* 208, 10 *Am.* *bert v. Haywood*, 37 *Atl.* 625 (alimony).

²⁶ *Greenwood v. Fen* 573, 74 *N. W.* 843.

²⁷ *DeCordova v. Galv* 470; *Grafton Bank v. D* 47 *Am. Dec.* 697.

²⁸ *Walker v. Byrd*,

preferable.²⁹ Where coupons for interest are attached to a money obligation, the coupons being separable and independent obligations,³⁰ it is well settled that the statute runs upon them separately,³¹ even though the coupons have not been detached.³²

The expiration of the time permissible for bringing action for non-performance of one instalment will not bar an action for subsequent defaults in the performance of a contract if it still continues in force.³³ Analogous in principle is a promise to render a certain performance on each occasion when a contingency shall happen. A promise by a surety company to indemnify the obligee of a bond whenever loss occurs from a specified cause, gives a separate right for each such occasion.³⁴

§ 2025. Acceleration of maturity.

Contracts frequently provide that on failure to pay one of several instalments at maturity the whole performance becomes due. English courts have interpreted this literally and have therefore held that after lapse of the statutory period from the

Calhoun v. Marshall, 61 Ga. 275, 34 Am. Rep. 99; *Wehrly v. Morfoot*, 103 Ill. 183; *Bahr v. Arndt*, 9 Ia. 39; *Hershey v. Hershey*, 18 Ia. 24; *Carter v. Carter*, 76 Ia. 474, 41 N. W. 168; *Bannister v. Roberts*, 35 Me. 75; *Andover Savings Bank v. Adams*, 1 Allen, 28. Interest so contracted for may also be recovered in a separate action after maturity of the principal. *French v. Bates*, 149 Mass. 73, 79, 21 N. E. 237, 4 L. R. A. 268.

²⁹ The statute was held a bar to recovery of interest more than six years before the action in *Dearborn v. Parks*, 5 Me. 81, 86, 17 Am. Dec. 206.

³⁰ *Nesbit v. Riverside District*, 144 U. S. 610, 36 L. Ed. 562, 12 S. Ct. 746; *Edwards v. Bates County*, 163 U. S. 269, 41 L. Ed. 155, 16 S. Ct. 967.

³¹ *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Nash v. ElDorado County*, 24 Fed. 252; *Griffin v. Macon*

County, 36 Fed. 885, 2 L. R. A. 353; *Reynolds v. Lyon County*, 97 Fed. 155; *Smythe v. Inhabitants of New Providence*, 253 Fed. 824; *Broadfoot v. Fayetteville*, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; *Galveston v. Loonie*, 54 Tex. 517. The statutory period applicable to the bonds is also applicable to the coupons, though it begins to run at a different time. *Smythe v. Inhabitants of New Providence*, 253 Fed. 824.

³² *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228.

³³ Breach of one instalment of a divisible contract may, however, operate as a breach of the entire contract. See *supra*, § 866.

³⁴ *Sanders v. Coward*, 13 M. & W. 65; *Deposit Bank v. Hearne*, 104 Ky. 819, 48 S. W. 160; *Thruston v. Blackiston*, 36 Md. 501, 510; *McKim v. Glover*, 161 Mass. 418, 37 N. E. 444; *Green v. Petersen*, 218 N. Y. 280, 112 N. E. 746.

first failure no recovery can be had even for a subsequent instalment,³⁵ and the same rule has been in some cases in the United States.³⁶ It seems, however, that the construction of such a provision—obviously intended solely for the advantage and security of the creditor—that the acceleration of maturity does not occur until the creditor so elects, even though in terms the provision runs on the entire obligation from the first default. Often the contract expressly gives the creditor the election. There can then be no question that the statute will run on the entire obligation from the first default if the creditor has manifested an intent that maturity of the instalments shall be accelerated.³⁸ But when the creditor has not manifested the election the statute will run from the date of the default on which the election is based, not from the date of the first failure itself.³⁹

³⁵ *Hemp v. Garland*, 4 Q. B. 519; *Reeves v. Butcher*, [1891] 2 Q. B. 509; *McFadden v. Brandon*, 8 Ont. L. Rep. 610; *Manitoba &c. Co. v. Daly*, 10 Manitoba L. Rep. 425.

³⁶ *Canadian Birkbeck &c. Co. v. Williamson* (Idaho), 186 Pac. 916; *Sturgis First Nat. Bank v. Peck*, 8 Kan. 660; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac. 576; *Van Arsdale-Osborne Co. v. Martin*, 81 Kan. 499, 106 Pac. 42; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 986; *Central Trust Co. v. Meridian Light & Ry. Co.*, 106 Miss. 431, 63 So. 575, 51 L. R. A. (N. S.) 151; *Green v. Frick*, 25 S. Dak. 342, 126 N. W. 579; *San Antonio Real Estate, etc., Assoc. v. Stewart*, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; *Kelly v. Kershaw*, 5 Utah, 295, 14 Pac. 804; *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209.

³⁷ *Moline Plow Co. v. Webb*, 141 U. S. 616, 35 L. Ed. 879, 12 Sup. Ct. 100; *Richardson v. Warner*, 28 Fed. 343; *Keene Five Cents Sav. Bank v. Reid*, 123 Fed. 221, 59 C. C. A. 225; *Phillips v. Taylor*, 96 Ala. 426, 11

So. 323; *Mason v. Lu*, 48 Pac. 72; *Richardson v. Cal.*, 336, 48 Pac. 220; *45 Colo.*, 304, 101 Pac. (N. S.) 1110, 132 Am. St. Rep. 495; *Watts v. Hoffman*, 71 N. W. 12; *Lowenstein v. Neb.*, 429, 22 N. W. 56; *50 N. J. Eq.*, 176, 24 A. 1; *hart v. Detrick*, 91 N. W. 1; *Walter*, (Tenn.), 41; *White v. Krutz*, 37 Wa. 495.

³⁸ *Sherwood v. Will*, 312, 45 S. W. 988; *Blair v. Ill.*, 116 App. 83; *Insur. Am. v. Martin*, 151 Ind. 361; *York-Ritchie &c. Co. v. 6 Kan. App.*, 317, 51 Pa. 552; *Spillman*, 85 Kan. 552; *Heburn v. Reynolds*, 7; *73*, 132 N. Y. S. 460; *v. Maples*, 123 N. Y. App. N. Y. S. 1047; *Bowman (Tex. Civ. App.)*, 47 S. 54; *v. Columbia &c. Assoc.*, 95 Pac. 54.

³⁹ *Lovell v. Goss*, 45 (N. Y. S. 1047; *Bowman (Tex. Civ. App.)*, 47 S. 54; *v. Columbia &c. Assoc.*, 95 Pac. 54.

§ 2026. Continuing securities.

Though it seems that generally on breach of a unilateral or independent promise other than for the payment of money as well as on breach of a bilateral contract, a right of action arises in substitution for the contract itself, if the breach is either necessarily material or is accompanied by total repudiation,⁴⁰ there is at least one case where that is not true. Where the purpose of a unilateral or independent obligation, as an insurance policy, a fidelity bond or continuing guaranty is to give continuing security the law does not allow the purpose of the parties to be defeated by the substitution of a single right of action for the obligation, as soon as a material breach has occurred. In such a case each breach gives rise to a separate cause of action.⁴¹

⁴⁰ In *Schell v. Plumb*, 55 N. Y. 592, an action for breach of a contract to support the plaintiff for life, the consideration for the promise having been fully performed, the court said of the defendant's obligation: "That was a continuing contract during that period, but the contract was entire and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages."

On the other hand, in *McCay v. McDowell*, 80 Iowa, 146, 45 N. W. 730, the court, while admitting that an action for damages for the entire value of such a contract for support might have been maintained more than the statutory period prior to the action, held that though recovery must be limited to damages sustained within the statutory period, the fact that more than that period had elapsed from the defendant's repudiation of the contract did not bar the action altogether.

In *Whitley v. Whitley's Admr.*, 26 Ky. L. R. 134, 80 S. W. 825, a similar ruling was made, though the evidence did not so clearly indicate any absolute repudiation by the defendant prior to the statutory period.

Cf. with these decisions, *Davis v. Brown*, 98 Ky. 475, 32 S. W. 416, 36 S. W. 534, where an action for damages for breach of a contract not to sell buggies in a particular town was held barred after the lapse of five years from the date of the contract, the defendant having continuously disregarded the contract from the time it was made. The fact that the breaches for which the plaintiff sought to recover occurred within the statutory period was held not to prevent the statute from operating as a bar.

⁴¹ In *Green v. Petersen*, 218 N. Y. 280, 112 N. E. 746, the court said of a fidelity bond: "We think that the bond was intended as a continuing security; that each breach as it was committed gave rise to a separate cause of action; and that the loss through lapse of time of the remedy for one wrong has therefore no effect upon the remedy for the others. *Austin v. Moore*, 7 Metc. 116; *McKim v. Glover*, 161 Mass. 418, 421, 37 N. E. 443; *Thayer v. Keyes*, 136 Mass. 104; *Deposit Bank of Midway's Assignee v. Hearne*, 104 Ky. 819, 48 S. W. 160. [See also *Sanders v. Coward*, 13 M. & W. 65, 71.] The defendant refers to cases in which it has been

§ 2027. Where the plaintiff elects to continue performance of a contract.

After a material breach by the defendant, of a contract in damages, it may be supposed either the plaintiff wishes to continue performance or that he does not to do so. In the first case the injured party may sue to continue performance if he so desires,⁴² and if another breach occurs, an action may be maintained for damages suffered by the defendant's failure to perform of the contract, or for recovery of the amount paid by the plaintiff on the theory of rescission although more than the statutory period has elapsed since the first breach.⁴³ In an action on the contract, however, that no damages can be recovered for the earlier breach.

If the defendant is unwilling to continue performance as indicated this by the character of the breach which has been committed, or by repudiation or otherwise, the injured party is held that, however numerous the breaches assigned in the complaint, the cause of action on such a bond is single and entire. *Lyman v. Broadway Garden Hotel Co.*, 33 N. Y. App. Div. 130, 53 N. Y. S. 347; *State v. Davis*, 35 Mo. 406; but there is nothing in those cases hostile to our conclusion. Causes of action divisible and separate as they arise, may, after they have arisen coalesce, and, at least for some purposes, become inseparable and single. The rule against splitting a cause of action is an everyday example of that truth. The seller of goods may sue for each instalment of the price as it matures; but if he waits till a later instalment becomes due, he must combine all that are in default. *Secor v. Sturgis*, 16 N. Y. 548; *Perry v. Dickerson*, 85 N. Y. 345, 348, 39 Am. Rep. 663; *Lorillard v. Clyde*, 122 N. Y. 41, 45, 25 N. E. 292, 19 Am. St. Rep. 470. The landlord who sues for rent is subject to like restrictions. *Kennedy v. City of New York*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847. But

the rule against splitting a cause of action is that because the remedy for late payment of an instalment is lost through the remedy for late payment of the whole also lost. The only remedy for late payment of an instalment which has been included is that the plaintiff may sue upon again. It is held that successive breaches of a bond create a single cause of action. The remedy for one breach is not by without prejudice to the remedy for others. For the purpose of the Statute the effect of the Statute is that the wrongs are distinct.

⁴² See *supra*, § 683.

⁴³ In *Richter v. Union*, 129 Cal. 367, 375, 61 P. 2d 1001, the court said: "The plaintiff is bound to treat the contract as a whole and not as a series of breaches. The election to sue on the first breach is an election to rely on the statute and not on the contract. The plaintiff cannot make his election to sue upon the contract and then sue for money paid to the defendant."

should never be allowed to continue performance where by so doing he will enhance damages.⁴⁴ But as matter of positive law he is allowed to do so in some jurisdictions in case of anticipatory repudiation,⁴⁵ and perhaps in other instances, It must be true that wherever a plaintiff has such a right of election, his remedy for breach of the contract will not be barred until the statutory period has run from the ultimate breach.⁴⁶

⁴⁴ See *supra*, §§ 1298 *et seq.*

⁴⁵ *Ibid.*

⁴⁶ In *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. 922, the plaintiff sued after the death of the promisor to recover upon a promise to pay the plaintiff (besides a monthly stipend), \$20,000 at the testator's death in return for board and care to be furnished by the plaintiff during the promisor's life. After about a year, the promisor left the plaintiff intending never thereafter to permit the plaintiff to care for her. Though the court admitted that the plaintiff might have brought an immediate action for total breach of the contract, it held that she might elect to wait until the promisor's death and enforce her right then, in spite of the fact that more than the statutory period had elapsed since the promisor repudiated her contract. The court said (p. 488): "It may be that but one cause of action exists in favor of the plaintiff for the breach of the \$20,000 clause of the contract, and that such an action could have been maintained at the time the decedent left the plaintiff's house and went to reside elsewhere. But in view of the fact that the plaintiff might meet with misfortune, disabling her from carrying out her part of the contract to care for the decedent 'in sickness and in health as long as she lives,' thus rendering the determination of the amount of her damages uncertain and difficult to prove, she saw fit to wait until the amount specified in the contract became due by the terms thereof. Did she have the right to do this? In

answering this question we shall assume for the purpose of this review only, that the breach of the testatrix's contract was of such a character as to amount to a notice to the plaintiff that she would not carry out the provision with reference to the giving her \$20,000 at the testatrix's decease, and that an action for damages could have been maintained immediately after such breach. The question thus arises as to whether the plaintiff was bound to treat the contract as broken and bring her action, or might she at her option treat the contract as still in force, and wait until the sum specified became due under its terms?" See also *Heery v. Reed*, 80 Kans. 380, 102 Pac. 846. Cf. *Paul v. Snyder*, 52 Ind. App. 291, 100 N. E. 571; *Bonesteel v. Van Etten*, 20 Hun, 468; *Henry v. Rowell*, 31 N. Y. Misc. 384, 64 N. Y. S. 488, *affd.* 63 N. Y. App. D. 620, 71 N. Y. S. 1137. The decision of *Ga Nun v. Palmer*, *supra*, seems open to question. The promised legacy was part of the compensation which the plaintiff was to receive for giving board and services. To allow the plaintiff to sue for the legacy as such when she had not given the board or rendered the services, seems open to the same objection as allowing an employee to sue periodically for wages after he has been wrongfully discharged. If an employee, employed for ten years at a monthly salary with a bonus payable at the end of the period, is wrongly discharged in the first year, can he wait ten years and then sue for the bonus? See *supra*, § 1361.

On the other hand, assuming that he has a right of manifestation of an intent to abandon the contract, the statute run from the earlier breach.⁴⁷⁻⁴⁸

§ 2028. Contracts for continuous determinate per

Where one of the parties to a contract has rendered services extending over a period of time, and makes no provision for payment in instalments, supposed:

(a) That the promise to pay for the service is indivisible and that no right of action on the contract arise until the performance has been rendered;

(b) That the defendant's promise though not indivisible and though specifying no precise times for payment support an action after partial performance for the value of what was done.

Though these two situations are logically distinct, it is not always easy to distinguish in practice. For the law does not always require an exceptional rule. No contractual liability arises until the end of the service, though it is true that in some jurisdictions the plaintiff might maintain an action for the benefit which the defendant had received by partial performance even though no definite price were fixed by the contract for each part.⁴⁹ But this fact will not preclude recovery on the contract at the end of the service in question, or at any time within the statutory period thereafter, for the value of the whole performance, though part of it was rendered before the statutory period. And this is true not only where the defendant's promise is in terms to pay after the service,⁵⁰ but generally also where there is only such a promise to pay as is implied from a request to perform the services,⁵¹ as where an attorney is employed to

⁴⁷ *McCurry v. Purgason*, 107 N. Car. 463, 471, 87 S. E. 244, Ann. Cas. 1918 A. 907, 911. See also *Messier v. Messier*, 34 R. I. 233, 82 Atl. 996.

⁴⁸ See *supra*, §§ 1473-1477.

⁴⁹ *Myers v. Saltry*, 163 Ky. 481, 173 S. W. 1138, Ann. Cas. 1916 E. 1134; *Benge's Adm. v. Fouts*, 163 Ky. 796,

174 S. W. 510; *Whitehead v. Whitehead* (Tex. Civ. App.), 168 S. W. 2d 761. See also *Scott v. Wilson* (Iowa), 134 Iowa 761.

⁵¹ *Whitehead v. Lord*, 134 Iowa 761; *Carte v. Carter*, 28 Ill. App. 116; *Snuley*, 9 Ind. 116; *Ca*, 40 Ia. 38; *In re Oldfield*

specific litigation.⁵² As has been said, however, this is no exception to the general rule that the statute runs from the time when the plaintiff might maintain his action, since the plaintiff's right to sue at the earlier date in the case supposed is based on quasi-contract, not on the express contract, and does not arise as the services are rendered but when the law creates an obligation in substitution for the express contract. The rule is the same where the express contract is within the Statute of Frauds and the plaintiff's only right is quasi-contractual. Thus where an oral promise to leave property by will is made in consideration of services to be rendered during the promisor's life, on failure of the employer to carry out the promise, thereby remitting the promisee to a quasi-contractual claim for the value of his services, "the Statute of Limitations begins to run against such a claim for services, based upon a *quantum meruit*, not as the services are rendered, but at the death of the promisor, when the obligation matures."⁵³

98, 138 N. W. 846, 175 Ia. 118; 156 N. W. 977; *Shafer v. Pratt*, 79 N. Y. App. D. 447, 80 N. Y. 109; *Darwin v. Smith*, 35 Vt. 69.

In *O'Brien v. Sexton*, 140 Ill. 517, 523, 30 N. E. 461, the court said: "Undoubtedly the general rule is that, where there is no special contract, the law will imply an agreement to pay for the materials as delivered, and the work as done. But where one continuous piece of work, consisting of a number of parts or items, is to be performed, the Statute of Limitations does not begin to run upon the completion of each separate part or item, but upon the completion of the whole. If the several items are merely parts of one transaction, the statute begins to run from the date of the last item, and all the others are saved from the bar. 'Each item is not to be regarded as a separate cause of action, but the whole rather as a continuous dealing.' (*Frankoviz v. Smith*, 34 Minn. 403, 26 N. W. 225, and cases there cited.) In *Hall v. Wood*, 9 Gray, 60, the action was on the common counts with a bill of

particulars, containing some items which bore date more than six years before the beginning of the suit; and it was held that recovery could be had for the full amount, notwithstanding the Statute of Limitations, as the whole work was done under an entire contract."

⁵² *McNeil v. Garland*, 27 Ark. 343; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 173, 46 N. E. 439; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Hale's Exec. v. Ard's Exec.*, 48 Pa. 22. Cf. *Carter v. Canty* (Cal.), 186 Pac. 346.

⁵³ *Quirk v. Bank of Commerce*, 244 Fed. 682, 688, 157 C. C. A. 130, citing *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703; *In re Kessler's Estate*, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74. To the same effect are: *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777; *Leahy v. Campbell*, 70 N. Y. App. D. 127, 75 N. Y. S. 72; *Miller v. Lash*, 85 N. C. 51, 39 Am. Rep. 678. See also *Vanhorn v. Scott*, 28 Pa. 316. But see *contra*, *Nelson v. Christensen* (Wis.), 172 N. W. 741;

Cases of the second type where an action may on the contract, express or implied in fact, from as work progresses, though the contract is not in t and perhaps not even the rate of compensation for any portion of the work,⁵⁴ logically involve th that the statute runs in regard to each portion of which compensation could have been separat from the time when such recovery was possible; cisions cited in the following section seem to indic jurisdictions would adopt a more lenient rule.

§ 2029. Contracts for continuous indeterminate

In considering the decisions, where neither the employment or services, nor the time of payment construction must first be put upon the agreeer must be determined whether in the particular ju law regards the employment as by the week, the year, or any other specified period, or merely at v this question is once determined, what has alrea sufficiently indicates when the statute will begi the employee's right to compensation for services r rendered, except when the agreement is construed tinuing merely at the will of each party. The agr creates no contract of itself, but as the employee v comes entitled to pay for what he has done. He c any time and recover this. Logically, therefore, more than the statutory period before the action t be no recovery; but probably because the failure tract to fix a precise time of payment may thro burden on the plaintiff if he is compelled at his pe mine the exact moment when he has a right of action in many jurisdictions will not begin to run until the

and *cf.* *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399.

⁵⁴ See *Roberts v. Havelock*, 3 B. & Ad. 404; *Shuler v. Cori* (Cal. App.), 178 Pac. 535; *Wagner v. Edison Electric Ill. Co.*, 177 Mo. 44, 75 S. W. 966; *In re Gardner*, 103 N. Y. 533, 9 N. E.

306, 57 Am. Rep. 768; *Judson*, 109 N. Y. App. N. Y. S. 147 (*Cf. Shafe* N. Y. App. D. 447, 80

⁵⁵ See *California and N* in the preceding note.

⁵⁶ See *supra*, § 39.

of the performance.⁵⁷ In a few jurisdictions, however, it is held that the statute begins to run on the right of compensation for each portion of the service as it is rendered.⁵⁸

⁵⁷ *Crampton v. Logan*, 28 Ind. App. 405; *Grisham v. Lee*, 61 Kans. 533, 60 Pac. 312; *Carter v. Carter*, 36 Mich. 207; *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352.

⁵⁸ *Ditch v. Wilkinson*, 10 La. 201; *Dempsey v. McNabb*, 73 Md. 433. See also *Carter v. Canty* (Cal.), 186 Pac. 346; *Wagner v. Edison Electric Ill. Co.*, 177 Mo. 44, 75 S. W. 966; *In re Gardner*, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768.

In *Schaffner v. Schaffner*, 98 Kans. 167, 168, 157 Pac. 402, the court said, the plaintiff "was to be paid the same sum he was receiving per month, not period by period, but as long as he worked. Consequently the promise was a continuing promise to pay, kept alive by continuous performance on the part of the appellee and effective at the termination of the employment for the entire time. There was no evidence of any usage or custom fixing the time of payment under circumstances of the character stated and the rule announced in the case of *Grisham v. Lee*, 61 Kans. 533, 60 Pac. 312, is applicable: 'If there is a single hiring, and the term of service of the employee and, also, the time when his compensation shall become due are not fixed by agreement or understanding, and the hiring and service continue without interruption or payment until the death of the employer, the employment, in the absence of the evidence of a general custom or usage, may be deemed continuous, and the Statute of Limitations will not begin to run against a claim for compensation until the services are ended.'"

In *Grisham v. Lee*, 61 Kans. 533, 538, 60 Pac. 312, the court cited in support of the passage quoted above: *Little v. Smiley*, 9 Ind. 116; *Carter v. Carter*, 36

Mich. 207; *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Hauser v. Sain*, 74 N. C. 562; *Schoch v. Garrett*, 69 Pa. St. 144; *Kansas Pacific Ry. Co. v. Robertson*, 3 Colo. 142; *Jackson v. Mull*, 6 Wyo. 55, 42 Pac. 603; *Hall v. Wood*, 9 Gray, 60.

In *Jackson v. Mull*, 6 Wyo. 55, 65, 42 Pac. 603, speaking of an action to recover expenses in the support and education of a child, the court said: "Had it clearly appeared, or had it been clearly expressed in a contract between the parties, that the plaintiff should from time to time, according to the necessities of the child, furnish and provide her with clothing, wearing apparel, and other articles in question, and the defendant should repay to her any such expenditures; or that the defendant had made a general request that the plaintiff keep the child well and suitably provided in the respect indicated; and in either such case the plaintiff complied therewith, the transaction would have been a continuing one; each item of expenditure would then relate back to the original agreement or request and thus each item would be related to each other and the statute would not run except from the date of the last item."

The court distinguished a case where the defendant's liability was imposed upon him by law, as that base on his parentage of the child, saying: "What was the purport of the agreement of defendant? Did he merely assent to retain a liability to clothe, support, and educate his child so that no other person could do so and recover therefor unless he omitted such duty? If so, then it would seem that no item would have

§ 2030. **Mutual accounts.**

Where there is a mutual account between the items of credit and debit for each party, the statute only from the date of the last item of the account action might have been maintained on any of them separately.⁶⁰ This rule, which was adopted by the United States from early decisions in England abolished by statute in the latter country.⁶¹ In the States, however, the rule has often been incorporated into local statutes; but in a few States this exception to the principle that the statute begins to run as soon as the action accrues is not accepted,⁶² or it is confined within limits. In some States there must be both credited and debited items within the statutory period in order to validate the action on items on which the statute has already completely

any relation to any other, and the term of the statute must be computed from each item."

⁶⁰ *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 14 S. Ct. 632, 38 L. Ed. 493, affirming 6 Utah, 439, 24 Pac. 534; *Sibley v. United States*, 49 Ct. Cl. 242; *Cannon v. Copeland*, 43 Ala. 201; *Moreland v. Dickerson, etc., Lumber Co.*, 12 Ala. App. 576, 68 So. 526; *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195; *Adams v. Holland*, 101 Ga. 43, 28 S. E. 434; *Reid v. Wilson*, 109 Ga. 424, 34 S. E. 608; *Bank of Blakely v. Buchannon*, 13 Ga. App. 793, 80 S. E. 42; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Perrill v. Nichols*, 89 Ind. 444; *Mills v. Davies*, 42 Iowa, 91; *Kilbourn v. Anderson*, 77 Ia. 501, 42 N. W. 431; *Waffle v. Short*, 25 Kans. 503; *Fairbanks v. Barker*, 115 Me. 11, 97 Atl. 3; *Kingsley v. Delano*, 169 Mass. 285, 47 N. E. 1013; *Robinson v. Robinson*, 179 Mass. 233, 53 N. E. 854; *Re Hiscock*, 79 Mich. 536, 44 N. W. 947; *Taylor v. Parker*, 17 Minn. 469; *Abbay v. Hill*, 64 Miss. 340, 1 So. 484; *Chadwick v. Chadwick*, 115 Mo. 581, 22 S. W. 479; *Gibson v. Jenkins*, 97 Mo. App. 27, 70 S. W.

1076; *Green v. Disbro*, 35 Am. Rep. 496; *Mac*, 53 N. Y. App. D. 48 1059; *Sandel v. Somm*, App. D. 537, 115 N. Y. v. Longshore, 147 N. Y. 131 N. Y. S. 1041; *Rollerell*, 77 N. C. 302; *F*, Co. v. Wachovia Bank S. E. 205; *McFarland*, Pa. St. 260, 25 Atl. 75 Est., 52 Pa. Super. 461 wood, 18 R. I. 303, 27 v. Carrier, 30 S. C. 61 741; *Woolf v. Gray*, 48 Pac. 788; *Culpepper*, Tidewater Improvement Va. 73, 89 S. E. 118; *Blofish Co.*, 71 Wash. 41, *Hannan v. Engelmann*, 5 N. W. 791.

⁶¹ See *Catling v. Skot*, 189.

⁶² *Knox v. Gye*, L. R.

⁶³ *Smith v. Dawson*, 1 Sprogle v. Allen, 38 Md. v. Marx, 69 Md. 252, 2 Gage v. Dudley, 64 N. 786.

⁶⁴ *Abbey v. Owens*,

the other hand, in a few States the scope of the rule is broadened by omitting the requirement that the account shall be mutual.⁶⁴ But it is generally held essential, in order to constitute such an account as shall fall within the principle in question, that there shall be mutual claims. A payment, therefore, given and received as partial discharge of an account for goods or services does not make the account mutual; it merely diminishes the amount due on a one-sided account.⁶⁵ And so it is where goods or services are given not with the intention of creating a cross-claim but in partial cancellation of an account to the extent of an agreed sum.⁶⁶

It is essential, also, that the items of the account shall have been regarded as constituting one account by the parties.⁶⁷

Gulick ads Princeton, etc., Turnpike Co., 2 Green (N. J. L.), 545; *Craighead v. State Bank*, 7 Yerg. 399.

"This is held to be a necessary construction of the Iowa statute. *Moser v. Crooks*, 32 Ia. 172. And in Missouri in a long series of cases it has been held that where there is a running account and it is fairly inferable from the conduct of the parties while the account was accruing that the whole was to be regarded as one, none of the items are barred unless the last item is before the statutory period. See *Ring v. Jamison*, 66 Mo. 424; *Chadwick v. Chadwick*, 115 Mo. 581, 22 S. W. 479; *Bowman v. Shelton*, 175 Mo. App. 696, 158 S. W. 404. In *Sidway v. Missouri Land, etc., Co.*, 187 Mo. 649, 86 S. W. 150, the court emphasized the necessity of the facts justifying an inference that the whole account had been regarded by the parties as a running account.

"*McNeil v. Garland*, 27 Ark. 343; *Norton v. Larco*, 30 Cal. 126, 89 Am. Dec. 70; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Carter v. Canty* (Cal.), 186 Pac. 346. *Shuler v. Coal* (Cal. App.), 178 Pac. 535; *Liseur v. Hitson*, 95 Ga. 527, 205 S. E. 498; *Prenatt v. Runyon*, 12 Ind. 174; *Perrill v. Nichols*, 89 Ind. 444;

Dyer v. Walker, 51 Me. 104; *Webster v. Byrnes*, 32 Md. 86; *Parker v. Schwartz*, 136 Mass. 30; *Cousins v. St. Paul & C. R. Co.*, 43 Minn. 219, 45 N. W. 429; *Abbey v. Owens*, 57 Miss. 810; *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496; *McDonald v. Jaffa*, 53 N. Y. App. D. 484, 65 N. Y. S. 1059; *Hollingsworth v. Allen* (N. C.), 97 S. E. 625; *Ingram v. Sherard*, 17 S. & R. 347; *Adams v. Carroll*, 85 Pa. 209 (Cf. *Davidson v. Davidson*, 262 Pa. 520, 106 Atl. 64); *McArthur v. McCoy*, 21 S. Dak. 314, 112 N. W. 155; *Cohen v. Shwartz* (Tex. Civ. App.), 32 S. W. 820. But see *contra*, *Payne v. Walker*, 26 Mich. 60; *Hollywood v. Reed*, 55 Mich. 308, 21 N. W. 313; *Lancieri v. Kansas City & C. Co.*, 95 Mo. App. 319, 69 S. W. 29; *Noyes v. Cushman*, 25 Vt. 390 (see also *Harris v. Howard*, 56 Vt. 695); *Hoy v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

"*Norton v. Larco*, 30 Cal. 126, 89 Am. Dec. 70; *Smith v. Hembree*, 3 Ga. App. 510, 60 S. E. 126; *Warren v. Sweeney*, 4 Nev. 101.

"*Higgs v. Warner*, 14 Ark. 192; *Parker v. Carter*, 91 Ark. 162, 168, 120 S. W. 836, 134 Am. St. Rep. 60; *Eldridge v. Smith*, 144 Mass. 35, 10 N. E. 717; *Harding v. Covell*, 217

The mere fact that each party is indebted to the other is not sufficient.⁶⁸ Nor is there a mutual account where one side or the other have been denied altogether. The account never been admitted as entering into a current account where the various dealings relate exclusively to a contract tract performable in instalments at agreed periods. The account must be continuous as distinguished from a dependent items at long intervals,⁷¹ and if an account has been settled or stated by agreement the occurrence of subsequent items will not re-open the account,^{71a} nor will the fact that an item of the account was omitted by mistake.

§ 2031. Alternative remedies.

In the fundamental English statute,⁷³ the limitation applied to specific legal remedies, such as the action of debt, the action on the case. The same method has been followed in many American statutes. In many others the limitation is imposed not only on the remedy but on the cause of action, as the right to sue upon a contract, or on indebtedness. This is important to observe in considering whether a claim is totally barred where the statutory period has expired since one remedy became available, but not since the first available. Under a statute in the earlier form

Mass. 120, 104 N. E. 452; Earls v. Earls (Mo. App.), 182 S. W. 1018.

“A mutual account is one based on a course of dealing wherein each party has given credit to the other on the faith of indebtedness to him.” Bank of Blakely v. Buchannon, 13 Ga. App. 793, 794, 80 S. E. 42, citing earlier Georgia cases.

⁸⁸ See cases in the preceding note.

¹⁹ Bay City Iron Co. v. Emery, 128 Mich. 506, 87 N. W. 652.

⁷⁰ *Goodsole v. Jeffery*, 202 Mich. 201, 168 N. W. 461, 1 A. L. R. 1057. See also *Union Naval Stores Co. v. Patterson*, 179 Ala. 525, 80 So. 807.

⁷¹*In re* Wooten, 118 Fed. 670; *Welch v. Santa Cruz County*, 30 Cal.

App. 123, 156 Pac.
Jackson County Ag

9 Ill. App. 272; Perr
Me. 393; Graham
Mass. 321, 58 N. E.
cock, 79 Mich. 537,
Sidway v. Missouri La
Mo. 649, 86 S. W.
Blackman, 109 Wis.

429. Cf. Cedar Cou
Iowa, 11, 57 N. W.
Davis, 103 Me. 405,
L. R. A. (N. S.) 126.

71^a *Houghton v. Key*
49, 119 N. E. 447; Ab
Vt. 525.

⁷² *Lancey v. Maine*
Me. 34.

⁷³ 21 Jac. I, c. 16 (1623).

remedy is not barred.⁷⁴ But if a statute is in such terms that the vital question is the character of the cause of action, neither the form of the proceeding nor the name by which it may be called can have any influence on the question whether the statute applies.⁷⁵ Even though a statute is in the latter form, however, the law not infrequently gives an injured party not merely alternative remedies, but alternative rights, and here the statute cannot run on one merely because the other has arisen. Thus previous conversion by a bailee will not preclude an action based on the bailor's subsequent refusal to redeliver on demand, and the statute will run from such refusal;⁷⁶ and other illustrations may be found.⁷⁷

§ 2032. Suits in equity.

In view of the terms of the early English statute, courts of equity were not affected by it in suits for the enforcement of rights cognizable only in such courts; but they followed by analogy the rule provided by the statute for corresponding actions of law,⁷⁸ and if there was no analogous legal right they applied the more elastic principle that stale demands would not be enforced.⁷⁹ So far, however, as concerns claims where there has not been fraud or fraudulent concealment, or mistake or any fiduciary relation, it may be said that even in

⁷⁴ See *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Avery v. Miller*, 81 Mich. 85, 45 N. W. 503; *Stringer v. Stevens' Est.*, 146 Mich. 181, 109 N. W. 269, 8 L. R. A. (N. S.) 393, 117 Am. St. Rep. 620. Cf. *People v. Michigan Central R.*, 145 Mich. 140, 147, 108 N. W. 772; *Lembeck & Co. Brewing Co. v. Krause* (N. J.), 109 Atl. 293.

⁷⁵ Thus the statutory right of a creditor of a corporation against a stockholder has been held barred when the statutory period has elapsed from the time when the creditor first had an available remedy against the stockholder. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725; *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519; *Conklin v. Furman*, 48 N. Y. 527.

⁷⁶ *Wilkinson v. Verity*, L. R. 6 C. P.

206; *Moses v. Taylor*, 6 Mackey, 255; *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487.

⁷⁷ *Missouri Sav. & Co. v. Rice*, 84 Fed. 131, 28 C. C. A. 305; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463; *Lamb v. Clark*, 5 Pick. 193; *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762, 44 L. R. A. (N. S.) 524, Ann. Cas. 1914 C. 636.

⁷⁸ *Smith v. Clay*, 3 Bro. C. C. 639, n.; *Hovenden v. Annesley*, 2 Sch. & Le F. 607, 630; *Allcard v. Skinner*, 36 Ch. D. 145, 186.

Most equitable rights are now brought within English Statutes of Limitations. 19 Halsbury's Laws of England, 169.

⁷⁹ *Brooks v. Muckleton*, [1909] 2 Ch. 519.

jurisdictions where the statute does not now directly apply to equitable rights, an analogy to legal rights will be found, and will be followed so closely as to make it immaterial that the statute is not directly applicable.⁸⁰

Courts of equity have, however, a doctrine of their own in regard to laches where rights cognizable only in chancery are concerned or, if special circumstances require its application, where equitable relief is demanded for the enforcement of a right recognized at law. Under this principle, "even if the Statute of Limitations be made applicable in general terms to suits in equity, and not to any particular defence, the defendant may avail himself of the laches of the complainant notwithstanding the time fixed by the statute has not expired."⁸¹

⁸⁰ *Updike v. Mace*, 194 Fed. 1001; *Presley v. Weakley*, 135 Ala. 517, 33 So. 434, 93 Am. St. Rep. 39; *Baldwin v. Williams*, 74 Ark. 316, 86 S. W. 423, 109 Am. St. Rep. 81; *Barnes v. Born*, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833; *Sioux City, etc., R. Co. v. O'Brien County*, 118 Iowa, 582, 92 N. W. 857; *McVickar v. Filer*, 31 Mich. 304; *Tucker v. Linn*, (N. J. Eq.), 57 Atl. 1017; *John v. Coates*, 63 Hun, 460, 18 N. Y. S. 419, *affd.* 140 N. Y. 634, 35 N. E. 891; *In re Bickel's Appeal*, 86 Pa. St. 204; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Montgomery v. Noyes*, 73 Tex. 203, 11 S. W. 138; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630.

⁸¹ *Patterson v. Hewitt*, 195 U. S. 309, 49 L. Ed. 214, 25 S. Ct. 35. See also *Whitney v. Fox*, 166 U. S. 637, 41 L. Ed. 1145, 17 S. Ct. 713; *Scruggs v. Decatur &c. Land Co.*, 86 Ala. 173, 5 So. 440; *Scherer v. Ingberman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; *Kronung v. Gehrli*, 112 Mo. 641, 20 S. W. 661; *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456; *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248; *Wilson v. Wilson*, 41 Ore. 459, 69 Pac. 923. *Cf.* *Hill v. Nash*, 73 Miss. 849, 19 So. 707. In *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A.

14, the court said: "In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the Statute of Limitations relating to actions at law of like character. *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420 . . . *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous Statute of Limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. . . . Some of the circumstances, which will induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute are the destruction of the muniments of title, the death or removal of parties, the number of innocent pur-

§ 2033. Statute does not run on trust obligation voluntarily assumed.

Neither directly nor by analogy does the statute affect the liability of an express trustee for breach of his equitable duties.⁸² And, though the rule is usually stated as confined to express trustees, it seems applicable to all who voluntarily assume a fiduciary relation.⁸³ Indeed, though a transaction is not strictly a trust since the person entrusted with money is not expected to keep it as a separate *res*, there may nevertheless be such a continuing relation of confidence where money is delivered to be "kept" as to prevent the statute from beginning to run.⁸⁴ Thus, the statute does not run in favor of a bank on a deposit account until after a demand, or some act of repudiation by the bank.⁸⁵ After the beneficiary has notice of the trustee's

chasers who may be affected, radical changes in the condition and value of the property, and its speculative character. *Lemoine v. Dunklin Co.*, 10 U. S. App. 227, 239, 2 C. C. A. 343, 348, and 51 Fed. 487, 492."

⁸² *Townshend v. Townshend*, 1 Bro. C. C. 550; *Beckford v. Wade*, 1 Ves. 87; *Petre v. Petre*, 1 Drew. 371; *Banner v. Berridge*, 18 Ch. D. 254, 262; *Patrick v. Simpson*, 24 Q. B. D. 128; *Smith v. Dallas Compress Co.*, 195 Ala. 534, 70 So. 662; *Pearl v. Pearl* (Cal.), 177 Pac. 845; *Varrois v. Gomet* (Cal. App.), 185 Pac. 1001; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; *Sheldon v. Sheldon*, 133 N. Y. 1, 30 N. E. 730; *Davidson v. Davidson*, 262 Pa. 520, 106 Atl. 65. The matter in England is now governed by a statute which subjects certain liabilities of an express trustee to a period of limitation. See *Re Swain*, [1891] 3 Ch. 233; *Re Timmis*, [1902] 1 Ch. 176.

⁸³ In *Soar v. Ashwell*, [1893] 2 Q. B. 390, 394, the court said of a solicitor into whose hands money had been put for investment by trustees: "Where a person has assumed, either with or without consent, to act as a trustee of money or other property, i. e., to

act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui que trusts* for all such money or property without regard to lapse of time."

See also *Snodgrass v. Snodgrass*, 185 Ala. 155, 64 So. 594; *Peixouto v. Peixouto*, (Cal. App.), 181 Pac. 830; *Doyle v. Doyle*, 268 Ill. 96, 108 N. E. 796; *Scott v. Dilley*, 53 Ind. App. 100, 101 N. E. 313; *Martin v. Barnes*, 214 Mass. 29, 100 N. E. 1023; *Smith v. Balch*, 89 N. J. Eq. 566, 581, 105 Atl. 17.

⁸⁴ *Schmidt v. Schmidt*, 216 Mass. 572, 104 N. E. 474; *Moore v. O'Hare*, 224 Mass. 283, 112 N. E. 863.

⁸⁵ *Re Tidd*, [1893] 3 Ch. 154, 156; *State v. Reynolds* (Mo.), 213 S. W. 804; *Koelzer v. First Nat. Bank*, 125 Wis. 595, 104 N. W. 838, 2 L. R. A. (N. S.) 571, 110 Am. St. Rep. 870.

repudiation of an express trust, the statute begins to run.⁸⁶ But the mere fact that the trustee had done some acts in contravention of the trust, is not enough.⁸⁷

Unless the local statute clearly requires it, the matter should not be dealt with on the basis of the remedies invoked by the plaintiff. Even an express trust may sometimes be enforced by an action of money had and received, and the remedy of general assumpsit was used at common law indiscriminately to enforce both obligations which were essentially trusts and obligations to pay money where there was no trust *res*.

§ 2034. Statute runs on liability of constructive trustee.

On the other hand, where a constructive trust is imposed by law upon a party without his consent, the statute runs in his favor.⁸⁸ Therefore, the statute runs from the time of payment

⁸⁶ *Philippi v. Philippe*, 115 U. S. 151, 29 L. Ed. 336, 5 Sup. Ct. 1181; *Goodno v. Hotchkiss*, 237 Fed. 686; *Terry v. Davenport*, 185 Ind. 561, 112 N. E. 998; *Caldwell v. Ulsh*, 184 Ind. 725, 112 N. E. 518; *Scott v. Dilley*, 53 Ind. App. 100, 101 N. E. 313; *Martin v. Barnes*, 214 Mass. 29, 100 N. E. 1023; *Schmidt v. Schmidt*, 216 Mass. 572, 104 N. E. 474; *State v. Northrop* (Conn.), 106 Atl. 504. See also *East Lake Lumber Co. v. Van Gorder*, 174 N. Y. 38; *Keller v. Washington* (W. Va.), 98 S. E. 880. In *Young v. Walker*, 224 Mass. 491, 493, 113 N. E. 363, the court said: "An open disavowal and express repudiation of an express or implied trust calls the *cestui que trust* to defend his equitable right if he would not have it barred by the Statute of Limitations. *Currier v. Studley*, 159 Mass. 17, 20, 33 N. E. 709; *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836; *Lufkin v. Jakeman*, 188 Mass. 528, 74 N. E. 933; *Thompson v. Thompson*, 1 Jones, 430; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 633; *Edwards v. University*, 1 Dev. & Bat. Eq. 325." Cf. *Baker v. Moore*, 4 N. Y. App. D. 234, 38 N. Y. S. 559.

⁸⁷ *Woolley v. Stewart*, 169 N. Y. App. Div. 678, 155 N. Y. S. 169.

⁸⁸ *Speidel v. Henrici*, 120 U. S. 377, 30 L. Ed. 718, 7 S. Ct. 610; *Goodno v. Hotchkiss*, 237 Fed. 686, 700; *Eighthart v. Churchill Co.*, 169 Cal. 728, 147 Pac. 942; *Terry v. Davenport*, 185 Ind. 561, 112 N. E. 998; *Nicholson v. Nicholson*, 94 Kans. 153, 146 Pac. 340; *Robinson v. Strauther*, 106 Miss. 754, 64 So. 724; *East Lake Lumber Co. v. Van Gorder*, 174 N. Y. S. 38.

In *Roediger v. Kraft*, 169 N. Y. App. Div. 304, 306, 154 N. Y. S. 435, the court said: "By receipt of said moneys and solely by operation of law Traugott became 'a trustee *de son tort*.' Under these circumstances the case is governed by the principles applied in *Mills v. Mills*, 115 N. Y. 80, 21 N. E. 714; *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328, and *Price v. Mulford*, 107 N. Y. 303, 14 N. E. 298. In *Lammer v. Stoddard* the court said, p. 673: "It is undoubtedly generally true that as against a trustee of an actual, express subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly, to the knowl-

on the right to recover money paid by mistake,⁹⁰ though the mistake is not discovered until later,⁹⁰ and in favor of a purchaser from an express trustee with notice of the trust,⁹¹ unless the *cestui que trust* is in possession of the *res*.⁹²

§ 2035. Whether statute runs on liability of corporate officer.

It has been held by a number of decisions that the statute runs in favor of a director or officer of a corporation on his obligation to the corporation or to its creditors for the proper fulfillment of his duties.⁹³ On principle, however, it would seem that such a person is a fiduciary not by imposition of law but by his own consent, and that the rules governing an express trustee should be applied; and so it has been held.⁹³

edge of the beneficiary, renounced, disclaimed or repudiated the trust. But Edward Lammer was not the actual trustee of this fund, and he never acknowledged trust as to the money loaned him. He could, at most, have been declared a trustee *ex maleficio* or by implication or construction of law, and in such a case the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication."

⁹⁰ *Baker v. Courage*, [1910] 1 K. B. 56; *Leather Mfrs. Nat. Bank v. Merchants Bank*, 128 U. S. 26, 9 S. Ct. 3, 32 L. Ed. 342; *County v. Montgomery*, 195 Ala. 197, 70 So. 642; *Schultz v. Cass County*, 95 Ind. 323; *Sturgis v. Preston*, 134 Mass. 372; *Morris v. Budlong*, 78 N. Y. 543; *Montgomery's Appeal*, 92 Pa. 202, 37 Am. Rep. 670.

⁹¹ See cases in the preceding note. But by statute in some States the time is computed from discovery of the mistake, or from the time when with reasonable diligence it might have been discovered. *Hayes v. Los Angeles County*, 99 Cal. 74, 33 Pac. 766; *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; *Storm Lake Bank v. Buena Vista County*, 66 Ia. 128, 23 N. W. 297; *Nicholson v. Nicholson*, 94 Kan.

153, 146 Pac. 340; *German Security Bank v. Columbia &c. Co.*, 27 Ky. L. Rep. 581, 85 S. W. 761; *Lanning v. Transylvania County*, 106 N. C. 505, 11 S. E. 622.

⁹² *Smith v. Dallas Compress Co.*, 195 Ala. 534, 70 So. 662.

⁹³ *Peixouto v. Peixouto*, (Cal. App.) 181 Pac. 830, and cases cited.

⁹⁴ *Rankin v. Cooper*, 149 Fed. 1010; *Knowles v. Rome Tribune Co.*, 127 Ga. 90, 56 S. E. 109; *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. See also *Re Lands Allotment Co.*, [1894] 1 Ch. 616. In *Lippett v. Ashley*, 89 Conn. 451, 94 Atl. 995, the court lay stress on the fact that the breach of duty was merely passive negligence, and held that at least in such a case the statute ran in favor of the officer. In *National Bank of Commerce v. Wade*, 84 Fed. 10, it was held that the statute did not run in favor of directors until after they had surrendered control of the corporation. In *Frost v. Arnaud*, 144 Ga. 26, 85 S. E. 1028, it was held that the statute ran in favor of a promoter in a suit for fraud by subscribers to the stock of the corporation.

⁹⁵ In *Greenfield Savings Bank v.*

§ 2036. Agents.

It is generally essential as a prerequisite to principal against an agent for money collected that a demand shall have been made upon the the agent under agreement with the principal i at once or at a particular time,⁹⁵ or if the re business indicates that payment should be ma mand,⁹⁶ or if a reasonable time for payment h demand is necessary. And this is true also if the the agency or repudiates liability,⁹⁸ or tortious

Abercrombie, 211 Mass. 252, 97 N. E. 897, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B. 420, the court said of such officers: "These defendants stood as to the bank and its depositors in the position of trustees of a direct trust. In such a case the Statute of Limitations does not begin to run against the *cestui que trust* until they have learned of the trustee's wrongdoing or of his practical repudiation of the trust and of the duties thereby imposed upon him. *Davis v. Coburn*, 128 Mass. 377; *Jones v. McDermott*, 114 Mass. 400; *Boxford Religious Society v. Harriman*, 125 Mass. 321; *Potter v. Kimball*, 186 Mass. 120, 71 N. E. 308. Instances of the application of the rule to such cases as the one now before us are sufficiently numerous. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, reversing same case *sub nom.* *Williams v. Halliard*, 38 N. J. Eq. 373; *Williams v. Riley*, 7 Stew. 398; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *National Bank of Commerce v. Wade*, 84 Fed. 10; *Brinckerhoff v. Roosevelt*, 143 Fed. 478, 74 C. C. A. 498; *In re Sharpe*, [1892] 1 Ch. 154. In most of the cases relied on by the defendants the case was either governed directly by statute, as *In re Lands Allotment Co.*, [1894] 1 Ch. 616, 631, and *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837, or it was held that no direct trust relation existed between the parties.

Such cases need. So far as they di clusions we have r follow them."

⁹⁴ *Taylor v. Spea* Am. Dec. 519; B. Ill. 193; *Eberhart* 478; *Claypool v. G* 9 N. E. 382; *Haas* 589; *Green v. Willi* *Roberts v. Armstr* 89 Am. Dec. 624; *V* La. Ann. 883; *Kim* Mich. 211; *Ewers v.* 266, 72 N. W. 18 *Trans. Co. v. Willie* 91 Pac. 1061; *King* N. Y. 215, 16 N. E. *Storrs*, 6 Johns. (N. Am. Dec. 340; *War* 11 Ired. L. 77; *Ege* N. C. 172; *Cole v.* 1, 91 N. W. 324.

⁹⁵ *Campbell v. R* 49 N. W. 452; *Hæ* N. Y. App. Div. 390 *affd.* 158 N. Y. 690 *Brown v. Arrott*, 6 V *bell v. Boggs*, 48 F *Hasher*, 96 Va. 584, also *Jewell v. Jewel* 102 N. W. 1059.

⁹⁶ *Brown v. Arrot*

⁹⁷ *Langley v. Sturt* *Eaton v. Welton*, 32 *v. Young*, 141 N. Y.

⁹⁸ *Hammett v. Br*

the principal's funds.³⁰ As the statute will not begin to run until the principal's right of action has accrued it will not ordinarily run until after demand by the principal,¹ or until a time has arrived when the agent has agreed or has been instructed to make payment.² Where the agent is bound to turn over the money immediately or at a fixed time, the principal's lack of notice of the collection is immaterial unless the agent is guilty of fraudulent concealment.³

§ 2037. Bailees; Attorneys.

The relation of bailor and bailee is within these principles. Until the bailee acts in violation of the terms of the bailment, or the time arrives when because of a demand or by virtue of the contract between the parties the bailment should end, the statute will not run.⁴ Whether the same principle applies to an attorney-at-law who has made a collection for a client who has not been notified that the collection has been made is disputed,⁵ but demand has in only a few cases been held a pre-

Campbell v. Wilson, 2 Mackey, 497; *Judith Inland Transp. Co. v. Williams*, 36 Mont. 25, 91 Pac. 1061; *Wiley v. Logan*, 95 N. C. 358.

³⁰ *Allsopp v. Hendy Mach. Works*, 5 Cal. App. 288, 90 Pac. 39; *Haas v. Damon*, 9 Iowa, 589; *Bartels v. Kinnenger*, 144 Mo. 370, 46 S. W. 163.

¹ *Burdick v. Garrick*, L. R. 5 Ch. App. 233; *Whitehead v. Wells*, 29 Ark. 99; *Baker v. Joseph*, 16 Cal. 173; *Knowles v. Rome Tribune Co.*, 127 Ga. 90, 56 S. E. 109; *Dodds v. Vannoy*, 61 Ind. 89; *Guernsey v. Davis*, 67 Kans. 378, 73 Pac. 101; *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624; *Sawyer v. Tappan*, 14 N. H. 352; *Egerton v. Logan*, 81 N. C. 172; *Quinn v. Gross*, 24 Oreg. 147, 33 Pac. 535; *Jayne v. Mickey*, 55 Pa. 260; *Ash v. Frank Co.* (Tex. Civ. App.), 142 S. W. 42. If the agency is in effect a continuous trust a demand will not start the statute. *Hilton v. Gordon* (N. C.), 99 S. E. 5.

² *Jewell v. Jewell*, 139 Mich. 578, 102 N. W. 1059; *Mast v. Easton*, 33 Minn.

161, 22 N. W. 253; *Haebler v. Luttgen*, 2 N. Y. App. Div. 390, 37 N. Y. S. 794, aff'd 158 N. Y. 693, 53 N. E. 1125; *Guarantee Trust Co. v. Farmers' Nat. Bank*, 202 Pa. 94, 51 Atl. 765; *Good-year Rubber Co. v. Baker*, 81 Vt. 39, 69 Atl. 160, 17 L. R. A. (N. S.) 667; *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41. But see *Douglas v. Corry*, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

³ *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253; *Garrett v. Conklin*, 52 Mo. App. 654; *Campbell v. Roe*, 32 Neb. 345, 49 N. W. 452.

⁴ *Parker v. Gaines* (Ark.), 11 S. W. 693; *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52; *Reisenstein v. Marquardt*, 75 Ia. 294, 39 N. W. 506, 1 L. R. A. 318, 9 Am. St. 477, 9 Am. St. Rep. 477. As to the bailor's alternative rights see *supra*, § 2031.

⁵ No exception to the rule that where money collected is payable immediately or within a reasonable time the statute begins to run im-

requisite to the running of the statute.⁶ Negligent professional business intrusted to an attorney contractual duty on which the statute begins to failure of duty occurs, though it may cause no later.⁷

§ 2038. Partners.

During the existence of a partnership the statute runs against any right arising out of the partnership against his co-partners,⁸ and if partnership property is held in the name of an individual partner,⁹ or is held in the name of a third person for the benefit of the firm,¹⁰ the statute runs in favor of the person thus holding title as long as the partnership exists, unless the fiduciary obligation of the partnership exists. Where, however, a partnership is dissolved as by the death of a partner, the statute begins to run at once against the representatives of the deceased partner,¹¹ unless the statute

runs immediately or within a reasonable time after the death of the partner is admitted in *Kimbro v. Waller*, 21 Ala. 376; *Coffin v. Coffin*, 7 Me. 298; *Cook v. Rives*, 21 Miss. 328, 53 Am. Dec. 88; *Douglas v. Corry*, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; *Campbell v. Boggs*, 48 Pa. 524; *Good-year &c. Shoe Co. v. Carpenter* (Vt.), 69 Atl. 160, 17 L. R. A. (N. S.) 667; *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762, 44 L. R. A. (N. S.) 524, Ann. Cas. 1914 C. 636. But other decisions require notice from the attorney or knowledge by the client that collection has been made in order to start the statute. *Leigh v. Williams*, 64 Ark. 165, 41 S. W. 323, 62 Am. St. Rep. 183; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *Wilder v. Secor*, 72 Iowa, 161, 33 N. W. 448, 2 Am. St. Rep. 236; *Guernsey v. Davis*, 67 Kans. 378, 73 Pac. 101; *Donahue v. Bragg*, 49 Mo. App. 273.

⁶ *Birckhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107; *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624; *Seed v. Hanly*, Hempstead, 659.

⁷ *Re Croyden*, 55 Solic. Jour. 632;

Wilcox v. Plummer, Ed. 821; *Fortune v. Ed. 262*, 80 N. E. 781, 1: 1005, 117 Am. St. Graham, 171 Ill. Ap Porter (Tex. Civ. Ap (Tex.), 155 S. W. 174 78 Wash. 662, 139 F A. (N. S.) 279.

⁸ *Barton v. North Co.*, 38 Ch. D. 45; *Chan Kit San v. [1902] A. C. 257.*

⁹ *Roach v. Roach*, S. E. 703.

¹⁰ *Arnold v. Loomis* Pac. 518.

¹¹ *Knox v. Gye*, L. Taylor v. Taylor, 28 189; *Roach v. Roach* S. E. 703; *Pierce v. 245*; *McKaig v. He McKelvy's Appeal*, Allen v. Woonsocket Coalter v. Coalter, See also *Harris v. I 463*; *Askew v. Spring Chandler v. Chandler*

ners tacitly or expressly accept the position of trustees for such representatives.¹¹ An exception has been made, moreover, where outstanding claims are to be collected by the surviving members of the firm, and it has been held that the statute does not begin to run until their collection, or until the surviving partners have been guilty of laches in failing to make it.¹²

§ 2039. Husband and wife.

Where no contractual liability can exist between husband and wife, as was the case at common law, and is still the case in many jurisdictions, there could be no question of limitation of contractual rights of action. And even where they are allowed to contract, they are ordinarily not allowed to sue one another at law on ordinary pecuniary obligations, or even if so allowed, it is deemed against the policy of the law to require such an action as a condition of preserving substantial rights. For one of these reasons or another, therefore, it is generally held that the statute will not run against a claim of a wife,¹³ or husband¹⁴ against the other until discoveriture.¹⁵

¹¹ See *Dovey v. Schlater* (Neb.), 175 N. W. 888.

¹² *Prentice v. Elliott*, 72 Ga. 154; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; *Holloway v. Turner*, 61 Md. 217; *McClung v. Capehart*, 24 Minn. 17; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Patterson v. Lilly*, 90 N. C. 82, 88; *Jordan v. Miller*, 75 Va. 442; *Sandy v. Randall*, 20 W. Va. 244.

¹³ *Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718; *Dice v. Irvin*, 110 Ind. 561, 568, 11 N. E. 488; *Fourthman v. Fourthman*, 15 Ind. App. 199, 43 N. E. 965; *Lower v. Lower*, 46 Iowa, 525; *Biggerstaff's Adm. v. Biggerstaff's Adm.*, 19 Ky. L. Rep. 371, 40 S. W. 671; *Sewell v. McVay*, 30 La. Ann. 673; *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; *Yeomans v. Petty*, 40 N. J. Eq.

495, 4 Atl. 631; *Alpaugh v. Wilson*, 52 N. J. Eq. 424, 28 Atl. 722; *Metlar v. Williams*, 86 N. J. Eq. 330, 97 Atl. 961; *Simmerson v. Tennery*, 37 Ohio St. 390; *Kennedy v. Knight*, 174 Pa. 408, 34 Atl. 585; *Gillan v. West*, 232 Pa. 74, 81 Atl. 128; *Stockwell v. Stockwell's Est.* (Vt.), 105 Atl. 30; *Gudden v. Gudden's Estate*, 113 Wis. 297, 89 N. W. 111. It makes no difference if the transaction out of which the claim arose took place before the marriage. *Fourthman v. Fourthman*, 15 Ind. App. 199, 43 N. E. 965; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 877; *Stockwell v. Stockwell's Est.* (Vt.), 105 Atl. 30. But see *Enwright v. Griffith* (Wis.), 172 N. W. 156. In Mississippi where all disabilities of coverture are removed the statute runs against the wife's

¹⁴ *Gracie's Estate*, 158 Pa. 521, 27 Atl. 1083.

¹⁵ Divorce will start the running of

the statute. *Hopson v. Fowlkes*, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120.

§ 2040. Limitation of action on negotiable instr

It is a fundamental principle that the statute of limitations runs until any condition necessary to the existence of action has happened, but as has been shown in many obligations payable in terms on demand and payable without a demand. Therefore the statute runs immediately on negotiable instruments payable on demand. The principle, however, has not generally been applied to notes,¹⁸ or to certificates of deposit,¹⁹ on which the

claim. *Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317. See also *Comstock's Appeal*, 55 Conn. 214, 10 Atl. 559; *Bromwell v. Bromwell's Est.*, 139 Ill. 424, 28 N. E. 1057.

In New Jersey a wife has capacity to sue her husband in equity, but because of the undesirability of such suits the marriage is treated as a disability while the parties are living together. Where, however, the wife has deserted the husband, equity applying the doctrine of laches and following the analogy of the Statute of Limitations will hold the wife's claim barred after the statutory period. *Dunham v. Adams*, 82 N. J. Eq. 265, 88 Atl. 696.

¹⁸ See *supra*, §§ 1175, 1289.

¹⁹ *Norton v. Ellam*, 2 M. & W. 461; *Re George*, 44 Ch. D. 627; *Massie v. Byrd*, 87 Ala. 672, 6 So. 145; *McCollum v. Neimeyer* (Ark.), 219 S. W. 746; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878; *Niemeyer v. Brooks*, 44 Ill. 72, 92 Am. Dec. 149; *Fenno v. Gay*, 146 Mass. 118, 15 N. E. 87; *Fletcher v. Sturtevant* (Mass.), 126 N. E. 428; *De Raismes v. De Raismes*, 71 N. J. L. 680, 60 Atl. 1133; *Dolan v. Mitchell*, 39 N. Y. App. Div. 361, 57 N. Y. S. 157; *Mills v. Davis*, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394; *In re Stevens' Est.*, 164 Pa. 216, 30 Atl. 245; *Jenkins v. De War*, 112 Tenn. 684, 82 S. W. 470. And an action on a contract guaranteeing payment of a demand note similarly must be brought within the statutory

period from the delivery. *Homewood People's Bank v. ...*, 263 Pa. 260, 106 Atl. 260. A note payable on demand for a subscription for shares retained the further payment was "subject to call." *Brockaway v. Gadsden Co.*, 102 Ala. 620, 15

¹⁸ *Tower v. Appleton*, 387, 389, 81 Am. Dec. 772. *Memphis v. White*, 111 Am. Dec. 772.

¹⁹ *Fells Point Institute v. ...*, 18 Md. 320, 18 Am. Dec. 772. *Pacific Nat. Bank v. ...*, 18, 101 N. E. 1060, 40 693; *Sharp v. Citizens*, 758, 98 N. W. 50; *Be ... v. Harrison*, 11 N. D. 460; *Cottle v. Marine*, 53, 58, 59 N. E. 736; *N. Y. App. D. 586*, 81 818; *McGough v. Jamison*, 101 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394. *See also Smith v. Ste ...*, 16 S. E. 1003; *Tobin ...*, 164 S. Dak. 257, 88 N. W. 694. But see *com ... v. Tallant*, 29 Cal. 503; *Tripp v. Curtenius*, 28 Am. Rep. 610; *Mitch ...*, 335, 33 N. W. 1

not run until a demand has been made. Where, moreover, an obligation is payable a certain time after demand the statute does not begin to run until demand has been made and the specified time thereafter has elapsed.²⁰

An instrument payable at sight unlike an instrument payable on demand could not be sued upon until the instrument had been exhibited to the obligor;²¹ but the Uniform Negotiable Instruments Law has generally abolished this distinction so far as negotiable instruments are concerned by enacting that instruments payable at sight are demand paper.²² The allowance of days of grace on negotiable paper also affected the running of the Statute of Limitations on negotiable instruments. Since the instrument was in legal effect not due until the last day of grace, the statutory period ran from that time.²³ Demand paper, however, was not entitled to grace and the Negotiable Instruments Law has now, where enacted, abolished grace for all kinds of instruments. On instruments payable at a fixed time or at a fixed period from date, the statute runs from the date of maturity.

§ 2041. Time within which a demand must be made.

In a Massachusetts decision²⁴ a problem in regard to contracts performable upon demand was well stated, and the diverse views indicated. "Where a demand must be made before bringing an action, it is plain that in a strict sense the cause of action does not accrue until after the demand. Whether the creditor's rights may be lost by delay in making a demand when no time is fixed for it, is a question which is answered differently in different jurisdictions. It has sometimes been held, or seemingly assumed, that, even if many years are permitted to elapse without a demand, the statute

²⁰ *Massie v. Byrd*, 87 Ala. 672, 6 So. 145; *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935; *Little v. Blunt*, 9 Pick. 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267, 28 Am. Dec. 464. See also *Clayton v. Gosling*, 5 B. & C. 360.

²¹ *Savage v. Aldren*, 2 Stark. 232; *Norton v. Ellam*, 6 L. J. Exch. (N. S.) 121.

²² See *supra*, § 1139. Massachusetts and North Carolina have restored sight paper as a separate kind of legal obligation. *Ibid.*

²³ *Morris v. Richards*, 45 L. T. (N. S.) 210.

²⁴ *Campbell v. Whoriskey*, 170 Mass. 63, 65, 48 N. E. 1070, by Knowlton, J.

will not begin to run until the demand is made.²⁵ Under this doctrine, carried to its extreme limit, a liability to a suit upon a claim might continue for an indefinitely long time. The extreme doctrine in the other direction is, that the 'cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable.'²⁶ In some of these cases the language of the contract was interpreted like that of a note payable on demand, which creates a liability to a suit without a previous demand. In some of the cases it is held that a demand must be made within a reasonable time, and that a reasonable time will not in any event extend beyond the statute period for bringing such an action.²⁷ In New York, Alabama, and Tennessee, there are statutes regulating the subject. In *Codman v. Rogers*,²⁸ Mr. Justice Wilde said: 'A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend on

²⁵ *Ibid.* citing *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, R. & M. 388; *Thorpe v. Coombe*, 8 Dowl. & Ry. 347; *Girard Bank v. Bank of Penn. Township*, 39 Penn. St. 92, 80 Am. Dec. 507. See *Thrall v. Mead*, 40 Vt. 540.

²⁶ *Campbell v. Whoriskey*, 170 Mass. 63, 66, 48 N. E. 1070, quoting from *Palmer v. Palmer*, 36 Mich. 487, 494, 24 Am. Rep. 605, and citing *Ware v. Hewey*, 57 Me. 391, 99 Am. Dec. 780; *Sanford v. Lancaster*, 81 Me. 434, 17 Atl. 402; *Pittsburg & Connellsville Railroad v. Byers*, 32 Pa. 22, 72 Am. Dec. 770; *Morrison v. Mullin*, 34 Pa. 12; *Rhines v. Evans*, 66 Pa. 192, 195, 5 Am. Rep. 364. The same principle was applied in *People v. Magee* (Cal. App.), 183 Pac. 289. A right of action against a receiver was held barred by the statutory period, though an action could not be brought against him until after leave had been obtained.

²⁷ *Campbell v. Whoriskey*, 170 Mass. 63, 66, 48 N. E. 1070, citing *High v.*

County Commissioners, 92 Ind. 580, 588; *Keithler v. Foster*, 22 Ohio St. 27; *Atchison, T. & S. F. R. Co. v. Burlingame Township*, 36 Kans. 628, 14 Pac. 271, 59 Am. Rep. 578. Frequently a court has occasion to decide only that demand must be made within a reasonable time without fixing the precise limit of reasonableness. In the following cases it was held that a principal who has notice, or should have known that money has been collected by his agent, will be barred by the statute, though he has made no demand upon the agent, after the statutory period has elapsed from a reasonable time within which a demand should have been made. *Jett v. Hempstead*, 25 Ark. 462; *Schofield v. Woolley*, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; *Campbell v. Boggs*, 48 Pa. 524; *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920.

²⁸ 10 Pick. 112, 120.

circumstance. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand, that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay.' Although he was merely stating the doctrine of laches in a suit in equity, his language has been quoted and referred to in several of the cases above cited as stating the true principle applicable to actions at law."²⁹

"We are of the opinion that the true principle is that of the time when the demand must be made depends upon the construction to be put upon the contract in each case. If the contract requires a demand without language referring to the time when the demand is to be made, it is as if the words 'within a reasonable time' were found in it. What is a reasonable time is a question of law, to be determined in reference to the nature of the contract and the probable intention of the parties as indicated by it. Where there is nothing to indicate an expectation that a demand is to be made quickly, or that there is to be delay in making it, we are of opinion that the time limited for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made."³⁰ Such a rule seems fairly to apply the principles and analogies of the Statute of Limitations to the contract of the parties, and it is in accordance with the weight of authority."

§ 2042. Nature of contract frequently indicates intention.

Not infrequently the nature of the contract will afford an indication of the intention. Thus the Pennsylvania Supreme Court has said:³¹ "It is plain that where a subscription to

²⁹ The court here says: "In *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783, the decision was put upon the construction of the contract in reference to the time when a demand under it was to be made."

³⁰ *Campbell v. Whoriskey*, 170 Mass. 63, 67, 48 N. E. 1070, citing *Jameson*

v. Jameson, 72 Mo. 640, and previous cases in this section. The principle was again applied in *Whitney v. Cheshire Railroad*, 210 Mass. 263, 96 N. E. 676.

³¹ In *Cook v. Carpenter* (No. 1) *Lipper's Appeal*, 212 Pa. 165, 169, 61 Atl. 799, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, the court thus

stock is not presently payable in full, but by payable from time to time as called for by th is no substantial basis for the existence of demand to be made within the statutory per call, there is no obligation on the stockholder never be made. If the enterprise is successf from the start, or the provision for capital has actual needs require, the duty of payment i duty for possible contingencies, and until the by calls by the corporation on the subscrip rights of creditors, there is no duty of the su no right of action against him for non-paymen ing point for the Statute of Limitations."

§ 2043. Penal bonds.

If the terms of a bond were literally enfor be a right of action for the full penal sum of ti as the condition was first broken, and the Statut would consequently then begin to run. Th modern times of damages recoverable on a per not logically alter the fact that the plaintiff's ri of the contract are followed, is based on a cover

stated the general principles involved: "In *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 47 Atl. 941, the law was thus stated. The general rules ars first, that on an obligation for the payment of money on demand the statute begins to run at once. Suit is a sufficient demand and must be brought within six years: *Andress's Appeal*, 99 Pa. 421; *Milne's App.*, 99 Pa. 483; *Boustead v. Cuyler*, 116 Pa. 551, 8 Atl. 848. Secondly, where the contract is to pay on the future performance of a condition, or happening of an event, or at a certain time after demand, there a demand is necessary to a right of action, and the statute does not begin to run until demand is made; *Smith v. Bell*, 107 Pa. 352; *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229; *Taylor v. Witman*, 3 Grant, 138. Whether there

is a third rule that sary it must be mi from the contrac affirmed and denied are much at varian It was asserted in . Pa. 410, and expre burg, etc., R. Co. v 72 Am. Dec. 770; M etc., R. Co., 32 Pa. R. Co. v. Graham Franklin Savings B W. N. C. 43. On was denied genera Witman, 3 Grant, 1 rejected in Girard Penn. Twp., 39 Pa. 507; *Smith v. Bell*, other cases."

²² *Supra*, §§ 774, 7

penalty of the bond upon a stated condition, and therefore, the statute might logically run from the first breach of condition, and this has indeed been so held.³³ But the practical injustice of such a rule when applied to bonds to secure continuous performance is obvious. The bond might become barred before the time for the full performance which it was intended to secure had elapsed; or in order to prevent such a result the plaintiff might have sued on the first breach of condition and had judgment for the penalty of the bond with a limitation of his recovery; and judgment having once been rendered on the covenant to pay the penal sum even though slight damages were recoverable, no further action could be brought. To avoid such results a bond is now treated in effect like a covenant to perform the condition.³⁴ And not only is an action maintainable for breach of a condition of the bond, in spite of a breach of another and separate condition before the statutory period,³⁵ but also in spite of a prior breach of the same condition before the statutory period, where compliance with the condition involved a continuing performance. A fidelity bond is thus in effect a promise to pay to the extent of the penal sum of the bond the consequences of lack of fidelity, from time to time, whenever the person whose performance is secured may prove unfaithful. Therefore, a breach of the condition of such a bond more than a statutory period before an action is brought on the bond will not bar a plaintiff's right to recover for any breach within the statutory period.³⁶

§ 2044. Computation of time.

In computing time under the Statute of Limitations the general rule of the common law is followed that fractions of a day are not regarded.³⁷ By the "trend of modern authorities, whatever may have been the rule in earlier times, the day on which an act or event occurs is excluded in the determination

³³ *Brown v. Houdlette*, 10 Maine, 399.

³⁴ See *supra*, § 670.

³⁵ *Sanders v. Coward*, 13 M. & W. 65; *McKim v. Glover*, 161 Mass. 418, 37 N. E. 443.

³⁶ *Deposit Bank v. Hearne*, 104 Ky. 819, 48 S. W. 160. See *supra*, § 2026.

³⁷ *First Nat. Bank v. Ziegler*, 24 Cal. App. 503, 141 Pac. 938; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. 183; *Cornell v. Moulton*, 3 Denio, 12; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; and see cases in this section *passim*.

of all questions of time.³⁸ The rule relates to as well as upon contract, and to questions arising under the Statute of Limitations."³⁹ Therefore, where a note is delivered on a certain day of the month, the action might be immediately maintained upon it,^{39a} a Statute fixing the number of years within which an action must be brought, will not bar an action begun that month later on the same day of the month on which the note was delivered.^{39b} For the same reason, if a note falls due on a certain day of the month, as no action can generally be brought upon it until the following day,⁴⁰ that day is excluded from computation.⁴¹ Where an action is brought for the recovery of a debt received by the defendant to which the plaintiff is entitled, or for goods sold to the defendant,⁴² though an action might have been maintained on the day when the mer-

³⁸ According to early authorities, still not wholly without influence, where computation was to be made from an act done, the day on which the act was done was included. *Frankfort v. Farmers' Bank*, 20 Ky. L. Rep. 1635; *Glaslington v. Rawlins*, 3 East, 407; *Shinn v. Tucker*, 33 Ark. 421; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Frankfort v. Farmers' Bank*, 20 Ky. L. Rep. 1635; *Pearpont v. Graham*, 4 Wash. 233; *Benoit v. New York & C. R.*, 94 N. Y. App. D. 24, 87 N. Y. S. 951.

³⁹ *Nebola v. Minnesota Iron Co.*, 102 Minn. 89, 92, 112 N. W. 880, citing *Halbert v. San Saba*, 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193, and note; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Davison v. Budlong*, 40 Hun, 245; *Geistweidt v. Mann* (Tex. Civ. App.), 37 S. W. 372; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Blackman v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634; *Beeman v. Cook*, 48 Vt. 201, 21 Am. Rep. 123; *Teucher v. Hiatt*, 23 Iowa, 527, 92

Am. Dec. 440; *Tex. Civ. App.*, 43 S. W. 68; *Watson*, 90 Ala. 68; also *Bank v. Ziegler*, 141 Pac. 938; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. 183; *Ault v. Syme*, 163 N. Y. 101, 15 N. E. 101; *Colwell v. Colwell*, 916; *Elder v. Bradley*, 565, 2 Sneed, 247; *Emmond* (Tex. Civ. App.), 627.

^{39a} See *supra*, §§ 11

^{39b} *First Nat. Bank v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. 183 (overruling *Williams*, 15 Mass. 193); *Denio*, 12; *Pearpont v. Graham*, 4 Wash. 233, 67 Pac. 145.

⁴⁰ See *supra*, § 1173

⁴¹ *Davison v. Budlong*, 40 Hun, 245, 67 Pac. 145, 54 Am. Rep. 146

⁴² *Menges v. Frick*, 731; *Smith v. Teucher*, 23 Iowa, 527, 92

were delivered, it is excluded from the computation, as is the day on which a partial payment is made which starts the statute running afresh.⁴⁴ Besides its more obvious applications, as stated above, this principle may become very important, if the plaintiff comes under a disability on the day when the right of action accrues, since the disability is thus conceived of as occurring before the statute has begun to run.⁴⁵ The fact that the last day of the statutory period is a holiday does not save an action brought on the following day,⁴⁶ and though not infrequently statutes expressly make some provision for the matter, such statutes are often construed in such a way as to leave the rule of the common law still in force.⁴⁷

⁴⁴ *Hicks' Est. v. Blanchard*, 60 Vt. 673, 15 Atl. 401.

⁴⁵ In *Nebola v. Minnesota Iron Co.*, 102 Minn. 89, 112 N. W. 880, the court held that insanity following an accident on the same day prevented the statute from beginning to run, and said: "Our conclusion is directly supported by *Sasser v. Davis*, 27 Tex. 656, though it is opposed by *Roelefsen v. Pella*, 121 Iowa, 153, 96 N. W. 738. These are the only cases bearing directly upon the facts of the present case to which our attention has been called. In the Iowa case it appeared that plaintiff was injured, and afterwards and as a result thereof, but on the same day, became insane, and was unable to give the city the necessary notice precedent to the commencement of an action against it. The court held that the Statute of Limitations barred the action, but in the course of the opinion remarked that, had there been no appreciable length of time between the happening of the accident and the resulting injury, the conclusion might be different. This, in our view of the question, is applying the law too strictly. For the reasons stated, we hold, as applied to this case, that

where a personal injury caused by the actionable negligence of another results in insanity, and the insanity occurs on the same day, the two events are, within the contemplation of the law, simultaneous, and the statute of limitations does not commence to run until the day following, and, further, generally, that the day on which a cause of action accrues should be excluded in the computation of the period within which an action may be brought thereon."

⁴⁶ *Morris v. Richards*, 45 L. T. (N. S.) 210; *Dechène v. Montreal*, [1894] A. C. 640; *Allen v. Elliott*, 67 Ala. 432; *Lowry v. Stotts*, 138 Ky. 251, 127 S. W. 789; *Alderman v. Phelps*, 15 Mass. 225; *Haley v. Young*, 134 Mass. 364; *Harrison v. Sager*, 27 Mich. 476; *Patrick v. Faulke*, 45 Mo. 312; *Benoit v. New York & C. R.*, 94 N. Y. App. D. 24, 87 N. Y. S. 951; *Standard v. Thurmond* (Tex. Civ. App.), 151 S. W. 627; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

⁴⁷ See *Allen v. Elliott*, 67 Ala. 432; *Richter v. Chicago, etc., R.*, 273 Ill. 625, 113 N. E. 153; *Chicago v. Braggio*, 187 Ill. App. 166; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.










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